

## Testimony, though conflicting, may help Workman

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*Harold Davis*

Was Harold Davis lying then, or is he lying now?

And how much difference does it make for death row inmate Philip Workman, who is seeking a new trial 19 years after his conviction on charges he killed a Memphis police officer?

Those are the questions that a Memphis judge must answer after listening to hours of often-conflicting testimony from Davis, who was the only witness at Workman's 1982 trial who claimed seeing Workman fire the fatal shot.

Legal experts contacted by *The Tennessean* say that Davis' testimony last week was helpful to the defense but probably was not enough, standing alone, to get Workman a new trial.

Workman and his lawyers also are pinning their hopes on ballistics evidence that, they say, shows the fatal shot did not come from Workman's gun. They are expected to present that evidence to Shelby County Criminal Court Judge John Colton Jr. later this year.

Davis' testimony, spread over four days last week, was a net gain for Workman, said Don Hall, who teaches criminal law at Vanderbilt University Law School.

"But it's not a sure thing," Hall said. "I would be very anxious to know the ultimate outcome of the question of the bullet."

Hall and David Raybin, a Nashville lawyer and legal scholar, agreed that prosecutors can make a plausible argument that Davis' trial testimony should be allowed to stand, despite his current uncertainty over what he saw 20 years ago. A simple "lack of memory" does not amount to a recantation, Hall and Raybin said.

"The standard (for the judge) is, does this create a reasonable doubt that didn't exist before?" Raybin said, adding that Colton has a lot of leeway in determining that.

Workman has acknowledged that he fired shots during a confrontation with police outside a Wendy's restaurant he had just robbed, at closing time on the night of Aug. 5, 1981.

Two Memphis police officers say Workman fired at them — striking one of them in the arm — but they did not see him fire the shot that killed Lt. Ronnie Oliver. Workman and his attorneys contend that Oliver was struck by "friendly fire," though the two other officers on the scene swear that they never got off a shot.

Davis testified last Monday, under questioning by defense attorney Robert Hutton, that he did not see Workman shoot Oliver. That's what Davis told two other lawyers representing Workman when they tracked him down at an Arizona motel in 1999 and told him that initial police reports made no mention of him being at the crime scene.

But when he was cross-examined Monday and Tuesday by a Shelby County prosecutor, Davis said he "can't remember" what happened after he saw a police car turn into the parking lot of the Wendy's.

"I can't tell the line between fact and fiction now," said Davis, 46, a Memphis preacher's son who said he had been abusing drugs and living "a deceitful life out there on the street for the last 20 years."

Davis told Workman's lawyers in 1999 that Memphis police had told him what to say at Workman's trial. But he testified last week that that didn't happen, and he said he could not think of any reason he would have lied in 1982.

Davis, who said he opposes the death penalty, testified Tuesday that he did not want "to let a man be executed for something that I don't remember saying."

The defense team had been looking for Davis ever since the Tennessee Supreme Court blocked Workman's execution on March 30 — less than an hour before he was scheduled to die by lethal injection — and ordered Colton to hold a full hearing on evidence that the defense had turned up in the past two years.

But it was the prosecution that found Davis about three weeks ago in Georgia and that brought him back to Memphis, under armed guard, after he was jailed on a shoplifting charge in Jacksonville, Fla., on Aug. 4.

Davis acknowledged from the witness stand that he had told prosecutors and jail personnel Aug. 12 — the day he was returned to Memphis — that he testified truthfully at Workman's trial. But he said Monday — after meeting with a lawyer hired by his sister — that he had little memory of what happened on Aug. 5, 1981.

The question of Davis' memory and reliability was further complicated by a Memphis doctor's conclusion, after Davis was sent to a hospital Tuesday night for an episode of high blood pressure, that he had suffered a series of mini-strokes over the years.

Workman's lawyers also presented testimony last week from Davis' "god-sister," Vivian Porter, who says she was doing drugs with Davis the night Oliver was killed. She said they drove past the Wendy's after the shooting.

But Davis testified last week that Porter, who runs a drug rehabilitation program for women in Memphis, was not with him that night.

Raybin and Hall offered differing opinions of the value of Porter's testimony to the defense.

"I think she is a more credible witness than Davis himself," Raybin said. "That's precisely the kind of corroborative evidence that appellate courts use to find that a recantation is valid."

But Hall said the conflict in testimony by Davis and Porter "does not bode well for the defense. It's almost a wash if he claims that she wasn't even there."

Raybin said Davis may have tailored his testimony to avoid being prosecuted for perjury, which would still be possible 19 years after his testimony in Workman's trial. Avoiding a charge of perjury "is a powerful motive for him to be cautious in his current testimony."

A conviction for lying under oath in a criminal trial carries a possible sentence of three to 20 years in prison.

Workman, 48, sat quietly during the four-day hearing in Memphis last week, occasionally suggesting questions to the three members of a prominent Memphis law firm who are representing him at this stage of the proceedings.

It has been almost two years since the U.S. Supreme Court refused to hear Workman's case in the last stage of the regular appeals process.

Attorneys from the Tennessee post-conviction defender's office, who have represented Workman since the mid-1990s, developed the evidence that is now being used to try to get him a new trial.

They could not persuade a state or federal court to give Workman a full hearing on that evidence, however, until the Tennessee Supreme Court voted 3-2 on March 30 to have Colton hear the evidence and rule on its validity. Any decision Colton makes is sure to be appealed by one side or the other, and those proceedings are likely to take months, if not years, to resolve.

Workman is in line to become the second Tennessee inmate to be executed since 1960. Robert Glen Coe was put to death in April 2000 for kidnapping, raping and murdering an 8-year-old West Tennessee girl in 1979.

Coe's death by lethal injection followed a legal battle over whether he was mentally competent to be executed.