

IN THE TENNESSEE COURT OF CRIMINAL APPEALS
AT JACKSON

STATE OF TENNESSEE,)	CCA # _____
Appellee)	
)	Shelby County Criminal Court
VS.)	No. B81209
)	
PHILIP WORKMAN,)	
Appellant)	

APPLICATION FOR T.R.A.P 10 EXTRAORDINARY APPEAL

Philip Workman and his attorneys request permission to appeal the gag order issued by the trial court, restraining all parties and lawyers involved in this action from having any contact with the media. The 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. There 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. This Application is made pursuant to Rule Ten of the Tennessee Rules of Appellate Procedure. Workman requests that the trial court's order be stayed pending review of this matter and thereafter vacated.

STATEMENT OF FACTS

On March 30, 2001, the Tennessee Supreme Court stayed Philip Workman's execution, which was scheduled within the hour, and remanded the cause to the Shelby County Criminal Court to hear evidence on various issues. On April 6, 2001, Criminal Court Judge John Colton entered an Order sua sponte restraining all attorneys involved in the present cause from having any contact with

any media, either in person or through third parties. The Order was entered without opportunity for any affected party to be heard.

Workman filed a T.R.A.P. 9 and 10 request for permission to appeal several orders of the trial court and this Court entered an order staying the proceedings on April 17, 2001, pending review of the claims. This Court then granted Workman's application for Rule 9 review, vacating previous orders of the trial court, and, on May 2, 2001, remanded this cause to the trial court.

On May 15, 2001, the trial court reentered its order that all attorneys refrain from "making any statements, writings or any communications outside the court."¹ Again the order was entered without briefing, argument or a shred of evidence being entered upon the record.

STATEMENT OF REASONS SUPPORTING EXTRAORDINARY REVIEW

The order of the Criminal Court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, because its order:

1. is fundamentally illegal in that it is not narrow or specific and is a complete and total restriction upon speech;
2. constitutes a failure to proceed according to established law as it fails to support a compelling state interest and offers no less restrictive, reasonable alternative measures to effect its stated goal of protecting "a possible witness or witnesses" from harm;
3. is a denial of Workman and his attorneys' due process rights and day in court, as no evidence has been entered nor hearing held in this matter;

¹"Order Requiring Defense Attorney And State Attorney To Refrain, Stop And Desist From Making Any Statements, Writings Or Any Communication Outside The Court" filed May 15, 2001. See Exhibit 1.

4. burdens the speech of a large group of attorneys representing Workman and the State of Tennessee;
5. does not exempt “general statements asserting innocence, commenting on the nature of an allegation or defense, and discussing matters of public record.” State v. Carruthers, 35 S.W.3d 516 at 565 (Tenn. 2000).
6. constitutes a plain and palpable abuse of discretion; and
7. divests Workman and his attorneys of a right and interest that may never be recaptured, as every day Workman’s attorneys’ speech is gagged can never be recaptured.

MEMORANDUM OF LAW IN SUPPORT OF EXTRAORDINARY REVIEW

Free speech has long been held as one of the most precious and fundamental rights guaranteed to citizens of this country. It is not an accident that the very first amendment to the United States Constitution protected the rights of citizens to speak freely and without restraint. U.S. Const. amend. I. This bedrock of liberty was and is recognized in Tennessee: “The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.” TN. Const. Art. I, § 19, State v. Montgomery, 929 S.W.2d 409 (Tenn. Crim. App. 1996).

The right to free speech is not entirely unfettered, and courts have carved narrow limitations when presented with compelling reasons why speech may be dangerous or may impermissibly intrude upon other fundamental rights. See New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)(restricting child pornography); Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)(restricting “fighting words”). Nevertheless, any restriction to

speech must be narrow and specific, must serve important, substantial public interests and must be no greater than is essential to the furtherance of that interest. NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), H & L Messengers, Inc. v. City of Brentwood, 577 S.W.2d 444 (Tenn. 1979).

Traditionally, when conflicts concerning free speech arise in criminal matters, there is a collision between the media's need to report a crime and an accused's need to protect the integrity of his or her trial. The fairness of the trial may be damaged by news accounts, implicating the accused's right to a fair trial. See Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)(pretrial publicity endangered defendant's due process rights). Often there is a danger that potential jurors will be influenced by media coverage of a crime and may lose their impartiality. The most restrictive method of avoiding these potential issues is by entering a "gag order," a restraint on the communications of the involved parties.

The Tennessee Supreme Court recently held that a gag order of a trial court that restricted all access to the media by a party who was both defendant and pro se attorney was unconstitutionally broad. State v. Carruthers, 35 S.W.3d 516 at 561. The error was judged harmless under the facts of the case, which included: 1. numerous threats to attorneys; 2. a co-defendant died in unusual circumstances; 3. the court had to be guarded by S.W.A.T. team members; 4. a jailer was murdered; 5. a witness fled after reading about the case in the newspaper; 6. a co-defendant allegedly threatened to kill two witnesses if they talked about the case; and 7. the defendant threatened a witness to make him recant his story to a reporter. Id. Given the preceding extraordinary factors, the Court held a gag order was proper, writing:

[W]e hold 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*. [Emphasis added]

Under these unusual circumstances, the trial court was justified in employing heightened measures to ensure that a *proper jury* could be found and to prevent [the defendant] from manipulating the media so as to intimidate witnesses. [Emphasis added]

Id. at 564. The Court continued, noting that before speech was so restricted, reasonable alternative measures should be considered such as a change of venue or a continuation for publicity to lessen.

Id. Finally, the Court announced:

[W]e hold that initial gag orders on trial participants should ordinarily contain the exceptions found in the Brown² order and allow trial participants to make general statements asserting innocence, commenting on the nature of an allegation or defense, and discussing matters of public record.

Id. at 565.

The matter before this Court is not a jury trial. In fact, Workman has already been adjudicated and sentenced to death. There is no threat of contaminating a jury even if Workman prevails and is granted a new trial--such a process will necessarily take years with appeals to higher courts. There is no evidence on record that any compelling government interest is at stake. The gag order of the trial court 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. The gag order is unconstitutional.

² United States v. Brown, 218 F.3d 415, 429-30 (5th Cir. 2000)(approved and quoted extensively in Carruthers).

CONCLUSION

Workman and his attorneys urge this Court to grant this extraordinary appeal and to stay the order of the trial court pending resolution of this matter. Workman and his attorneys further request that this Court vacate the order of the trial court restricting Workman and all involved attorneys from communicating with media, individually or through third parties, as it is an unconstitutional restriction upon the parties fundamental right to free speech under the Constitutions of the United States and Tennessee.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing to Joe Whalen, 425 5th Avenue North, Nashville, Tennessee 37202, this _____ day of May, 2001.
