

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FILED

ROBERT GLEN COE,

Petitioner-Appellant

No. 02S01-9910-CR-00098

December 6, 1999

STATE OF TENNESSEE

Cecil Crowson, Jr.

Appellate Court Clerk

Respondent-Appellee.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISQUALIFY ATTORNEY GENERAL PAUL G. SUMMERS &
THE OFFICE OF THE ATTORNEY GENERAL**

The Attorney General has filed in this Court a motion to set execution date. The motion is improper, because the Attorney General suffers from an irreconcilable conflict of interest in this matter. The Attorney General has judged Robert Coe's case as a Tennessee judge; as a judge, he has himself previously set an execution date for Robert Coe. Now, having been appointed by this Court, he has come before this Court as a litigant requesting that Robert Coe be executed. By being both judge and advocate in this case, by ordering Robert Coe's execution as a judge and then asking for his execution as an advocate before a court which appointed him, Attorney General Summers has created an appearance of impropriety plainly recognized by Tennessee law in State v. Tate, 925 S.W.2d 548, 550 (Tenn.Cr.App. 1995). This disqualifies him from this case. In fact, it appears that he is well aware that his participation in this matter is improper, having personally ordered his own recusal in All cases . . . [in] which I acted in a judicial capacity as Judge of the Court of Criminal Appeals. Yet he is now refusing to follow his own directives, and is doing so in violation of Tennessee law. The Attorney General and his office must be disqualified.

FACTS

I. Purported Conflict-Avoidance Procedures in the Office of the Attorney General

On January 8, 1999, Paul G. Summers was sworn in as Attorney General and Reporter for the State of Tennessee. Anticipating that Attorney General Summers' former employment as a judge on

the Court of Criminal Appeals would create conflicts for him, the Attorney General's Office issued several memoranda to its employees outlining procedures to follow in conflict cases. The Office of the Attorney General also has internal Aethics Guidelines,@ including a supplement which explains AHow To Build a Chinese Wall@ in conflict cases requiring that an attorney be screened from participation. The Supplement further indicates that in cases where a AChinese Wall@ cannot be built, Athe Office may have to consider having outside counsel sought for the client on the matter or litigation.@

As part of the screening procedures, Attorney General Summers signed a ADelegation of Authority@ indicating that he would recuse himself Afrom participating in any decision-making, recommendation, advice or approval in all cases and matters upon the merits of which I acted in a judicial capacity as a Judge on the Court of Criminal Appeals . . . I further delegate authority to act in these matters to Michael E. Moore, Solicitor General of the State of Tennessee.@See Exhibit 7.

II. Attorney General Summers' Participation in the Robert Glen Coe Litigation

On January 16, 1991, the Court of Criminal Appeals at Jackson issued an opinion in State v. Robert Glen Coe, CCA No. 138, 1991 WL 2873, in which the appellate court rejected the defendant's requests for relief. The author of the opinion was Judge Paul G. Summers. *Judge Summers* signed an order for Robert Coe's execution. See Exhibit 1 (Order setting execution date signed by Judge Paul Summers). Now, after being appointed by this Court to be Attorney General and Reporter for the State of Tennessee, *Attorney General Summers* has signed a November 29, 1999 motion seeking Robert Coe's execution. See Exhibit 2 (Signature on Motion For Execution Date).

The Attorney General's participation in this case as Robert Coe's adversary has not simply been limited to the courtroom. During a press conference on Tuesday, October 5, 1999, Attorney General Summers stated to members of the television, radio, and newspaper media:

These were heinous crimes. In each of these cases, a jury heard the evidence and

decided a death sentence was appropriate. *Those judgments have been upheld throughout the appellate process, and we intend to carry out those judgments and the law of the State of Tennessee.*

(emphasis added), Kirk Loggins, Workman, Coe Denied Appeals, The Tennessean, October 5, 1999, at 1A, 2A. He failed to tell the public during the press conference that he personally upheld the judgment as a Tennessee judge. And even as late as last week, Attorney General Summers has made public pronouncements in regard to the pending motion to set an execution date. See The Tennessean, *Death Dates Sought For Coe And Workman*, Nov. 30, 1999, p. 1A-2A (noting that Attorney General Summers filed papers asking for new execution date and gave prepared statement concerning the cases).

LAW

I. Attorney General Summers' Prosecution of Robert Glen Coe Creates an Improper Conflict of Interest.

To determine whether a prosecutor should be disqualified for an alleged conflict of interest, the Court must consider whether the circumstances establish an actual conflict of interest or the appearance of impropriety. In either situation, disqualification is required. State v. Tate, 925 S.W.2d 548, 550 (Tenn.Cr.App. 1995).

A. An Appearance of Impropriety Arises from General Summers' Participation as Both Judge and Prosecutor.

"Ethical precepts preclude a former judge from prosecuting a case over which he or she presided, even when there has been no showing of an actual conflict of interest." Id. at 555. An attorney must avoid even the appearance of impropriety and "that goes double" for an attorney who has acted a judge." Id.

To protect the integrity of the judiciary, the ethical rules provide specific directives designed to avoid even the appearance of impropriety where judges are involved:

After a lawyer leaves judicial office or other public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial

responsibility prior to leaving, since to accept employment would give rise to the appearance of impropriety even if none exists.

Sup. Ct. R. 8, Ethical Consideration 9-3. Thus, a judge who has had substantial responsibility¹ in a criminal matter should not "later assume the function of prosecutor on the same charges. . . . A former judge who, in his previous capacity, had undertaken substantial responsibility in the disposition of a case, and who later supervises the prosecution of that individual, gives rise to the appearance of impropriety." " Tate, 925 S.W.2d at 555, 557.²

Here, Attorney General Summers's participation creates an appearance of impropriety violating the ethical standards established by Tennessee law and this Court. As the author of the 1991 opinion of the Court of Criminal Appeals in State v. Robert Glen Coe, the Attorney General undertook substantial responsibility in the judicial disposition of the case. He wrote the court's opinion and then ordered Robert Coe's execution. Yet since his appointment as the Attorney General for the State of Tennessee, Attorney General Summers has supervised the prosecution team and maintained a public profile as the Attorney General seeking the execution of Robert Glen Coe. Because Attorney General Summers had substantial responsibility in the 1991 appellate court decision, and subsequently has supervised the prosecution of Mr. Coe, an appearance of impropriety arises.

The citizens of the State of Tennessee will surely have little faith in the fairness of a system in which a judge can make a decision, and then go to the Court which appointed him to get his own

"Substantial responsibility" in this context means "a responsibility requiring the official to become personally involved to a significant, material degree, in the investigative or deliberative processes regarding the transaction or facts in question." State v. Tate, 925 S.W.2d 548, 551 (Tenn. Crim. App. 1995) (quoting ABA Formal Ethics Opinion 342 (1975)).

The principles of the Code of Judicial Conduct, found at Rule 10 of the Tennessee Supreme Court Rules, further explains the appropriate nature of a former judge's participation in later proceedings. Canon Five of the Code of Judicial Conduct advises that "judges, pro tempore judges, and continuing part-time judges shall not act as a lawyer in a proceeding in which the judge has acted as a judge or in any other proceeding related thereto except as otherwise permitted by the Code of Professional Responsibility." Tenn. Sup. Ct. Rule 10, Canon 5. This portion of Canon Five substantially mirrors language in former Canon Eight, and has been interpreted to mean that "a person who has served in a judicial capacity should not later act as counsel, whether public or private in the same case or one related to it." Tate, 925 S.W.2d at 552.

decision enforced -- after that former judge has already acknowledged that it is improper for him to now act as a litigant. Attorney General Summers has placed himself in an untenable position. His actions seeking Robert Coe's execution may be perceived as based upon some form of self-interest in upholding his previous judicial actions.

It is precisely to prevent such ethical dilemmas **B** because they foster a disrespect for our system of law **B** that Tennessee law precludes Attorney General Summers and all attorneys in this state from being bound by a conflict of interest, i.e., assuming a role in which personal interest may trump the public interest, the interest of a client, or the interest of a party. The law simply recognizes that no person -- no matter how well-intentioned -- should decide between courses of action when one such course has the effect of benefitting the decision maker.

In this particular case, the appearance of impropriety is heightened by media attention and Attorney General Summers's public profile. The intense public scrutiny and the Attorney General's prominence in the media have only served to heighten the appearance of impropriety.

II. To Remedy the Conflict, Attorney General Summers and the Entire Office of the Attorney General Must Be Disqualified.

A. Attorney General Summers Must Be Disqualified.

Because his participation as prosecutor has created the appearance of impropriety, Attorney General Summers must be disqualified from further participation in the prosecution of Robert Glen Coe. The existence of an appearance of impropriety requires disqualification of the offending lawyer. An actual conflict of interest need not be present. See Tate, 925 S.W.2d at 550 (an appearance of impropriety would also result in a disqualification).

B. The Entire Office of the Attorney General Must Be Disqualified.

Whether the disqualification of one prosecuting attorney also requires the disqualification of the entire prosecuting attorney's office is an issue to be determined on a case-by-case basis. Tate, 925

S.W.2d at 557 (citing Formal Ethics Opinion 87-F-1 11). Given the disregard for any screening procedures at the Office of the Attorney General, the entire Office of the Attorney General must be disqualified from further participation in this case as a result of the taint caused by Attorney General Summers.

As a general rule, an entire prosecuting attorney's office need not be disqualified "as long as the attorney at issue does not disclose confidences or otherwise participate in the prosecution." State v. Mason, CCA No. 01C01-9603-CC-00103 (Tenn. Crim. App. 1997)(Exhibit 3). In Mason, the attorney, then a public defender, represented the defendant in a preliminary hearing. Shortly thereafter, he obtained employment in the district attorney's office. He did not participate in the prosecution of the defendant in any way and never discussed the defendant's case in the district attorney's office. He had scrupulously followed instructions "not to have any contact with the prosecutors on any case in which the Public Defender was involved." Mason, at page 15. Because the proof demonstrated that district attorney's office had an actual screening procedure in place, and there was no proof that the attorney had shared any information with the prosecutor for the case or participated in any capacity in the prosecution of the defendant, it was not necessary to disqualify the entire district attorney's office. Mason, p. 17.

In stark contrast, in Robert Glen Coe's case, it appears that no screening procedure has been employed, and Attorney General Summers has participated as a supervisor, spokesman, and advocate for the State in the prosecution of Mr. Coe. "Because the burden of proof must rest upon the state to establish appropriate screening measures have been taken and because no precautions whatsoever have been taken during the course of the prosecution, the result here is inevitable." Tate, 925 S.W.2d at 557. The failure to screen Attorney General Summers from participation "irretrievably taints those employed in his newer office." Id. To preserve the integrity of the criminal justice system, it is necessary to require the appointment of an entirely new prosecution team.

Very recently, in State v. Bondurant, this Court considered whether it was necessary to

disqualify the Office of the Attorney General. In that case, based on the State's representations that Attorney General Summers has recused himself from this case in accordance with the screening procedure that has been implemented, this Court determined it was unnecessary to recuse the entire Office. See Order filed March 9, 1999 in State v. Bondurant, No. 01S01-9804-CC-00064 (Exhibit 4).

In Robert Glen Coe's case, the Office of the Attorney General failed to employ its own conflict-avoidance procedures. In January 1999, the Attorney General's Office made an internal determination that DR 9-101 (a) required Attorney General Summers' disqualification in cases in which he had acted as a judge on the merits. See Affidavit of Michael E. Moore in Response To Motion To Disqualify the Office of the Attorney General, notarized on January 25, 1999, paragraph 5 (Exhibit 5). An internal memorandum implemented screening procedures for the Attorney General's Office. See Memorandum from Solicitor General Michael E. Moore, Re: Screening Procedures for Incoming Attorney General Paul G. Summers, dated January 14, 1999 (Exhibit 6). These procedures included excluding Attorney General Summers "from all criminal appeals and matters upon the merits of which he acted in his judicial capacity as a Judge of the Court of Criminal Appeals." Id. Moreover, Attorney General Summers completed a "Delegation of Authority" in which he stated the following:

[] I **RECUSE** myself from participating in any decision-making, recommendations, advice or approval in all cases and matters upon the merits of which I acted in a judicial capacity as a Judge of the Court of Criminal Appeals.

I further **DELEGATE** authority to act in these matters to Michael E. Moore, Solicitor General of the State of Tennessee, effective the 8th day of January, 1999.

See Delegation of Authority (Exhibit 7).

The internal guidelines imposed by the Attorney General's office required Attorney General Summers, as the author of the 1991 opinion Court of Criminal Appeals in State v. Coe, to recuse himself from participation on the case, and required the implementation of the internal screening procedures by the Office of the Attorney General to prevent the appearance of impropriety from

arising. Instead of implementing screening procedures or recusing himself, however, Attorney General Summers introduced himself into Robert Glen Coe's case in a very public way. Attorney General Summers affixed his signature atop the rest of the State's attorneys. He held press conferences covered by state and local media discussing Robert Glen Coe's case.

Merely excluding Attorney General Summers from participation, and allowing the Office of the Attorney General to remain involved, would not remedy the conflict or the appearance of impropriety which has been created. Through Attorney General Summers' opinion issued as a judge on the Court of Criminal Appeals, and through the press conferences and participation in the current prosecution, Attorney General Summers has made clear to his Assistants his position on the prosecution and execution of Robert Glen Coe. Any Assistant Attorney General who might take charge upon the recusal of Attorney General Summers nevertheless would be discouraged from conceding error or taking a position different than that already articulated by their boss. Should the Office of the Attorney General remain involved, the loyalty of the Assistants would be divided between the interests of their employer, Attorney General Summers, and their duty as a prosecutor "to seek justice, not merely to convict." See Sup. Ct. R. 8, EC 7-13 Tate, 925 S.W.2d at 555 (citing Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935)).

WHEREFORE, for the above-stated reasons, petitioner Robert Glen Coe respectfully requests that Paul G. Summers and the Office of the Attorney General and Reporter be disqualified from further participation in this prosecution. The petitioner further requests that this court grant him any and all other relief to which he may be entitled, including ordering a hearing on this matter.

Respectfully Submitted,

James H. Walker
Attorney at law

601 Woodland Street
Nashville, TN 37206
(615) 254-0202

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid, to Glenn R. Pruden, Assistant Attorney General, 425 5th Avenue, North, Nashville, TN 37243, on this the _____ day of December, 1999.

EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

EXHIBIT 4

EXHIBIT 5

EXHIBIT 6

EXHIBIT 7