

**IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
DIVISION III**

PAUL DENNIS REID, JR.)	
)	
)	
)	No. 97-C-1834
vs.)	(Captain D's)
)	(Capital Case)
)	(Post-Conviction)
)	
STATE OF TENNESSEE)	

ORDER DENYING MOTION TO RECUSE

Citing multiple examples which purportedly support her claim that a reasonable person would question this Court's impartiality, petitioner's counsel requests that the Court recuse itself from these proceedings.¹ The Court will attempt to address the issues in the order raised by counsel.²

RELEVANT AUTHORITIES

Canon 3E of the Code of Judicial Conduct provides in relevant part as follows:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a

¹Petitioner also requests that this Court "further elucidate on the record of the proceedings any potential reasons which would warrant her recusal in this cause." The Court knows of no facts or arguments which would support a request for recusal. If the Court learns of any such information, the Court will immediately notify both parties.

²The Office of the Post Conviction Defender recently assigned Nicholas Hare to serve as Marjorie Bristol's co-counsel. Because Mr. Hare did not sign the motion to recuse, the Court will refer to counsel in the singular.

party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding; [or]

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it.

Commentary

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Tenn. Sup. Ct. R. 10, Canon 3E.

As the Tennessee Court of Criminal Appeals has noted, the standard employed in this analysis has both objective and subjective aspects:

A trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever his impartiality can reasonably be questioned. This is an objective standard. Thus, while a trial judge should grant a recusal whenever the judge has any doubts about his or her ability to preside impartially, recusal is also warranted when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.

Pannell v. State, 71 S.W.3d 720, 725 (Tenn. Crim. App. 2001) (internal citations omitted).

PROCEDURAL HISTORY

Three juries sentenced petitioner to death for a total of seven homicides. This Court presided over the first and third trials, which dealt with the homicides of two

Captain D's employees and three McDonald's employees, respectively (Case Nos. 97-C-1834 and 97-C-1836). The second trial, which dealt with the homicides of two Baskin Robbins employees, was conducted in Montgomery County. The Tennessee Supreme Court affirmed the defendant's convictions and sentences for the Captain D's homicides and those convictions are at issue in this post-conviction proceeding. See State v. Reid, 91 S.W.3d 247 (Tenn. 2002), cert. denied, ____ U.S. ____ (Oct. 6, 2003).

With regard to the competency issue mentioned by petitioner's counsel in the motion to recuse, the Court notes that trial counsel filed last-minute challenges to petitioner's competency to stand trial in the McDonald's and Baskin Robbin's cases, but did not file such a motion in the Captain D's case. After conducting separate hearings, both this Court and the Montgomery County Circuit Court concluded that petitioner was competent to stand trial.

LEGAL ANALYSIS

Counsel first contends that the Court improperly formed and expressed an opinion regarding petitioner's competency prior to the competency hearing in the McDonald's case.³ In support, counsel attached a copy of a motion to recuse filed by defense counsel prior to that trial. However, post-conviction counsel failed to note that the Court addressed this allegation in its order denying the motion to recuse. In that

³Counsel contends that petitioner's competency to stand trial is "an issue which is paramount to these post-conviction proceedings." The post-conviction petition does not raise any issues regarding petitioner's competency and counsel has not filed an amended petition. Nevertheless, the Court chooses to address the merits of counsel's allegations and will assume for purposes of this order that petitioner's competency to stand trial for the Captain D's homicides will be at issue in the pending post-conviction proceedings.

order the Court stated:

With regard to the competency hearing, the defendant notes that the Court indicated that it had extensive knowledge concerning his background, that it had reviewed reports from the Montgomery County Circuit Court's competency hearing, and that it was not interested in 're-litigating Clarksville.' Despite the defendant's allegation to the contrary, the Court did not form an opinion regarding the merits of the competency issue prior to the hearing.

Prior to the presentation of evidence regarding the defendant's competency, the Court informed the parties of the limited scope of the competency hearing. Because the Court had previously heard extensive testimony [during the penalty phase of the defendant's trial for the homicides of two Captain D's employees] from several State and defense experts regarding the defendant's childhood, family life, medical history, and mental-health history, there was no reason for either party to present testimony regarding those facts. The Court simply saw no benefit in repeating testimony which the Court had already heard.

Further, because the Montgomery County Circuit Court had found the defendant to be competent and because approximately six months had passed since the time of that hearing, the Court informed the parties that the critical issue was the defendant's current mental state. Specifically, the Court advised the parties that it was interested in hearing testimony concerning any deterioration that had occurred in the defendant's mental health subsequent to the Montgomery County hearing.

Finally, with regard to the Montgomery County reports, the Court notes that defense counsel provided the Court with the reports and at no time requested that the Court refrain from reading them. In fact, defense counsel specifically asked the Court to review the reports to determine whether the State was entitled to view them.

For reasons which are not relevant to this motion, counsel requested that the Court refrain from relying upon one of those reports in determining the defendant's competency. The Court honored that request. Indeed, the Court did not consider any of those reports in determining that the defendant is competent to stand trial in this case.

The Court believes that this response to trial counsel's motion to recuse adequately responds to post-conviction counsel's erroneous assertion that the Court formed an opinion regarding petitioner's competency prior to conducting the

competency hearing.

Counsel next alleges that the Court exhibited “expert shopping” by rejecting the opinion of Dr. Keith Caruso, whom the Court appointed to evaluate petitioner’s competency to stand trial prior to the McDonald’s trial, and by retaining the services of experts employed by Middle Tennessee Mental Health Institute. Again, post-conviction counsel refers to this allegation in trial counsel’s previously-filed motion to recuse, but fails to note that the Court addressed the allegation in its order denying the motion to recuse as well as in its order denying trial counsel’s motion for a new trial following the conclusion of the McDonald’s trial.⁴ In the order denying the motion for a new trial, the Court stated:

The defendant argues that the Court erred by permitting the forensic team at Middle Tennessee Mental Health Institute (MTMHI) to evaluate him on the issue of competency after Dr. Keith Caruso concluded that he was incompetent, by refusing to allow Dr. Caruso to testify in response to the forensic team’s report, and by refusing to allow Dr. Caruso to continue to evaluate the defendant following the Court’s conclusion that he was competent to stand trial.⁵ The Court disagrees.

Although the procedural history of the competency issue is discussed in various pretrial orders filed by the Court, the Court will briefly reiterate those aspects which are most relevant to the issues currently raised by the defendant. Due to the seriousness of this case and the MTMHI forensic team’s extensive experience in conducting competency evaluations, the Court’s first inclination upon receiving the defendant’s motion for a competency determination was to appoint that team to conduct the evaluation. However, pursuant to Tenn. Code Ann. § 33-7-

⁴For the parties’ convenience, the Court has attached copies of both of these orders to this order.

⁵Over the State’s objection, the Court subsequently agreed that defense counsel could call Dr. Caruso as a defense witness during the penalty phase of the trial. Although counsel presented the testimony of four other expert witnesses during that phase, they ultimately chose not to present the testimony of Dr. Caruso. (Footnote in original order)

301(a)(1), the Court was first required to contact Vanderbilt University, with whom MTMHI contracts to perform such evaluations for Davidson County. For reasons explained in the Court's order denying the defendant's motion to recuse, Vanderbilt was unable to provide the necessary services. However, MTMHI did not have the statutory authority to conduct an evaluation in the absence of a preliminary examination conducted by another mental health expert. Therefore, due to various experts' conflicts of interest, the Court ultimately appointed Dr. Keith Caruso, a mental health expert with whom the Court was unfamiliar, to conduct the competency evaluation. At no time did the Court lose interest in having MTMHI conduct an evaluation if an additional evaluation became necessary. The Court merely attempted to comply with the statutorily-mandated procedures.

During the subsequent competency hearing, the Court heard conflicting testimony from Dr. Daniel Martell, Dr. Pamela Auble, and Dr. Keith Caruso regarding various aspects of the defendant's competency. Because of the inconsistencies in the experts' conclusions, the Court believed it would be helpful for the defendant to undergo an additional evaluation. Having complied with the statutory requirements, the Court again approached the MTMHI forensic team and requested a thorough evaluation of the defendant's competency, including any recommendations regarding the need for medication.⁶

The Court did not, as the defendant has implied throughout these proceedings, order an additional evaluation because Dr. Caruso reached the 'wrong' conclusion by finding the defendant incompetent. This Court has no interest in trying any incompetent defendant, much less one whose life is at stake. Although the Court takes this position for obvious ethical reasons, the Court also recognizes that trying an incompetent defendant will ultimately result in a reversal of his conviction and sentence. Given the amount of time and money required to conduct a capital murder trial, the Court was understandably reluctant to take any action which even arguably could have resulted in a retrial.

With regard to the defendant's complaint that the Court erred by refusing to allow Dr. Caruso to testify for a second time and to continue evaluating the defendant throughout the trial proceedings, the Court wishes to make several points. First, although Dr. Caruso is obviously an intelligent man

⁶The Court notes that, although MTMHI's forensic team is very experienced, the Court did not find the defendant competent merely because the team reached that conclusion. The Court considered all of the testimony and evidence presented at the competency hearing before finding the defendant competent. (Footnote in original order)

and a well-qualified psychiatrist, the Court had concerns regarding the accuracy of some of his findings. For instance, in his report Dr. Caruso stated, 'In regard to his appraisal of available legal defenses, Reid had to be reminded that the insanity defense was available. Although his overlooking this defense was not singularly fatal to competency, it was predictable that someone denying his own mental illness would do so.' Contrary to this finding, the insanity defense was not available in this case. To the best of the Court's knowledge, not a single defense or State expert has ever concluded that the defendant was insane at the time of the offenses in any of his three cases. Moreover, the deadline for asserting such a defense had passed long before the initiation of the competency proceedings. Although this mistake dealt with criminal procedure as opposed to psychiatry, it concerned the Court nonetheless.

More importantly, the Court was greatly concerned with Dr. Caruso's initial finding – and subsequent amendment to the finding – that the defendant was not familiar with the nature of his pending charges. In his report, Dr. Caruso stated:

With regard to charges, Reid stated that he was alleged to have committed three murders and robbery of McDonald's on March 23, 1997. I asked the defendant repeatedly if there were any other charges. Reid replied negatively each time. I finally reminded Reid that he was also charged with attempted murder. I found this deficit to be of grave concern, as the apparent cornerstone of the case is eyewitness identification by the survivor of that attack.

Subsequent to Dr. Caruso's testimony, the parties were provided with tapes of a portion of his interview with the defendant. According to Dr. Caruso, the tape recorder malfunctioned and the remainder of the interview was not taped. In any event, after listening to the tapes the State informed the Court that Dr. Caruso's conclusions regarding the defendant's understanding of the charges against him were not supported by the tapes. Indeed, on at least two occasions during the interview the defendant accurately informed Dr. Caruso that he had been charged with three counts of murder, one count of attempted murder, and one count of robbery.

The day after the State informed the Court of this error in open court, the Court received an unsolicited facsimile from Dr. Caruso. Dr. Caruso acknowledged that he 'may have unintentionally misstated Reid's knowledge of his charges, both in [his] report and [his] testimony.'

Although he asserted that this mistake did not affect his conclusion that the defendant was incompetent, he requested that the Court substitute the following paragraph for the previously-discussed paragraph in his report:

Although Reid accurately stated the charges against him when initially asked, he later had difficulty recalling the attempted murder charge, even when asked repeatedly. I finally reminded Reid that he was also charged with attempted murder. I found this deficit to be of grave concern, as the apparent cornerstone of the case is eyewitness identification by the survivor of the attack.

The Court finds the circumstances of this amendment to be somewhat suspicious. Although it is entirely possible that Dr. Caruso discovered his error when reviewing his notes for the purpose of preparing for any potential future testimony as he claimed in his facsimile, the Court finds it interesting that the error he discovered was identical to the error identified by the State in open court on the previous day. Although Dr. Caruso was not present in the courtroom, all proceedings in this case were televised live on cable television. Regardless of Dr. Caruso's reason for submitting the correction, however, the fact that he initially misstated such an important fact was cause for concern. The Court also finds the amended report to be somewhat lacking in credibility. Due to the malfunctioning tape recorder, the Court does not have access to the substance of the final portion of Dr. Caruso's interview with the defendant and has no way of verifying Dr. Caruso's statement that the defendant had difficulty recalling that he was charged with attempted murder during that portion of the interview. However, having considered the defendant's initial statements to Dr. Caruso regarding the nature of his charges and his thorough understanding of the surviving victim's expected eyewitness testimony, the testimony of other experts, and the Court's own observations of the defendant throughout the various proceedings, the Court has a difficult time believing that the defendant could not recall the nature of the charges against him.

The Court was also somewhat concerned that Dr. Caruso's office submitted a bill for \$20,250.00 after conducting the initial competency evaluation. Prior to hiring Dr. Caruso, the Court informed him that, despite his \$250.00/hour fee, the maximum compensation he would receive for the competency evaluation was \$7,500.00.⁷ Although Dr.

⁷The Court initially submitted an order requiring the Administrative Office of the Courts to pay any fee generated by Dr. Caruso, but the Tennessee Supreme Court declined to approve

Caruso agreed to those terms and the bill submitted by his office acknowledges the agreement, the bill also states, 'Should the Court find the funds, Treadway Clinic, PC would graciously accept full payment, although this is not expected.' Given the fact that the Court's initial agreement with Dr. Caruso, which in reality does not appear to have been satisfactory to him, did not include any discussions concerning continued evaluations following the conclusion of the competency hearing, the Court saw no reason to continue employing a private psychiatrist when a qualified forensic team was at the Court's disposal.

Assuming the Court had no concerns about finances or about the accuracy of Dr. Caruso's report, the Court still would not have sought his services following his initial testimony. Although the defendant apparently believes he had a right to 'rebut' the MTMHI forensic team's testimony with additional 'pro-defense' testimony, the Court is not aware of any such right. Moreover, the Court notes that it permitted defense expert Dr. Auble to testify for a second time following the forensic team's testimony.

Dr. Farooque is a very qualified expert whom the Court found to be quite credible, and the defendant has not established that he suffered any prejudice as a result of the Court's decision to allow her to conduct competency evaluations prior to jury selection and to the trial itself. As the Court has noted in previous orders, the defendant was entitled to a fair determination of his competency, or lack thereof, and his rights were more than protected by his multiple evaluations, a very thorough hearing, and the Court's consideration of all relevant factors during the competency hearing as well as during the trial. He is entitled to nothing more.

Although the majority of the Court's analysis is self-explanatory, the Court wishes to clarify the first sentence of the last paragraph, which may not be clear to someone who was not involved in those proceedings. Following the pretrial competency hearing, the Court concluded that petitioner was competent to stand trial. However, the Court informed the parties that it intended to continue to monitor petitioner's behavior throughout the trial. See State v. Taylor, 771 S.W.2d 387, 396 (Tenn. 1989) (finding that a defendant's demeanor and behavior at trial are relevant to competency).

the order. Therefore, Davidson County was required to pay Dr. Caruso and the available funds were quite limited. (Footnote in original order)

Moreover, out of an abundance of caution, the Court ordered Dr. Rokeya Farooque, one member of the three-person MTMHI forensic team that evaluated petitioner during the competency proceedings, to continue to monitor petitioner and report any concerns to the Court. Specifically, the Court ordered Dr. Farooque to evaluate petitioner's competency to stand trial immediately prior to jury selection and again immediately prior to the guilt phase of the trial. Following each evaluation, Dr. Farooque reported in open court that petitioner was competent to stand trial and the Court permitted the parties to question her regarding the basis for her conclusion.

The Court finds that this explanation regarding the post-competency hearing proceedings and the previously-filed order's explanation regarding the competency hearing are more than adequate to dispel any notion that the Court's actions were improper.⁸

Likewise, counsel's reference to a newspaper article in which a reporter conveyed this Court's conclusion that the defendant was competent to stand trial for the McDonald's homicides in no way supports counsel's assertion that the Court's findings in that case will affect the Court's ability to address competency issues raised during the pending Captain D's post-conviction proceedings. Although the Court found petitioner competent to stand trial following a lengthy hearing prior to the McDonald's trial, competency is a fluid issue. The fact that the Court found the defendant competent prior to that trial in no way impairs the Court's ability to fairly and accurately

⁸Although the Court did not have an opportunity to draft a competency order immediately following the competency hearing due to time constraints, the Court thoroughly addressed the competency issue in its order denying petitioner's motion for a new trial. As previously noted, that order is attached to this order.

assess an argument that petitioner's trial attorneys should have raised a competency claim prior to the Captain D's trial, which occurred one year before the McDonald's trial. In other words, although the Court concluded that petitioner was competent prior to the McDonald's trial, the Court is both willing and able to objectively entertain an argument that the Court would have found petitioner incompetent prior to the Captain D's trial if trial counsel had raised the issue.

Petitioner's counsel also contends that the Court was "employed as a forensic psychological examiner at MTMHI from 1975 to 1979" and that a video prepared during that employment "offers stark proof of [the Court's] bias in favor of finding defendants competent and illustrates her lack of knowledge regarding what constitutes a professionally acceptable competency evaluation." Again, the Court finds no merit in counsel's argument.

This Court was the Coordinator of Institute Forensic Programs in the Forensic Services Section of the Tennessee Department of Mental Health and Mental Retardation during the time period in question. Although the Court was a licensed psychological examiner at that time as counsel contends, the Court was not employed in that capacity during the referenced period and has never been employed by Middle Tennessee Mental Health Institute in any capacity. Moreover, although the Court assisted the Department of Mental Health in preparing a video demonstration of a competency evaluation in a criminal case, the video did nothing more than expose the evaluators to the unique issues which arise when a competency determination is made in the context of a criminal proceeding. The Court rejects counsel's argument that the Court's previous employment or the video, which was prepared more than twenty years

ago, in any way impairs, or reasonably could be believed to impair, the Court's ability to competently and impartially consider any competency issues which might arise during this post-conviction proceeding.

Counsel next asserts that the Court's "comment on petitioner's demeanor in the Rule 12 makes her a witness in petitioner's post-conviction proceedings." The Court disagrees. The post-trial report the Court filed pursuant to Rule 12 of the Rules of the Tennessee Supreme Court at the conclusion of petitioner's trial for the Captain D's homicides requested a "[b]rief impression of the trial judge as to the conduct and/or affect of defendant at trial and sentencing." The Court responded as follows:

The defendant was very calm, immaculately attired with an air of confidence during the guilt phase of the trial. After the guilt determination the defendant appeared sullen and withdrawn as the expert witnesses described his childhood history of mental disturbance and his prior violent behavior. The defendant's behavior in the courtroom did not seem to have any effect on the jury. Their determination appeared to be made on the facts as well as his prior record.

Counsel contends that these remarks, coupled with the information the Court gleaned from the testimony of trial witnesses regarding petitioner's mental health history, are sufficient to require the Court to serve as a witness during the post-conviction hearing. Specifically, counsel wishes to question the Court regarding the failure of the Court and trial counsel to question petitioner's competency to stand trial.⁹

In Harris v. State, 947 S.W.2d 156 (Tenn. Crim. App. 1996), the post-conviction petitioner sought the recusal of the judge on the basis that petitioner's counsel intended

⁹With regard to her claim that the Court erred by failing to raise the issue of competency *sua sponte*, counsel has not attempted to rebut the presumption that petitioner waived that issue by failing to raise it on direct appeal. See House v. State, 911 S.W.2d 705, 713-14 (Tenn. 1995).

to call the judge as a witness during the post-conviction hearing. Affirming the judge's denial of this request, the Court of Criminal Appeals noted that "to require recusal whenever a trial judge in a post-conviction proceeding has knowledge of disputed facts would wreak havoc in the criminal justice system", and further explained that recusal was unnecessary because "other witnesses were available to address the factual issues." Harris, 947 S.W.2d at 173.

In the present case, petitioner's counsel has access to numerous potential witnesses who observed petitioner's behavior both prior to and during the Captain D's trial. They include, but are not necessarily limited to, the following: (1) Petitioner's sister, Janet Kirkpatrick, who testified on petitioner's behalf at trial and observed portions of the trial; (2) Psychologists Dr. Xavier Amador and Dr. Pamela Auble, both of whom evaluated petitioner, testified on his behalf at trial, and observed portions of the trial; (3) Neuroradiologist Dr. Robert M. Kessler, who conducted tests on petitioner prior to trial and testified on his behalf; (4) Speech pathologist Patsy Casey Allen, who evaluated petitioner prior to trial and testified on his behalf; (5) Dr. Daniel Martell, who evaluated petitioner and testified on behalf of the State regarding his mental health; (6) Jury consultant Maureen McGinley, who spent a considerable amount of time with petitioner during the jury-selection process; (7) Reverend Joseph Ingle, who served as petitioner's spiritual advisor during the relevant time period; (8) Dawn Deaner, Michael Engle, and David Baker, who represented petitioner at trial; and (9) the mitigation specialist(s) who had contact with petitioner prior to and during the trial.

Due to the Court's neutral role in the trial proceedings, the Court's contact was limited to observing petitioner during pretrial hearings and the trial itself. In contrast, the

contact between petitioner and each of the previously-mentioned witnesses was more personal and lengthy than that of the Court. Under these circumstances, it is not imperative that counsel call the Court as a witness during the post-conviction hearing. Moreover, the fact that the Court observed petitioner during the trial and heard testimony regarding his mental health does not require recusal. See Harris, 947 S.W.2d at 172 (distinguishing between extrajudicial knowledge and knowledge obtained in a professional capacity in the courtroom); see also State v. Hines, 919 S.W.2d 573, 578-79 (Tenn. 1995) (finding that trial court's involvement in a related proceeding did not require recusal) .

Counsel also alleges that it is necessary for her to develop a record regarding the Court's close working relationship with Deputy District Attorney General Tom Thurman as well as the Court's previous employment conducting competency evaluations on behalf of the state at MTMHI.¹⁰ The Court disagrees.

As the Court previously noted, the Court was never employed by MTMHI as a psychological examiner or in any other capacity. Although counsel accurately asserts that the Court was previously employed by the District Attorney's Office in a supervisory capacity, the defendant was arrested following the Court's judicial appointment seven years ago and neither the Court nor the District Attorney's Office had any contact with the defendant prior to that date. Indeed, the robbery/homicides at issue in the defendant's three trials occurred more than six months after the Court's judicial

¹⁰In her motion, counsel erroneously states that the Court graduated from law school in 1982. The Court graduated in 1979.

appointment.¹¹ The mere fact that the Court was previously employed by the same office as the prosecutors in this case has no bearing on the Court's ability to remain fair and impartial. See State v. Conway, 77 S.W.3d 213, 224-25 (Tenn. Crim. App. 2001); Owens v. State, 13 S.W.3d 742, 757 (Tenn. Crim. App. 1999), app. denied (Tenn. Feb. 28, 2000); Wells v. State, No. M2002-01303-CCA-R3-PC (Tenn. Crim. App. July 23, 2003); Minor v. State, M2001-00545-CCA-R10-PC (Tenn. Crim. App. Dec. 5, 2001).

Counsel also alleges “[u]pon information and belief” that General Thurman “provided both vocal and financial support for [the Court’s] election campaign in 1998”. The Rules of Professional Conduct preclude an attorney from attempting to influence a judge, but permit a lawyer to “make a contribution to the campaign fund of a candidate for judicial office in conformity with [Canon 5] of the Code of Judicial Conduct.” See Tenn. Sup. Ct. R., RPC 3.5. Canon 5 provides in relevant part as follows:

(2)(a) A candidate shall not personally solicit or accept campaign contributions. A candidate may personally solicit publicly stated support and establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums, and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate’s campaign, and may also obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers.

* * *

Commentary

Section 5C(2)(a) permits a candidate, other than a candidate for

¹¹The Court was appointed on August 8, 1996, and sworn in on August 22. Petitioner was arrested in June of 1997 for offenses which occurred in February, March, and April of 1997. The Court was subsequently elected in August of 1998.

appointment, to establish campaign committees to solicit and accept financial contributions. At the start of the campaign, the candidate must instruct the campaign committees to solicit or accept only those contributions authorized by Tennessee law.

* * *

Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E.

Tenn. Sup. Ct. R. 10, Canon 5.

Clearly, the Tennessee Supreme Court contemplated the potential conflicts of interest which could arise as a result of an attorney's financial contribution to a judicial candidate's campaign. Rather than infringing upon the candidate's right to raise funds or an attorney's right to contribute to a candidate's campaign, the court devised a procedure whereby a candidate would be precluded from learning of the existence or amount of any contributor's financial contribution. Consistent with the Code of Judicial Conduct, the Court appointed a campaign committee to deal with all election-related issues.¹² The Court has no knowledge whatsoever regarding anyone's financial contributions or lack thereof. Given the Court's strict compliance with the ethical rules, the Court finds that no reasonable person could question the Court's ability to fairly and impartially rule upon petitioner's post-conviction claims.¹³

¹²This "committee" consisted of a campaign chairman, a treasurer, and a few close friends. A professional fund-raiser also participated in the campaign, but the fund-raiser discussed campaign contributions and other financial issues with the Court's campaign committee. In compliance with the ethical rules, the committee did not share that information with the Court.

¹³Following the filing of counsel's motion to recuse, the Court issued an order requiring the parties to file any additional information on this issue under seal so the Court would not be exposed to the financial information in violation of the ethical rules. The Court believed this was the most effective way to preserve the issue for future review by other courts.

Likewise, assuming *arguendo* that General Thurman provided “vocal support” during the Court’s campaign as post-conviction counsel contends, the Court states unequivocally that an attorney’s support, or lack thereof, during the Court’s campaign has never affected the Court’s objectivity in a court proceeding. Moreover, if counsel’s argument were to succeed, a judge could never fulfill his or her duties once elected. Under counsel’s theory, a successful candidate will be subject to recusal in every case, with Attorney A seeking the Court’s recusal because he opposed, or merely failed to vocally support, the Court’s appointment or with Attorney B seeking the Court’s recusal because his opposing counsel, Attorney A, supported the Court’s appointment. That result cannot be what the Tennessee Supreme Court contemplated, and the Court declines to recuse itself merely because General Thurman may have supported its candidacy five years ago.¹⁴

The Court also notes that it ruled against the State’s attorneys, including General

¹⁴According to General Thurman’s affidavit, which the State attached to its response to the motion to recuse, General Thurman did not speak on the Court’s behalf before the Judicial Selection Commission, contact the Governor’s Office on the Court’s behalf, participate in strategy meetings, work a poll on election day, display a yard sign or bumper sticker, or attend a victory celebration. Many civil attorneys, criminal defense attorneys, prosecutors, and non-lawyers orally encouraged the Court during the election process five years ago. Although it would not surprise the Court to learn that many of the Court’s former co-workers expressed “vocal” support for the Court as counsel contends, the Court states unequivocally that it cannot recall what, if any, support the attorneys currently representing the State in this case provided. During the election at issue, voters elected candidates to the following offices: criminal court clerk, circuit court clerk, district attorney general, public defender, sheriff, fifteen trial court judgeships, one juvenile court judgeship, and eleven general sessions court judgeships, among others. Prior to the election, the Court obviously attended the functions organized by its own campaign committee but also attended a very large number of functions sponsored by candidates for other offices. Numerous attorneys and lay people attended all of these functions, and the Court has no recollection regarding who attended its functions as opposed to other candidates’ functions. Under these circumstances, the Court concludes that the support alleged by counsel will not affect the Court’s ability to fairly and impartially conduct these proceedings and further concludes that a reasonable person would not find to the contrary.

Thurman, on numerous occasions during both of petitioner's trials. Indeed, as discussed below, the Court ruled against the State on a very important issue during the trial at issue in this post-conviction proceeding. This act should be sufficient to convince a reasonable person that General Thurman's alleged support of this Court's candidacy did not affect the Court's ability to render a decision based upon the facts and the law as opposed to any sense of obligation to General Thurman.

In her next argument, counsel argues that the Court's previous experience as a prosecutor renders it incapable of acting impartially in a capital murder case in general and in petitioner's criminal proceedings in particular. A cursory review of the record of the trial in this case demonstrates that this allegation is without merit. Although the record as a whole reflects the Court's impartiality, the Court notes that it ruled in petitioner's favor on a crucial issue despite the prosecution's strenuous argument that the Court's ruling was erroneous. During the guilt phase of petitioner's trial, the prosecution sought permission to introduce proof of the McDonald's murders to establish the defendant's identity as the perpetrator of the Captain D's murders pursuant to Tenn. R. Evid. 404(b). Although the prosecution's arguments regarding admissibility were not wholly without merit, the Court considered the relevance of that evidence as well as the possible prejudice against petitioner and ultimately precluded the State from presenting the proposed evidence. Had the Court been prejudiced against petitioner or biased in favor of the death penalty, the Court could have ruled to the contrary. Given the similarities between the two incidents, the Court could have justified such a ruling under Rule 404(b). However, because of the seriousness of the charges and potential sentences, the Court erred on the side of caution.

With regard to this Court's alleged "prosecutorial bias", counsel next alleges that the Court "used her own experience as a death penalty proponent as the window through which she judges petitioner's case." In support, counsel references statements included in the post-trial report the Court prepared pursuant to Rule 12 of the Rules of the Tennessee Supreme Court. The section at issue requires the trial judge to provide "[g]eneral comments . . . concerning the sentence imposed in this case (e.g., whether this sentence is consistent with those imposed in similar cases the judge has tried, etc.)." In an attempt to comply with the supreme court's request for this information following petitioner's convictions for the homicides of two Captain D's employees, this Court responded:

The evidence presented showed that there were two victims who were shot execution style in a fast food restaurant as they prepared to open for the day. The victims were shot multiple times. The evidence revealed a well planned robbery; the defendant had visited the restaurant on the prior evening inquiring about a job. A large amount of cash was taken and the defendant then set about spending a large amount of money on a new car, etc. The defendant's fingerprints were located on one of the victim's movie rental cards which had only been used the previous evening. The proof at the sentencing hearing included the defendant's prior conviction for aggravated robbery as well as a history of violent behavior since childhood. The sentence was consistent with those imposed in similar cases I tried as a prosecutor.

Although counsel takes issue with the final sentence of that paragraph, the Court finds no cause for concern. Conducting a proportionality review is typically a function of the appellate courts, but the supreme court's Rule 12 request was apparently designed to elicit information regarding the consistency, or lack thereof, of sentences imposed in the first degree murders cases with which the presiding trial judge was familiar. Because petitioner's trial for the Captain D's murders was the first capital murder trial

over which this Court presided, the Court referenced the only capital murder cases about which it had personal knowledge. Although the cases at issue were cases in which the Court served as a prosecutor, the Court did nothing more than comply with Rule 12. The Court's response in no way demonstrates "bias in favor of the prosecution" as counsel alleges.

Counsel next alleges that the Court has a conflict of interest because the Office of the Post Conviction Defender pursued post-conviction petitions which challenged actions taken by the prosecutors in two cases in which this Court served as a prosecutor. Counsel did not provide the Court with any legal authority which requires a court to recuse itself under these circumstances and the Court is unaware of any such authority in Tennessee. The Court notes, however, that a trial court is not required to recuse itself merely because a litigant has filed a lawsuit or formal grievance against the court. See Dunlap v. Dunlap, 996 S.W.2d 803, 812-14 (Tenn. App. 1998), app. denied (June 14, 1999); State v. Parton, 817 S.W.2d 28, 29-30 (Tenn. Crim. App. 1991); State v. Little, No. 01C01-9710-CR-00461 (Tenn. Crim. App. Dec. 31, 1998); State v. Chouinard, No. 03-C-01-9310-CR-00340 (Tenn. Crim. App. June 30, 1994). Likewise, the mere fact that counsel's office made allegations against this Court and its co-counsel in two unrelated cases does not warrant the Court's recusal in the present case.

In the first case cited by counsel, the Tennessee Supreme Court affirmed the post-conviction court's dismissal of the petition on the basis that it was untimely filed. Wright v. State, 987 S.W.2d 26 (Tenn. 1999). In the second case, post-conviction counsel alleged that Byron Black's trial counsel were ineffective for failing to object to

the closing argument made by the Court's co-counsel during the penalty phase of the trial. See Black v. State, No. 01C01-9709-CR-00422 (Tenn. Crim. App. April 8, 1999), app. denied (Sept. 13, 1999).

The appellate opinions in both cases reflect that the petitioners were represented by someone other than the two attorneys representing the petitioner in this case. Moreover, because the petition in Wright was dismissed on procedural grounds and the petition in Black raised an issue regarding the behavior of the Court's co-counsel, this Court did not respond to the allegations, present testimony, or have any contact whatsoever with the petitioners' attorneys or any other employees of the Office of the Post Conviction Defender during the post-conviction proceedings. In any event, the Court is well aware that the attorneys employed by that office are required to zealously represent their clients and the Court harbors no ill will toward them for doing so.

Finally, counsel alleges that the Court must recuse itself because it "has exhibited bias against" Ms. Bristol, who is currently representing petitioner. The Court disagrees.

The Court concedes that it has admonished counsel for repeating the same issues and/or factual assertions on numerous occasions while consistently arguing that she is without sufficient time to complete the tasks assigned by the Court. Contrary to counsel's assertion, the Court's comments reflect neither ignorance regarding procedural bars nor a personal problem with counsel.

With regard to procedural bars, the Court is well aware that for purposes of state post-conviction appellate review as well as federal habeas corpus review counsel will waive all issues she fails to raise at this stage of the proceedings. However, the Court

is equally aware that counsel is not required to reassert those claims, or the facts upon which the claims are based, on numerous occasions in order to preserve them for future review. This Court expects all attorneys who appear before it to proceed in a professional and efficient manner, and the Court is confident that counsel now understands the Court's expectations and will act accordingly.

Counsel notes that the Court acknowledged counsel's "troubling habit of wasting time addressing insignificant issues [and/or repeating previously-recited facts and arguments while she simultaneously and repeatedly argues that she has insufficient time to devote to the relevant, substantive post-conviction issues]". Although the Court gave specific examples in its previously-filed order, which is attached to this order, the Court will revisit some of those issues to clarify its concerns.

First, although counsel has repeatedly complained that her heavy caseload precludes her from complying with deadlines set by this Court, she wasted time drafting a three-page argument regarding this Court's obligation to appoint her office to represent petitioner in this case. As this Court's staff informed Ms. Bristol and other OPCD attorneys and staff members who repeatedly called the Court's office following the filing of petitioner's post-conviction petition, the Court was well aware of its obligation to appoint that office and intended to do so as soon as the Court's schedule permitted it to draft an order to that effect. If counsel believed it was necessary to remind the Court of its obligation despite the Court's assurances that it intended to appoint her office, she could have preserved the issue by merely citing the Court to the relevant statutory provisions and the Court of Criminal Appeals' orders reversing Shelby County trial courts for failing to appoint the Office of the Post Conviction Defender to

capital post-conviction cases.¹⁵ Extensive argument was not necessary and counsel's time could have been better spent addressing substantive issues in her other cases or reviewing some of the trial documents relevant to this case.

Counsel also notes that the Court questioned the necessity of drafting an argument objecting to the Court's use of the word "themselves" when referring to petitioner's counsel. It is unclear what issue counsel intended to preserve for further review when she drafted that argument. If she wished to preserve the issue that she was petitioner's sole counsel and that the Court was precluding her from adequately representing her client by declining to grant extensions of time and failing to appoint co-counsel, counsel adequately preserved those issues in her multiple requests for extensions of time as well as in her motion for the appointment of co-counsel. The request for the appointment of co-counsel was filed after the Court filed the order referring to counsel as "themselves" and counsel's motion clearly explained that the OPCD had assigned only one attorney to this case. Given that fact, it was not necessary for counsel to subsequently file another pleading complaining about the Court's use of the term "themselves."¹⁶

Counsel also took the time to draft a motion objecting to this Court's reference to the current case as the "Captain D's" case. Nowhere in that motion did counsel advance a legal argument explaining how the Court's reference prejudiced her client.

¹⁵Stout v. State, No. W2002-02811-CCA-R10-PD (Tenn. Crim. App. Dec. 4, 2002); Bane v. State, No. W2002-01891-CCA-R10-PD (Tenn. Crim. App. Aug. 30, 2002). According to the orders in those cases, Ms. Bristol was personally involved in one of them and her office was involved in both.

¹⁶As previously noted, the OPCD has now assigned two attorneys to this case.

Instead, counsel made multiple conclusory statements, including an allegation that “[t]he use of this offensive nomenclature in referring to this case demonstrates that the Court has been exposed to and influenced by the vast media coverage of this case” and an assertion that the “nomenclature may sell newspapers, but is wholly inappropriate for a court of law.”

Had counsel spoken with any of the attorneys involved in petitioner’s three trials, she would have learned that the parties and the Court have consistently referred to petitioner’s three cases in this manner as a matter of convenience. Many of the facts and legal issues in petitioner’s cases were intertwined, and referring to the cases only by their docket numbers in court proceedings and in pleadings would have caused unnecessary confusion. The Court is more than willing to entertain any motions counsel wishes to file. The Court merely requests that she advance legal arguments which support her assertions and reflect respect for the Court.

The United States Supreme Court has discussed the circumstances in which an allegation of bias or prejudice requires recusal:

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and

they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

* * *

Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration--remain immune.

Liteky v. United States, 510 U.S. 540, 555-56 (1994) (internal citations omitted).

This Court recognizes that counsel has an obligation to zealously represent her client, and the Court expects nothing less from her. However, the Court expects her to use her time wisely and to avoid repeating previously-expressed or unnecessary legal arguments and facts. A trial judge has the right to control the courtroom, and exercising that right should not preclude the Court from presiding over future proceedings in the matter.

CONCLUSION

This Court has no doubt whatsoever that it is capable of presiding impartially in this matter. Moreover, a person of ordinary prudence would not find a reasonable basis for questioning the Court's impartiality. Therefore, for all of the previously-discussed reasons, the Court denies counsel's request that the Court recuse itself from this case.

ENTERED this the ____ day of October, 2003.

Cheryl Blackburn
Judge

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