IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE v. PHILIP R. WORKMAN

Criminal Court for Shelby County
No. B-82109

No. W2001-01238-CCA-R10-PD - Filed June 21, 2001

ORDER/OPINION

In this capital case, Petitioner Philip R. Workman seeks this Court's review, pursuant to Rule 10, Tennessee Rules of Appellate Procedure, of the trial court's "Order Requiring Defense Attorney and State Attorney to Refrain, Stop and Desist From Making Any Statements, Writings, or Any Communication Outside the Court," ("gag order"), entered by Division III of the Shelby County Criminal Court on April 6, 2001, and reissued by the court on May 15, 2001. Workman contends that "[t]he trial court's order was entered without proof or creation of a record, and has departed so far from the accepted and usual course of judicial proceedings as to require immediate review." Additionally, he avers that "[t]here is no compelling state interest that justifies the extreme burden to Workman and his attorneys' rights, the order is over broad and offers no less restrictive means to accomplish any purpose, and the order violates the First, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Tennessee Constitution." We find that Workman's position in his Rule 10 application is well-taken. Accordingly, Workman's application for extraordinary appeal is GRANTED. See generally Tenn. R. App. P. 10(a)(1).

I

Workman filed, in the Shelby County Criminal Court, a Petition to Re-Open Post-Conviction and, in the alternative, an application for writ of error coram nobis. The trial court denied Workman's petition and application for the writ on March 29, 2001. This Court affirmed the trial court's denial of both the motion to reopen and the writ of error coram nobis. On the date of Workman's scheduled execution, March 30, 2001, the Tennessee Supreme Court stayed the execution, finding that "due process requires that the decision of the trial court dismissing the writ of error coram nobis should be reversed and the case remanded for a hearing." See Workman v. State, 41 S.W.3d 100, 104 (Tenn. 2001).

During subsequent proceedings before Division III of the Shelby County Criminal Court, the trial court entered *sua sponte* an order on April 6, 2001, prohibiting attorneys for both Workman and the State from having any contact with any media outside the court, either in person or through third

parties. Specifically, the trial court's order provided:

> It is therefore Ordered, Adjudged and Decreed that:
>
> 1. All lawyers representing the defense and [S]tate in this case shall and will make no contact with any media outside of this court. This will include oral, written, phone, fax, or any other means of communication. Further, no communication shall or will be given through a third party.
>
> This order will be in affect at all times until further orders from this court.

In support of this order, the trial court stated:

> It has come to the Court's attention that comments concerning this case have been communicated through certain media to the public. It appears to the court that these comments about a possible witness or witnesses have or could cause harm to one or more parties involved in this matter.
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> . . . [T]his court has a duty and responsibility to protect the integrity of the record, but more importantly to protect all individuals connected in this case and respect there [sic] personal safety.

It is undisputed that the Order was entered without opportunity for any affected party to be heard.

On May 2, 2001, this Court, in its response to Workman's application for Rule 9 review, vacated all orders entered by the Shelby County Criminal Court in this matter between March 29, 2001, and April 17, 2001, and remanded this cause to the trial court. See Philip R. Workman v. State, No. W2001-00881-CCA-R9-PD (Tenn. Crim. App. at Jackson, May 2, 2001). The Shelby County Criminal Court, on May 15, 2001, found that this Court "did not conclude that the order issued on April 6, 2001, was substantively barred." The trial court further found that "the need to protect all individuals connected in this case still exists." Accordingly, the trial court reissued the order prohibiting attorneys in the case from "making any statements, writings or any communications outside the court."

II.

In State v. Carruthers, 35 S.W.3d 516 (Tenn. 2000), our supreme court discussed the constitutional standards applicable to the issuance of a "gag order." See generally Carruthers, 35 S.W.3d at 559 (the issuance of "gag orders," while permissible, implicates 5th, 6th, and 14th Amendment rights). In doing so, the supreme court held that "a trial court may constitutionally restrict extrajudicial comments by trial participants, including lawyers, parties, and witnesses, when

the trial court determines that those comments pose a substantial likelihood of prejudicing a fair trial." Id. at 563 ("substantial likelihood test strikes a constitutionally permissible balance between the free speech rights of trial participants, the Sixth Amendment rights of defendants to a fair trial, and the State's interest in a fair trial) (citing Gentile v. State Bar of Nevada, 501 U.S. 1030, 1070, 111 S. Ct. 2720. 2742 (1991)). Under this constitutional standard, a trial court, before the issuance of a "gag order," should consider:

> 1. The nature and circumstances of the judicial proceeding, including concerns about media coverage, the intimidation of witnesses, the parties' manipulation of the media, and the expedition and ultimate resolution of the judicial proceeding. See generally Carruthers, 35 S.W.3d at 563.
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> 2. Reasonable alternative measures that would ensure a fair trial without restricting speech, including a change of trial venue; postponement of the trial to allow public attention to subside; searching questions of prospective jurors; and "emphatic" instructions to the jurors to decide the case on the evidence.[1] See Carruthers, 35 S.W.3d at 563-64 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-64, 96 S. Ct. 2791, 2804-05 (1976)).
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> 3. The scope of the "gag order." See Carruthers, 35 S.W.3d at 564 (because a "gag order" by definition restricts speech, "a court must be mindful that '[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals'") (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S. Ct. 2746, 2758 (1989); see also Procunier v. Martinez, 416 U.S. 396, 413, 94 S. Ct. 1800, 1811 (1974)).

After full consideration of these factors, the trial court must determine that the potential comments of any and all trial participants pose a substantial likelihood of prejudicing a fair trial. See Carruthers, 35 S.W.3d at 563.

III.

Under the guidelines set forth by our supreme court in Carruthers, we conclude that Workman and his attorneys are entitled to immediate relief from the trial court's "gag order," as the trial court's order has so far departed from the accepted and usual course of judicial proceedings, in that:[2]

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[1]In this regard, the court may appropriately consider the costs of the alternative measures to the judicial system. See generally Carruthers, 35 S.W.3d at 564.

[2]We acknowledge that the trial court's order did not restrict Workman from making comments to the media, only his attorneys.

1. The trial court failed to afford Workman an opportunity to be heard upon the matter and failed to accept and/or enter evidence upon the record in support of the court's order.

2. The trial court failed to proceed in accordance with Carruthers by failing to consider on the record the nature and circumstances of the proceeding and by failing to consider on the record any reasonable alternative measures that would ensure a fair proceeding without restricting speech.[3]

3. The trial court's order is overly broad in scope in that the plain language of the order has no exceptions or limitations: (a) the order prohibits the attorneys from making any contact with the media, *i.e.*, the order does not allow the affected parties to make general statements asserting innocence, to comment on the nature of an allegation or defense, or to discuss matters of public record; see Carruthers, 35 S.W.3d at 564 (citing United States v. Brown, 218 F.3d 415, 429-30 (5th Cir. 2000); (b) the order is not limited to the case before the court; and (c) although the plain language of the order does limit the effectiveness of the order "until further orders of the court," this language fails to provide a specific time frame for termination effectively permitting the order to continue for perpetuity, see generally Carruthers, 35 S.W.3d at 564-65.

4. The trial court failed to make the determination that extrajudicial comments by trial participants in the present case pose a substantial likelihood of prejudicing a fair trial in this matter. See Carruthers, 35 S.W.3d at 563.

For these reasons, we hold that the "gag order" entered on April 6, 2001, and reentered May 15, 2001, is constitutionally infirm. Notwithstanding this conclusion, we are not precluding the Shelby County Criminal Court from entering a subsequent "gag order, provided the trial court complies with the constitutional standards set forth in State v. Carruthers and specifically articulates its reasons for finding that extrajudicial comments by trial participants pose a substantial likelihood of prejudicing a fair trial.

IV.

It is therefore ORDERED that the "gag order" entered in the above-captioned matter is

[3]We acknowledge, however, that the trial court's concern for the safety and recognition of danger posed to possible witnesses is a proper consideration under Carruthers. See generally Carruthers, 35 S.W.3d at 563.

vacated. This case is hereby remanded to Division III of the Shelby County Criminal Court for proceedings consistent with this opinion.

All of which is so ordered by the Court.

Enter, this the 21st day of June, 2001.

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DAVID G. HAYES, JUDGE

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JOE G. RILEY, JUDGE

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JOHN EVERETT WILLIAMS, JUDGE