IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

PHILIP R. WORKMAN,	)	
Petitioner,	)	
	)	
v.	)	**No. W2001-01238-CCA-R10-PD**
	)	**Shelby County**
STATE OF TENNESSEE,	)	
Respondent.	)	

ANSWER IN OPPOSITION TO APPLICATION
FOR EXTRAORDINARY APPEAL

INTRODUCTION

Petitioner, Workman, has applied to this Court under Tenn.R.App.P. 10 for an extraordinary appeal of the May 15, 2001, "gag order"[1] of the trial court in the above-styled error coram nobis proceeding. Workman contends that the order, which prohibits attorneys for both parties from making any media contact outside the court, runs afoul of the First Amendment's protection of free speech. Respondent submits that the order is not unconstitutional and that, in any event, the trial court did not so far depart from the accepted and usual course of judicial proceedings in issuing the order as to require immediate review by this Court. Accordingly, Workman's application should be denied.

STATEMENT OF FACTS

Subsequent to the issuance of the Tennessee Supreme Court's March 29, 2001, opinion

[1] The actual caption in the trial court was as "Order Requiring Defense Attorney and State Attorney to Refrain, Stop and Desist from Making Any Statements, Participating in Conversations Outside the Court." Tr. 1.

remanding Workman's petition for writ of error coram nobis to the Shelby County Criminal Court for an evidentiary hearing, *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001), the trial court issued an order on April 6, 2001, prohibiting attorneys for "the defense and state" from making any contact with any media outside the court. In support of that order, the 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."[2]

On May 2, 2001, this Court vacated all orders of the trial court issued after March 29, 2001, and prior to April 17, 2001, for want of jurisdiction. Once jurisdiction was returned, the trial court, on May 15, 2001, found that "the need to protect all individuals connected in this case still exists," and reissued the order prohibiting attorneys in the case from making contact with any media outside the court.[3]

REASONS AGAINST IMMEDIATE REVIEW

The Trial Court Has Not So Far Departed From the Accepted and Usual Course of Judicial Proceedings As to Require Immediate Review

Workman contends that the gag order issued by the trial court in this case tramples upon the free speech rights of his attorneys. A lawyer representing a party in a pending judicial proceeding, however, does not enjoy the same protection under the First Amendment as does an ordinary citizen.

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[2] While not a matter of record, the State represents that prior to the issuance of this order, anonymous letters threatening the safety of the Shelby County Criminal Courthouse, D.C. Smith, had been delivered to attorneys for both parties and to a Memphis newspaper. *See* Tr. 11-16.

[3] Id.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991). *See Zimmermann v. Board of Professional Responsibility*, 764 S.W.2d 757, 761-62 (Tenn. 1989).[4] Such an attorney is an officer of the court, and his constitutional rights may be subordinated to other legitimate interests. *Gentile*, *supra*, at 1073. Accordingly, when a state regulation implicates an attorney's First Amendment rights, a balancing test between those rights and the State's legitimate interest in regulating the activity must be employed. *Gentile v. State Bar of Nevada, supra*, at 1075. In support of his contention that the trial court's order in this case constitutes an unconstitutional infringement upon his attorneys' First Amendment rights, Workman relies on the recent Tennessee Supreme Court case of *State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000). There, following the majority holding in *Gentile*, the Court held that, for purposes of assessing the constitutionality of a gag order imposed in a criminal trial context, the "substantial likelihood of prejudice" test struck a permissible balance between the free speech rights of trial participants, the Sixth Amendment right of defendants to a fair trial, and the State's interest in a fair trial. *Id.* at 563. Accordingly, the Court held that the gag order in that case, which had been imposed out of concern for the media's influence on the potential jury pool and the safety of all involved in the trial, was proper; the Court further held, however, that the scope of the particular order in question was too broad. *Id.* at 560, 563-64.

Here, Workman correctly points out that a criminal trial is not involved. Indeed, Workman was convicted of and sentenced for first degree felony murder some twenty years ago. Accordingly, his Sixth Amendment right to a fair trial is not implicated. Nevertheless, a judicial proceeding is pending wherein a full evidentiary hearing, involving the calling of witnesses before an impartial

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[4] *See State v. Carruthers, infra* [illegible] wherein the Tennessee Supreme Court [illegible] the balancing test applied in *Zimmermann* in light of *Gentile*

factfinder, is contemplated. "A goal of our legal system is that each party shall have his or her case, criminal or civil, adjudicated by an impartial tribunal." Tenn.Sup.Ct.R. 8, EC 7-33. *See also* Tenn.Sup.Ct.R. 8, DR 7-107(G)(restrictions on extrajudicial statements by a lawyer during investigation or litigation of a civil action). Accordingly, the State also has a legitimate interest in ensuring and protecting the integrity and fairness of the non-criminal proceedings involved in this matter. *See Gentile v. State Bar of Nevada*, *supra*, at 1069, *quoting Bridges v. California*, 314 U.S. 252, 271 (1941)("[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper"). *Compare Zimmermann v. Board of Professional Responsibility*, *supra*, at 761 (Disciplinary Rule's restriction on free speech addresses substantial governmental interest in fairness and integrity of the administration of justice, which is particularly compelling in the criminal justice system). The gag order imposed in this case not only serves to further such an interest, but the trial court appears to have specifically based the issuance of its order partly on this ground. *See* Exs. 1, 3 ("this court has a duty and responsibility to protect the integrity of the record").

In addition, the trial court here was concerned with the potential for "harm to one or more of the parties involved" and with "protect[ing] all individuals connected in this case and respect[ing] their personal safety." *Id.* This represents yet another legitimate governmental interest that is furthered by the prohibition in question. *See State v. Carruthers*, *supra*, at 560. In view of these identifiable and legitimate interests of the State that are served by the gag order, as well as the recognized ability of a court to limit the speech of an attorney participating in a pending adjudicative proceeding, it cannot be said that the trial court in this case departed from the usual course of judicial proceedings in issuing the gag order. While the court did not invoke the "substantial likelihood of

prejudice" language of *Carruthers*, such a determination appears implicit in the trial court's order.[5]

Lastly, and insofar as the proceedings in this case *do not* involve a criminal jury trial, the references in *Carruthers* to, and Workman's insistence upon, consideration of less restrictive alternative measures, such as a change of venue or a continuance for publicity to lessen, are simply not germane. Similarly, since Workman has already been convicted, it is not necessary for the order to be narrowed to allow for his attorneys to make statements asserting his innocence. *See Carruthers*, supra, at 565. Moreover, and even if Workman himself should be allowed to make such statements, the terms of the order do not apply to him.

[5] Should the Court decline to deny the application on this basis, we would remand this case to the trial court for further consideration of the order in light of *Carruthers*, which is the appropriate alternative.

CONCLUSION

For the reasons advanced, Workman's application for extraordinary appeal should be denied.

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 June, 2001.

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JOSEPH F. WHALEN
Assistant Attorney General