

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,

v.

CCA No. _____

PHILIP R. WORKMAN,

Shelby County No. B81209

Defendant.

**APPLICATION FOR PERMISSION TO APPEAL
PURSUANT TO RULES 9 & 10, TENNESSEE RULES OF APPELLATE PROCEDURE**

On Application for Interlocutory Appeal from Division III of the Criminal Court of Shelby County, Tennessee.

Submitted by:

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Attorney for Philip R. Workman

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Applicant, Philip Ray Workman, pursuant to Rules 9 & 10, Tennessee Rules of Appellate Procedure, respectfully applies to this Court for review of orders of the Shelby County Criminal Court, Division III (Trial Court). Specifically, on April 11, 2001, the Trial Court agreed that an interlocutory appeal was proper to resolve three questions:

1. Whether the Trial Court has jurisdiction to enter orders in this case, prior to the filing of the mandate from the Supreme Court with the Trial Court clerk.

2. Whether the Trial Court has authority to order production of witness statements 24 hours prior to such witnesses testimony, notwithstanding Rule 26.2 of the Tennessee Rules of Criminal Procedure.

3. Whether the Trial Court erred by entering an order on April 9, 2001 setting a hearing date for Monday April 23, 2001.

(A copy of the "Order Granting Permission to Appeal Pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure" is attached hereto as Exhibit 1).

I. STATEMENT OF THE FACTS

On March 28, 2001, Mr. Workman filed in the Trial Court (1) a Petition For Writ of Error Coram Nobis; (2) a Motion to Reopen Mr. Workman's previous post-conviction proceeding; and (3) a Motion for a Declaratory Judgment. On March 29, 2001, the Trial Court denied these motions, this Court affirmed those denials, and Mr. Workman filed an application for permission to appeal in the Tennessee Supreme Court. On March 30, 2001, the Tennessee Supreme Court granted Mr. Workman's application for permission to appeal remanding the case to the Trial Court to conduct a hearing as to the Petition for Writ of Error Coram Nobis.

On April 9, 2001, Mr. Workman filed in the Tennessee Supreme Court a petition for rehearing. (A copy of which is attached hereto as Exhibit 2). In that petition Mr. Workman noted that the Court had not ruled on his Motion To Reopen and Motion For Declaratory Judgment, and Mr. Workman respectfully requested that the Court address the issues raised in those proceedings. At the time of filing of this Rule 9 Application, Mr. Workman's rehearing petition remains pending.

Also on April 9, 2001, the Trial Court held a conference to resolve preliminary matters and schedule a hearing on Mr. Workman's Error Coram Nobis Petition. (See Exhibit 3). At that hearing, undersigned counsel appeared and informed the Trial Court that because the mandate had not issued from the Tennessee Supreme Court, the Trial Court did not have jurisdiction over the proceeding. The Trial Court nonetheless went on to conduct the following proceedings:

The Trial Court ordered undersigned counsel to respond to a motion Assistant District Attorney General John Campbell handed counsel in open court immediately prior to the conference. That motion requested that Mr. Workman provide the State more than twenty-four hours prior to April 23, 2001, 9:30 a.m., any previous statements of Harold Davis. When undersigned counsel requested an opportunity to research and draft a response, the Trial Court told counsel he had twenty minutes. The Trial Court thereafter orally granted the State's motion, and it issued an order requiring production of the Davis statements twenty-four (24) hours prior to his testimony.

The Trial Court thereafter set an April 23, 2001, date for an evidentiary hearing on Mr. Workman's Petition For Writ Of Error Coram Nobis. Undersigned counsel informed the Trial Court that it would be impossible for counsel to be prepared for a hearing on such short notice given (1) counsel's obligations in other cases; (2) the inability of counsel to secure out of state expert witnesses on such short notice; and (3) the inability to locate and secure the appearance of Harold Davis, a key fact witness whose whereabouts are currently unknown. The Trial Court responded that despite counsel's objections, it would hold the hearing April 23, 2001, at 9:30 a.m.

The court then entered an "Order Setting Hearing on Mr. Workman's Petition for Writ of Error Coram Nobis for Monday, April 23, 2001" (a copy of which is attached hereto as Exhibit 4); and an "Order to Produce All Unedited Videotapes, Audiotapes, Written Statements of Harold Davis in the Possession of the Defendant and Order of Protection" (a copy of which is attached hereto as Exhibit 5). ("Jencks Order"). Because Mr. Workman was not provided an opportunity to file written motions prior to the orders, on April 11, 2001, Mr. Workman filed (1) a "Motion for Continuance of April

23, 2001, Hearing Date” (a copy of which is attached hereto as Exhibit 6); (2) a “Motion to Vacate all Orders Entered Subsequent to the Filing of the Notice of Appeal in this Cause” (a copy of which is attached hereto as Exhibit 7); and (3) “Response to ‘Motion of the State of Tennessee for an Order Directing the Defendant to Produce All Unedited Videotapes, Audiotapes, Written Statements of Harold Davis; and Request for an Order of Protection’ Motion for Court to Vacate its Previous Order” (a copy of which is attached hereto as Exhibit 8). By Order dated April 11, 2001, the court denied these motions (a copy of which is attached hereto as Exhibit 9). Counsel then filed a “Motion for Leave to Seek Interlocutory Appeal” (a copy of which is attached hereto as Exhibit 10). On April 11, 2001, the court entered an “Order Granting Interlocutory Appeal.” (See Exhibit 1).

II. REASONS FOR IMMEDIATE REVIEW

The Tennessee Supreme Court ordered the Trial Court to afford Mr. Workman “the opportunity to establish that newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial.” (See Workman v. State, M1999-01334-SC-DPE-PD, March 30, 2001, Opinion, p. 4). By acting without jurisdiction, by acting contrary to law, and by requiring Mr. Workman to go forward on short notice when neither counsel nor Mr. Workman’s witnesses can be prepared, the Trial Court denies Mr. Workman the meaningful opportunity to be heard ordered by the Tennessee Supreme Court. If this Court does not intervene, that opportunity will be lost, and that loss will itself become an issue of litigation. To prevent such occurrences, this Court must review the Trial Court’s actions immediately.

A. The Trial Court Is Without Jurisdiction

On March 29, 2001, Mr. Workman filed in the Trial Court a Notice of Appeal. This notice divested the Trial Court of jurisdiction to take further action in this matter. State v. Pendergrass, 937 S.W.2d 834, 837-38 (Tenn. 1996). Pursuant to Rule 43 of the Tennessee Rules of Appellate Procedure, the Trial Court does not acquire jurisdiction to conduct further proceedings until ten (10) days after the mandate has been filed with the trial court clerk. Specifically Rule 43(a), (c) provides as follows:

(a) **Filing Of Mandate** - the clerk of the Trial Court shall file the mandate promptly upon receiving it.

...

(c) **Remandment** - when the Appellate Court remands the case for a new trial or hearing and the mandate is filed in the trial court, the case shall be reinstated therein and the subsequent proceedings conducted after at least ten (10) days notice to the parties.

T.R.A.P. 43 (a), (c)

Pursuant to Rule 42 (a) of the Tennessee Rules of Appellate Procedure, the mandate issues eleven (11) days after the entry of judgment of the Supreme Court unless a Petition to Rehear is timely filed by either party, which automatically stays the issuance of the mandate. Specifically Rule 42 (a) of the Tennessee Rules of Appellate Procedure provides in relevant part as follows:

The clerk of the Supreme Court shall transmit to the clerk of the trial court the mandate of the Supreme Court, with notice to the parties, 11 days after the entry of the judgment unless the court orders otherwise. The timely filing of a Petition for Rehearing will stay the mandate until disposition of the Petition unless the Court orders otherwise....

Pursuant to Rule 39 (b) of the Tennessee Rules of Appellate Procedure, a Petition for Rehearing may be filed within ten (10) days after the entry of the judgment. See Rule 39 (b) T.R.A.P.

Since the judgment of the Supreme Court was issued March 30, 2001, Mr. Workman had until and including April 9, 2001, to file a Petition for Rehearing to the Tennessee Supreme Court. Counsel for Mr. Workman filed a Petition for Rehearing with the Tennessee Supreme Court, by mailing same certified mail return receipt requested on April 9, 2001. This constitutes a timely filing for Petition for Rehearing in accordance with Rules 20 (a) & 21 (a), of the Tennessee Rules of Appellate Procedure.

Thus, the mandate in this case has not issued, and will not issue until the Tennessee Supreme Court enters an order upon Mr. Workman's Petition for Rehearing. Thereafter, the Trial Court may not conduct any proceedings until the clerk of the Supreme Court transmits a copy of the mandate to the Trial Court Clerk, and the parties have been given ten (10) days notice of the filing of the mandate.

Thus, the Trial Court has been without jurisdiction to conduct any proceedings with respect to this case. Therefore, the Trial Court's orders entered since filing of the Notice of Appeal have been entered while the Court was wholly without jurisdiction of this cause; and are thus void and of no effect.

III. THE TRIAL COURT'S JENCKS ORDER IS CONTRARY TO LAW

Tennessee Criminal Procedure Rule 26(a) provides that

After a witness other than the defendant **has testified on direct examination**, the trial court ... shall order (the production of) any statement of the witness ... that relates to the subject matter concerning which the witness has testified.

By its terms, this rule does not require the production of a witness's prior statement until after the witness has testified. As the Tennessee Supreme Court holds, given the rule's express terms, there simply is no right to have witness statements produced until after the witness has testified. State v. Taylor, 771 S.W.2d 387, 394 (Tenn. 1989). The Trial Court's Jencks Order is therefore contrary to law and should be vacated.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY SETTING AN APRIL 23, 2001, HEARING DATE

On April 9, 2001, the Trial Court set April 23, 2001, as the date for the evidentiary hearing on Mr. Workman's Petition For Writ Of Error Coram Nobis. When it did so, undersigned counsel informed the Trial Court that, for the following reasons, there was no way that Mr. Workman's case could be ready for a hearing thirteen days later:

A. Counsel's Obligations In Other Cases: Undersigned counsel informed the Trial Court that he has pending a case styled Little v. Shelby County, Docket Number 96-2520, in the United States District Court for the Western District of Tennessee, Western Division. A hearing is currently scheduled for Friday April 20, 2001, before the Honorable Jon Phipps McCalla with respect to that case. Undersigned counsel informed the Trial Court that Little involves an order granting injunctive relief for the class of inmates in the Shelby County Jail, entered due to the failure of the Shelby County Sheriff and the County to protect inmates from physical and sexual assault. By order dated December 22, 2000, the Honorable Jon Phipps McCalla found the County

and Sheriff in contempt of court. A hearing is set for April 20 to determine how to remedy the contempt.

Undersigned counsel informed the Trial Court that in all likelihood, the hearing in Federal Court will continue through April 23, 2001, making it impossible for undersigned counsel to be present on April 23. Undersigned counsel contended that even if the hearing does not continue until April 23, he will need to spend a substantial amount of time reviewing voluminous documents and taking depositions in order to prepare for the case. Undersigned counsel noted that the County's remedial plan was not filed until Monday April 9, and the U.S. District Court has granted him leave to take depositions of the County's experts in preparing for the hearing. Undersigned counsel stated that given his duty to properly prepare for the Little hearing, he cannot prepare for a hearing on Mr. Workman's Petition for Writ of Error Coram Nobis.

Undersigned counsel informed the Trial Court that, additionally, he has a brief due in the Tennessee Supreme Court in the Capital Case of State of Tennessee v. Richard Austin, which is due April 28, and preparing that brief will require a substantial amount of preparation as well.

In an Affidavit subsequently filed with the Trial Court, undersigned counsel summarized his position as follows:

Simply put, with my other commitments as an attorney, there is simply no way I can properly prepare for a hearing with less than two weeks notice. Furthermore, to go forward with such short notice would in essence constitute malpractice.

(See generally, Affidavit of Robert Hutton, attached as Exhibit 1 to the Motion for Continuance attached hereto as Exhibit 6).

B. Unavailability Of Witnesses: Undersigned counsel informed the Trial Court that witnesses needed for presentation of Mr. Workman's case would not be available, or perhaps even located, for a hearing thirteen days away. In an Affidavit undersigned counsel subsequently filed with the Trial Court, counsel informed that prospective expert witnesses Mr. Workman intended to present were not available on April 23, 2001. In addition, undersigned counsel stated that it would be humanly impossible to present at the hearing the testimony of Harold Davis, a critical witness who is believed to be currently residing outside the State of Tennessee. Specifically, undersigned counsel affirmed that

In order to secure (Mr. Davis's) attendance, I will have to file a "Petition to Secure Attendance of Out of State Witness," pursuant to T.C.A. §40-17-201 once Mr. Davis is located. Litigation would need to be commenced in the state where Mr. Davis is found to secure his attendance. There is in my professional judgment no way this can be accomplished by Monday April 23.

(See Affidavit attached to Motion for Continuance attached as Exhibit 6).

After the April 9, 2001, hearing, undersigned counsel formally moved, by written motion, the Trial Court to continue the April 23, 2001, hearing. The Trial Court denied that motion.

Given counsel's obligations in other cases and the unavailability of witnesses needed for presentation of Mr. Workman's case, the Trial Court abused its discretion in setting the evidentiary hearing for April 23, 2001, and denying counsel's request that the hearing be continued.

V. CONCLUSION

The Tennessee Supreme Court ordered a meaningful hearing on Mr. Workman's Petition For Writ Of Error Coram Nobis. By acting without jurisdiction, by acting contrary to law, and by requiring Mr. Workman to go forward on short notice when neither counsel nor Mr. Workman's witnesses can be prepared, the Trial Court has denied Mr. Workman the meaningful opportunity to be heard which the Tennessee Supreme Court ordered. Pursuant to Tennessee Rules of Appellate Procedure 9 & 10, this Court must therefore immediately review the Trial Court's actions and vacate them to ensure that Mr. Workman is afforded the meaningful process that the Tennessee Supreme Court ordered he receive.

Respectfully Submitted,

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Memphis, TN 38103
(901) 525-1322

By: _____
Robert L. Hutton #15496

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing to John Campbell,
201 Poplar Avenue, Memphis, Tennessee, 38103 and Glen Pruden, P.O. Box 20207,
Nashville, Tennessee 37202, this _____ day of April, 2001.

1. Order Granting Permission to Appeal Pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure
2. April 9, 2001 petition for rehearing filed in the Tennessee Supreme Court
3. Notice of hearing of 4/9/01
4. Order setting Mr. Workman's Petition for Writ of Error Coram for 4/23/01
5. "Order to Produce All Unedited Videotapes, Audiotapes, Written Statements of Harold Davis in the Possession of the Defendant and Order of Protection"
6. "Motion for Continuance of April 23, 2001, Hearing Date"
7. "Motion to Vacate all Orders Entered Subsequent to the Filing of the Notice of Appeal in this Cause"
8. "Response to 'Motion of the State of Tennessee for an Order Directing the Defendant to Produce All Unedited Videotapes, Audiotapes, Written Statements of Harold Davis; and Request for an Order of Protection' Motion for Court to Vacate its Previous Order"
9. By Order dated April 11, 2001, the court denied these motions
10. "Motion for Leave to Seek Interlocutory Appeal"