IN THE COURT OF CRIMINAL APPEALS
FOR THE WESTERN DISTRICT OF TENNESSEE
AT JACKSON

PHILIP R. WORKMAN,

Petitioner,

v

STATE OF TENNESSEE,

Respondent.

CCA No.

Shelby County No. B81209

APPLICATION FOR PERMISSION TO APPEAL
PURSUANT TO RULE 10, TENNESSEE RULES OF APPELLATE PROCEDURE

Petitioner Philip Ray Workman, pursuant to Rule 10, Tennessee Rules of Appellate Procedure, respectfully requests that this Court review the orders of the Shelby County Criminal Court (Trial Court) (1) that the Tennessee Rules of Civil Procedure do not apply to this proceeding, and therefore Mr. Workman is not entitled to discovery prior to the evidentiary hearing; and (2) that despite the unavailability of the majority of witnesses Mr. Workman intends to present Mr. Workman must present proof on August 13, 2001.

I STATEMENT OF THE FACTS

A Based On The Trial Court's Representations, Undersigned Counsel Released From Subpoena Dr. Cyril Wecht, And Dr. Wecht Is No longer Available For The Hearing The Trial Court Intends To Hold August 13, 2001

In or around May 2001, the Trial Court set an August 13, 2001, date for an evidentiary hearing on Mr. Workman's Petition For Writ Of Error Coram Nobis.

On July 31, 2001, Mr. Workman filed in the Trial Court a Motion For Default Judgment. In support of that motion, Mr. Workman asserted that pursuant to statute, the Tennessee Rules of Civil Procedure govern the proceedings in this matter, the State had not timely answered, and Mr. Workman was therefore entitled to a default judgment. On August 1, 2001, the Trial Court informed undersigned counsel that instead of taking proof on August 13, 2001, the Trial Court would instead hear argument on that date on the motion for default judgment, including the issue of whether the Rules of Civil Procedure govern the proceedings in the Trial Court. (See Letter From The Trial Court to Counsel, attached as Exhibit 1). Relying on this communication, undersigned counsel informed witnesses they need not appear August 13, including Dr. Cyril Wecht, a forensic pathologist Mr. Workman intends to present in support of the allegations in the petition.

On August 3, 2001, pursuant to Tennessee's Rules of Civil Procedure, Mr. Workman propounded interrogatories on the State to discover the identity and opinions of its experts. These interrogatories have not been answered. Undersigned counsel contacted Assistant District Attorney General Jerry Kitchen on Monday August 6, 2001. General Kitchen informed counsel that the State takes the position that the Rules of Civil Procedure are not applicable to this cause, and thus the state does not intend to comply with the interrogatories propounded.

Also on August 3, 2001, the Trial Court contacted undersigned counsel and was told to be in court at 2:00 p.m. At that time, due to objection by the State, the Court announced that it would change its previous position and would hear proof on August 13, 2001. When undersigned counsel informed the Trial Court that he had excused

Mr. Workman's witnesses, the Trial Court instructed him to re-issue subpoenas.

After the August 3, 2001, hearing, undersigned counsel contacted Dr. Wecht. Dr. Wecht informed that, relying on undersigned counsel's previous release, he had canceled his airplane reservations and was no longer available to testify on August 13, 2001.

B Other Witnesses Are Not Available For A Hearing On August 13, 2001

1 Harold Davis

The Tennessee Supreme Court remanded this case to the Trial Court to hear evidence on Harold Davis's recantation of his testimony that he saw Mr. Workman shoot Memphis Police Lieutenant Ronald Oliver. Mr. Workman obtained funds from the Trial Court to hire an investigator, Ron Lax, to locate Mr. Davis. While Mr. Lax's efforts, to date, have not led to the discovery of Mr. Davis, there is reason to believe that with additional time, Mr. Workman will be able to find Mr. Davis.

Specifically, Mr. Lax has learned that Mr. Davis placed a telephone call to his son, Harold Davis Jr., who resides in California, on his birthday, May 31, 2001. After learning this fact, undersigned counsel obtained from the Trial Court an order and commission to take an out of state deposition to depose the custodian of the records for Pacific Bell for all phone calls placed to Harold Davis Jr.'s home in California on or about May 31, 2001. (See Affidavit of Ron Lax attached as Exhibit 2, Affidavit of Robert Hutton, attached as Exhibit 3). Counsel has elicited the help of the Santa Clara County Deputy Public Defender, Mr. Francis Cavagnaro, to obtain an order from a California Court to obtain the phone records from Pacific Bell. The superior court of Santa Clara County California entered an order on Tuesday August 7, 2001 requiring Pacific Bell to

comply with the trial court's previously issued order (a copy of the order is attached as Exhibit 4). As of the time of filing this motion, Pacific Bell has yet to comply with the Court's order.

Counsel believes that the phone records will help secure the whereabouts of Mr. Davis since they should identify where he was living on May 31, 2001. There is simply not enough time to obtain Pacific Bell telephone records and review addresses of all person's calling Harold Davis Jr., in order to locate Mr. Davis prior to the August 13 hearing. (See Exhibit 2, and Exhibit 3)

Additionally, upon information and belief, Ms. Kennete Williamson, an investigator for the Greeneville District Attorney has been working with Ms. Deborah Owens, an investigator of the Shelby County District Attorney, and made telephone contact with Harold Davis last week. (See Exhibit 2). Based on this fact, in conjunction with the soon to be received telephone records, Mr. Lax believes there is a good possibility that Mr. Davis can be located given sufficient time (See Exhibit 2). Currently, however, Mr. Davis is not available for the August 13, 2001, hearing.

2 A Ballistics Expert, Funds For Whom The Trial Court Has Approved, Is Not Available For A Hearing On August 13, 2001

The Trial Court approved funding for a ballistics expert; and pursuant to Tennessee Supreme Court Rule 13, the order approving funding was submitted to the Chief Justice for approval. The Chief Justice, however, was not available to review the funding order until August 8, 2001. On that date, Ms. Holly Kirkham at the administrative office of the courts informed undersigned counsel that the funding was rejected because the ballistics expert requires a $1500 retainer. There is no guideline

promulgated in Supreme Court Rule 13 or anywhere else, however, that puts defense counsel on notice that the Tennessee Supreme Court will not authorize payment of retainers for experts. The fees charged by the approved ballistics expert will thus not be funded, and thus Mr. Workman will either need to request the Chief Justice to concur with the Trial Court's funding order, or he will need to secure another ballistics expert. Either of these courses of action will prevent Mr. Workman from being ready on August 13, 2001, with additional expert testimony that the Trial Court deemed significant enough to warrant funding.

3 Christopher M. Minton

Christopher M. Minton represented Mr. Workman in prior proceedings and was the person who located Harold Davis in 1999. Mr. Minton is a predicate witness to the introduction of the video tapes. Mr. Minton is also a material witness needed to authenticate and admit video tape recentations of Mr. Davis if Mr. Workman is unable to locate Mr. Davis in time for the hearing. As discussed, above, if that hearing goes forward on August 13, 2001, Mr. Davis will be unavailable, and Mr. Minton's testimony will be required. On August 13, 2001, however, Mr. Minton must be in Nashville, Tennessee, for a hearing before the Honorable John T. Nixon, United States District Judge for the Middle District of Tennessee. (See Affidavit of Chris Minton attached as Exhibit 6). Thus, like Mr. Davis, Mr. Minton will also be unavailable on August 13, 2001.

C On August 9, 2001, The Trial Court Ordered Mr. Workman To Present Proof August 13, 2001, Despite The Fact That Mr. Workman's Witnesses Are Unavailable And The State Has Refused To Comply With Mr. Workman's Discovery Request

On August 8, 2001, Mr. Workman filed a Motion For Continuance. At an August

9, 2001. hearing on that motion, Mr. Workman argued a continuance was proper because (1) the State had yet to respond to Mr. Workman's discovery request; and (2) Mr. Workman's witnesses were unavailable. The Trial Court held that the Tennessee Rules of Criminal Procedure, instead of the Civil Rules, would govern this writ of error coram nobis proceeding, and therefore Mr. Workman was not entitled to discovery. The Trial Court further ruled that while many of Mr. Workman's witnesses are unavailable, he must present the proof he can on August 13, 2001, and the Trial Court would take additional proof at a later date.

II STATEMENT OF REASONS SUPPORTING AN EXTRAORDINARY APPEAL

For the following reasons, the Trial Court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review.

A If Mr. Workman Is Forced To Present Proof On August 13, 2001, He Will Forever Lose His Right To Obtain Discovery Prior To Presenting Proof

A Rule 10 appeal is proper when a trial court's actions, if left unchecked, will result in a litigant losing a right that cannot thereafter be recaptured. State v. Callaher, 730 S.W.2d 622, 623 (Tenn. 1987); State v. Willoughby, 594 S.W.2d 388, 392 (Tenn. 1980). Such is the case here. As the following sections demonstrate, because the Tennessee Rules of Civil Procedure Apply to this proceeding Mr. Workman is entitled to obtain discovery prior to presenting any proof. If he is forced to present proof on August 13, 2001, he will lose that right forever. A Rule 10 appeal is therefore appropriate.

1 The Rules Of Civil Procedure Apply To This Error Coram Nobis Proceeding

In 1955, the Tennessee General Assembly by statute provided that the common

law writ of error coram nobis should be extended to criminal proceedings. The criminal writ of error coram nobis now codified at T.C.A. §40-26-105, provides in relevant part as follows:

> There is hereby made available to convicted defendants in criminal cases a proceeding in the nature of a writ of error coram nobis, to be governed by the same rules and procedure applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith.

T.C.A. §40-26-105 (emphasis supplied)

In order for this Court to understand what the legislature intended by providing that civil rules of procedure are applicable to coram nobis in criminal cases, the Court must ascertain what procedural rules governed civil coram nobis cases at the time of enactment of T.C.A. §40-26-105, since such rules are expressly referred to by the statute. After all, "it is well established that the fundamental role of this Court in construing statutes is to ascertain and give effect to legislative intent." State v. Mixon, 983 S.W. 2d 661, 669 (Tenn. 1998). "Moreover, the legislature is presumed to know the state of the law at the time it passes legislation." Id.

The common law writ of error coram nobis was developed by the judiciary in Sixteenth Century England. State v. Mixon 983 S.W. 2d at 666. Essentially the common law writ of error coram nobis allowed a trial court to reopen and correct its judgment upon discovery of a substantial factual error not appearing in the record, which if known at the time of judgment, would have prevented the judgment from being pronounced. Id. at 667. The coram nobis was in the nature of a new lawsuit to revoke and annul the judgment in the former suit — it is not a mere proceeding to correct or revise errors. Wills v. Wills, 104 Tenn (20 Pick) 382, 386, 56 S.W. 301 (1900); Higgins,

Tennessee Practice in law cases §1765 (1937).

The rules of pleading in civil actions at law governed litigation of the petition, including the requirement that the adverse party must respond to the petition. Crawford v. Williams, 31 Tenn (1 Swan) 341, 342 (1851); Caruthers, History of a lawsuit (8th ed.), §402 p. 454 (1963). A petitioner had the right to a jury trial, and for the writ to act as a supersedeas. Caruthers, History of a lawsuit (8th ed.) §399, p. 451 (1963); Crawford v. Williams, 31 Tenn at 343. Though the writ of error coram nobis in civil cases was superseded when Rule 60 of the Tennessee Rules of Civil Procedure became effective in 1971, the adoption of Rule 60 did not diminish or supersede the statute which extended the writ as an available remedy in criminal proceedings. State v. Mixon, 983 S.W. 2d at 668. Thus the Tennessee Supreme Court noted:

> The anomalous result is that the writ of error coram nobis continues to be an available remedy in criminal actions, but the procedure governing the remedy is based upon the civil writ of error coram nobis which has been abolished for over 28 years.

State v. Mixon, 983 S.W. 2d at 668.

The statute providing for the writ of error coram nobis in criminal cases mandates that the same rules and procedure applicable in civil cases apply except as inconsistent in the statute. The statute expressly provides that in the criminal context, there is no right to trial by jury and the writ may not act as a supersedeas. See T.C.A. § 40-26 105. Yet the clear intent of the legislature was that in all other aspects the civil procedural rules would apply.

For the foregoing reasons, the Tennessee Rules of Civil Procedure govern this error coram nobis proceeding. As the next section demonstrates, if Mr. Workman is

forced to present proof on August 13, 2001, he will lose forever rights guaranteed by those rules, and this Court should therefore grant this Rule 10 application.

2 Under The Tennessee Rules Of Civil Procedure, Mr. Workman Is Entitled To Obtain Discovery Prior To Presenting Any Proof

Civil Rule 26.02 (4)(A)(i) states that a party may, by interrogatory, require another party to identify any expert witness it intends to call at trial, the subject matter on which the expert shall testify, and the substance of the expert's opinion on that subject matter. Rule 26.02 (4)(A)(ii) further provides that upon learning these facts, a party is entitled to depose the other party's expert prior to trial.

Mr. Workman served the State with an interrogatory requesting the information that Mr. Workman is entitled to under Rule 26.02 (4)(A)(i). The State refused to answer the interrogatory based on the position that the Rules of Criminal Procedure, not Civil Procedure, apply to this proceeding, and the Trial Court upheld the State's refusal for that reason. As demonstrated above, the State and the Trial Court are clearly wrong - the Civil Rules apply and Mr. Workman has a right to obtain discovery on the State's expert witnesses before presenting any proof. As things now stand, if this Court does not intervene, Mr. Workman will forever lose this right. This Court should therefore grant this Rule 10 appeal.

B For Reasons Beyond Mr. Workman's Control, Mr. Workman's Proof Is Not Available For An August 13, 2001, Hearing

Mr. Workman's error coram nobis proceeding asks whether two things could have made a difference to the jury that convicted him of first-degree murder and sentenced him to death - (1) proof that Harold Davis has recanted his testimony; and (2) expert medical proof that the bullet that killed Lieutenant Oliver did not come from

Mr. Workman's gun. If Mr. Workman is forced to an August 13, 2001 hearing he will not have available core evidence on these issues. Messrs. Davis and Minton will be unavailable to testify on the Davis recantation issue, and Dr. Wecht and the ballistics expert will be unavailable to testify on whether the bullet that killed Lieutenant Oliver came from Mr. Workman's gun. For the reasons stated above, these witnesses are unavailable for reasons beyond Mr. Workman's control, including the Trial Court's communication to undersigned counsel that it was not going to hear proof on August 13, 2001.

The Trial Court's purported remedy to Mr. Workman's dilemma, that Mr. Workman present the proof that is available, and then present his other proof at a later date, is no remedy at all. For good reasons, Tennessee courts have a longstanding policy disfavoring such piecemeal litigation. "Such 'litigation should be discouraged, not only because it is antagonistic to the goals of public policy but also because it is prejudicial to the rights of individual litigants.'" See Nance v. City of Knoxville, 883 S.W.2d 629, 630-31 (Tenn.App. 1994)(quoting Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968, 970 (6th 1973). Such is the case here.

As a litigant, Mr. Workman is entitled to present his proof in the order that he believes serves his best interest. Mr. Workman cannot be forced into presenting his proof in such a manner that would make his case disjointed and hard to unravel by Tennessee's Courts. Forcing Mr. Workman to present his proof piecemeal, in a haphazard manner prejudices Mr. Workman's rights as a litigant. This Court should therefore grant this Rule 10 appeal.

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III CONCLUSION

This Court should

(1) vacate the Trial Court's order that the Tennessee Rules of Civil Procedure do not apply to this proceeding and Mr. Workman is therefore not entitled to discovery;

(2) vacate the Trial Court's order that Mr. Workman must put on any proof that is available on August 13, 2001; and

(3) order that the Trial Court hold a hearing only after Mr. Workman has had an opportunity to engage in discovery, at a time when Mr. Workman's proof is available for presentation

Respectfully Submitted,

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