

**IN THE SUPREME COURT OF TENNESSEE
AT JACKSON**

PHILIP R. WORKMAN,)	
Appellant,)	
)	
v.)	No. W2001-01920-SC-S10-PD
)	Shelby County
STATE OF TENNESSEE,)	
Appellee.)	

**ANSWER IN OPPOSITION TO APPLICATION
FOR PERMISSION TO APPEAL**

INTRODUCTION

On March 29, 2001, a majority of this Court granted Workman’s request for a hearing on his petition for writ of error coram nobis so that the trial court could evaluate “newly discovered evidence” that Workman had steadfastly insisted proved his innocence. As that hearing proceeds in the trial court,¹ Workman now returns to this Court demanding that he be allowed to conduct discovery on his petition and seeking permission to appeal the August 10, 2001, Order/Opinion of the Court of Criminal Appeals that limited his ability to do so. *See* Tenn.R.App.P. 11.² Workman contends that he is entitled to conduct such discovery under Rule 26 of the Tennessee Rules of Civil Procedure. The State submits that he is not and that there is no need for this Court to review the

¹ The hearing on the writ of error coram nobis, the hearing ordered by this Court on a request for the taking of testimony on August 11, 2001, the hearing on a motion for judgment, and the hearing scheduled to occur on October 11, 2001, and again on November 14, 2001, for additional testimony.

² Workman’s application was docketed as a “T.C.A. Rule 11 Application to the Supreme Court.” While the content of Workman’s application is styled as a “T.C.A. Rule 11 Application for Appeal” in the Court of Criminal Appeals, the first page of the application styles Workman’s filing as an “Application for T.C.A. Rule 11 Appeal” in this Court. Accordingly, the State responds to the application pursuant to the provisions of Rule 11.

matter as the Court of Criminal Appeals has satisfactorily determined the issue.

STATEMENT OF RELEVANT FACTS³

Pursuant to this Court's March 29, 2001, decision in *Workman v. State*, No. W2001-00774-SC-R11-PD (Tenn. March 29, 2001), further proceedings were had in the Criminal Court of Shelby County to schedule a hearing on Workman's previously-filed petition for writ of error coram nobis, in which he sought to challenge his conviction for the 1981 murder of Memphis Police Lieutenant Ronald Oliver. During the course of those proceedings, Workman propounded interrogatories on the State, invoking Tenn.R.Civ.P. 26. The trial court, however, ruled that Workman was not entitled to conduct discovery under the Tennessee Rules of Civil Procedure.

Subsequently, Workman filed an application for extraordinary appeal with the Court of Criminal Appeals, *see* Tenn.R.App.P. 10, challenging, *inter alia*, the trial court's ruling that the Tennessee Rules of Civil Procedure relating to discovery do not apply to a criminal coram nobis proceeding. On August 10, 2001, the Court of Criminal Appeals issued an Order/Opinion in which it granted Workman's application with respect to the discovery issue, and held that Workman was not entitled to the broad discovery rules afforded by the Tennessee Rules of Civil Procedure. The court further held that discovery in a criminal coram nobis proceeding is governed by Rule 16 of the Tennessee Rules of Criminal Procedure.

³ The State concedes the facts relevant to the issue presented by Workman's application. Therefore Workman's application recites a plain facts relating to the procedural history in the trial court, the State's con- currence shall not be construed as an admission of any of these additional facts.

ARGUMENT

THE COURT OF CRIMINAL APPEALS CORRECTLY DETERMINED THAT WORKMAN, A PETITIONER IN A CORAM NOBIS PROCEEDING IN A CRIMINAL CASE, IS NOT ENTITLED TO DISCOVERY UNDER THE TENNESSEE RULES OF CIVIL PROCEDURE.

A. The Tennessee Rules of Civil Procedure Do Not Apply to a Proceeding in the Nature of a Writ of Error Coram Nobis in a Criminal Case.

_____ In 1955, the Tennessee legislature made available to convicted defendants in a criminal case “a proceeding in the nature of a writ of error coram nobis.” Tenn.Code Ann. § 40-26-105; *State v. Mixon*, 983 S.W.2d 661, 668 (Tenn. 1999). Pursuant to the statute, this proceeding is “to be governed by the same rules and procedures applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith.” *Id.* As support for his position, Workman interprets this provision as if it read: “to be governed by the same rules and procedures applicable in civil cases,” concluding that “the clear intent of the legislature was that in all other aspects the civil procedural rules would apply.”⁴ He then extends such an interpretation to incorporate the Tennessee Rules of Civil Procedure into the statute, despite the fact that such rules had not yet been promulgated in 1955.

Workman misinterprets the statutory language. The statute’s provision that criminal coram nobis proceedings be governed by “the same rules and procedures applicable to the writ of error coram nobis in civil cases” refers to the rules and procedures for such cases set out by the legislature in Tenn.Code Ann. §§ 27-7-101 to 27-7-108. *See Johnson v. Russell*, 404 S.W.2d 471, 473 (Tenn. 1966)(coram nobis in criminal cases governed by same rules and procedures as in civil cases except as the statute is inconsistent with Tenn.Code Ann. §§ 27-701 - 27-708); *see also State v. Mixon*,

⁴ _____

supra, at 668 (criminal coram nobis statute of limitations set forth in Tenn.Code Ann. § 27-7-103). As these statutes appeared in 1955, and, in large part, as they still appear today, they made provision, among other things, for the scope of the coram nobis remedy in civil cases, notice to the opposing party, and the scheduling of the matter for trial. *See* Tenn.Code Ann. §§ 27-702, 27-705, 27-706 (1955). Additional rules for administering the proceeding, it appears, were left by the legislature to the discretion of the trial court. *See* Tenn.Code Ann. § 27-7-107 (the court may prescribe rules for the assignment of errors, making issues thereon, “and for all such matters as are necessary to give full effect to this proceeding”); *see also Elliott v. McNairy & Co.*, 60 Tenn. 342 (Tenn. 1872)(formal assignment of errors to be made under the direction of the court, “as provided for in Sec. 3,115(sic)”).⁵

This statutory scheme for coram nobis proceedings in civil cases makes no provision for discovery. Indeed, the nature of such a proceeding is inconsistent with affording the petitioning party with any right to discovery. When such a petition was filed, the grounds upon which reversal of the judgment was sought were required to be stated in the petition and, while a more formal assignment of errors would later be presented, the petitioner could only rely on the matter alleged in his petition. *See Elliott v. McNairy & Co.*, *supra* (there may be no departure from the grounds stated in the petition). No opportunity for discovery of additional facts on which to further base the request for relief is contemplated by such a procedure. *Compare Crawford v. Williams*, 31 Tenn. 341 (1851)(discussion of pre-Code coram nobis procedures). *See generally* Tenn. Juris. (1998 Repl.), Judgments and Decrees, §§ 52 - 56. —

Petitioner, though, relies on the Tennessee Rules of Civil Procedure for his assertion of a

⁵ [The citation information is the full citation of the case.]

right to discovery on his criminal coram nobis petition. But, as previously noted, these Civil Rules were not promulgated until 1971 — some 16 years *after* the extension of coram nobis to criminal cases. Accordingly, the legislature could not have intended for such rules to apply. Moreover, there is evidence that, upon adoption of the Civil Rules, the legislature specifically intended that they *not* apply.⁶

As this Court has previously observed, when the Rules of Civil Procedure became effective in Tennessee in 1971, the writ of error coram nobis in civil cases was specifically abolished thereby. *See* Tenn.R.Civ.P. 60.02; *State v. Mixon, supra*, at 668. In the wake and in recognition of the Civil Rules, the legislature repealed many of the State’s laws relating to matters of procedure in civil cases. *See* Public Acts 1972, c. 565. The legislature, however, did *not* repeal the statutory scheme for writs of error coram nobis in civil cases then set out in Tenn.Code Ann. §§ 27-701 - 708. Instead, the legislature amended Tenn.Code Ann. § 27-701 to limit the applicability of these sections to civil cases “which [are] not governed by the Tennessee Rules of Civil Procedure.” Public Acts 1972, c. 565, § 2(7). Consequently, Tenn.Code Ann. §§ 27-701 to 708, now §§ 27-7-101 to 108, remained, and remain, in the Code, presumably for the sole purpose of continuing to provide the source of the “rules and procedures” for coram nobis proceedings in criminal cases under § 40-26-105, independent of the formal Rules of Civil Procedure. Furthermore, had the legislature intended

⁶ The State court below held that its position in this respect was contrary to the statement of the Court of Civil Appeals, in a footnote to its August 11, 1971, order, that the Rules of Civil Procedure apply to civil and criminal proceedings, “as in all civil actions,” to provide the procedures for commencing the action and for the State’s response. The intent of the appellate court, however, granted Torkelson’s Rule 11 application without entering a response from the State, and thus issued its opinion without benefit of the State’s considered position on this issue. Furthermore, this statement in the Court’s order is false and is presently the subject of yet another Rule 11 application filed by Torkelson. Action on that application has been stayed pending this Court’s resolution of the instant Rule 11 application.

for such proceedings to be governed by the Rules of Civil Procedure, as Workman insists, they could have easily said so in the statute.⁷ *See State v. Mixon, supra*, at 670 (had legislature intended coram nobis statute of limitations to begin after conclusion of appellate proceedings, it could have employed clear language to accomplish that intent).

B. Affording Workman a Right to Broad Discovery Runs Counter to the Nature and Purpose of a Coram Nobis Proceeding in a Criminal Case.

_____ Coram nobis is an “extraordinary remedy to which resort should be had only if no other remedy is available;” “it fills only a slight gap into which few cases fall.” *State v. Mixon, supra*, at 663, 672. The purpose of this remedy “is to bring to the attention of the court some fact unknown to the court, which if known would have resulted in a different judgment.” *Teague v. State*, 772 S.W.2d 915, 920 (Tenn.Crim.App. 1989), *overruled on other grounds, State v. Mixon, supra*, at 671 n. 13, *quoting State ex rel. Carlson v. State*, 407 S.W.2d 165, 167 (Tenn. 1966). Where, as here, the relief is sought on the ground of subsequently or newly discovered evidence, the petition must recite, *inter alia*, the grounds and nature of the newly discovered evidence. *Id.*, at 921. In this respect, the procedure “is almost identical in nature to a motion for a new trial on the ground of newly discovered evidence.” *Id.*, at 920; *see* Tenn.R.Crim.P. 33. Accordingly, while it is not incorrect for Workman to assert that coram nobis is “a device for *examining* facts,” it does not follow that it is a vehicle for *searching for* them through discovery. Indeed, the notion that a coram nobis petitioner should be entitled to broad discovery under the Civil Rules is antithetical to the very purpose of the proceeding — to bring to the attention of the court that issued the judgment some fact that the convicted

⁷ The legislature had the opportunity to amend § 40-2-106 in 1988, but it amended the statute to provide for the availability of such a remedy in cases of newly discovered evidence. *See* *State v. Mixon, supra*.

defendant *has already discovered*.

Furthermore, and as a practical matter, the notion advanced by Workman that the Rules of Civil Procedure, in general, and Rule 26.02 thereof, in particular, apply to his coram nobis petition, is unworkable. Such a scheme would demand that criminal prosecutors, at least some criminal defense attorneys, and, in a few jurisdictions, Criminal Court judges, not only develop and possess a working knowledge of the Tennessee Rules of *Civil* Procedure, but to purport to practice thereunder at their potential peril. This cannot have been the intent of the legislature.⁸

On the other hand, such participants in criminal proceedings are familiar with, and regularly practice under, the Rules of Criminal Procedure. In its interlocutory order, the Court of Criminal Appeals held that Tenn.R.Crim.P. 16 shall govern discovery in a criminal coram nobis proceeding. Rule 16, of course, already defines the parameters of discovery in a proceeding under Tennessee's Post-Conviction Procedure Act, Tenn.Code Ann. § 40-30-201 *et seq.*, pursuant to the rules of this Court. *See* Tenn.S.Ct.R. 28, § 7. Insofar as a coram nobis proceeding under Tenn.Code Ann. § 40-25-106 constitutes a post-conviction remedy by which a convicted defendant may seek relief from the judgment of conviction, such proceeding bears obvious similarities to a proceeding under the Post-Conviction Procedure Act. Furthermore, Rule 16 of course provides the standard for discovery in the underlying criminal case. The State therefore determines not to take issue with the holding of the Court of Criminal Appeals that discovery is available under Tenn.R.Crim.P. 16 in a criminal

⁸ The fully advised proposition is illustrated in this very case, wherein Workman has asked the federal judge to grant his petition, alleging a failure of the State to appropriately conform to the Tennessee Rules of Civil Procedure, such an effort to secure relief on the petition flies in the face of the statutory provision that, "a writ of coram nobis shall be granted only if the judge determines that such evidence may have resulted in a different judgment, but it has been presented at trial." Tenn.Code Ann. § 40-25-106(b)(1).

coram nobis proceeding. Accordingly, the State submits that Workman's application for permission to appeal the August 10, 2001, order of the Court of Criminal Appeals in this matter should be denied.

In the alternative, and to the extent the Court concludes that Workman's application should be granted so that this Court may settle the issue, the State submits that any such grant of the application should be summary in nature, accompanied by this Court's contemporaneous order that the Tennessee Rules of Civil Procedure do not apply to coram nobis proceedings under Tenn.Code Ann. § 40-26-105, and that Workman is consequently not entitled to discovery on his petition. In this respect, the State respectfully requests that any grant of the application not be issued in the normal course, to be followed by formal docketing and briefing. *See* Tenn.R.App.P. 11(e),(f). The issue here presented by Workman is not complex, and such additional proceedings on his application would only serve to further delay a final disposition on Workman's coram nobis petition, which has now been pending in the trial court for more than six months since this Court awarded him a hearing thereon.

CONCLUSION

For the reasons stated the application should be denied; in the alternative, the application should be summarily granted and an order should issue contemporaneously therewith rejecting Appellant's claim on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served on the petitioner by forwarding same to Robert L. Hutton, Esq., Glankler Brown, PLLC, 1700 One Commerce Square, Memphis, Tennessee, 38103, on this, the _____ day of October, 2001.

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