

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,)	
)	
Appellee,)	
)	COFFEE COUNTY
v.)	NO. M1987-00067-SC-DPE-DD
)	Filed April 2, 2004
GREGORY THOMPSON,)	
)	
Appellant.)	

**RESPONSE OF THE STATE OF TENNESSEE TO MOTION
TO VACATE TRIAL COURT ORDER, OR, IN THE ALTERNATIVE
SUPPLEMENTAL BRIEF IN SUPPORT OF APPEAL**

Gregory Thompson was tried and convicted of first-degree murder by a Coffee County jury in 1985. Judge Gerald L. Ewell, Sr., presided over the trial proceeding, which was affirmed by this Court on direct appeal. *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990). At the conclusion of the trial, in accordance with Rule 12.1 of the Rules of the Supreme Court, Judge Ewell completed the judicial report required by this Court in all first-degree murder cases. Under Section D.8, which requested “other significant data about defense representation,” Judge Ewell reported, “Appointed counsel afforded the defendant as vigorous and thorough defense as the undersigned Trial Judge has observed in a lifetime of exposure to the legal system.” (Attachment A) Judge Ewell’s report to this Court was consistent with observations made on the record at the sentencing phase of Thompson’s trial after the jury had retired for deliberation but before the death verdict.

THE COURT: Ladies and gentlemen, I want to say something for the record here. Mr. [Thomas] Parsons and Mr. [Doyle] Richardson were appointed to represent this man. They have conducted themselves in the defense of this defendant in keeping

with the highest traditions of the legal profession. They have represented him as vigorously and as competently as if they were being paid a million dollars. I want the record to show that their actions would serve as an example for all young attorneys who are beginning the practice of law concerning the zealousness, attention and devotion in representing a criminal defendant. I am not commenting one way or the other about anything except that. I want them to know, and I want the general public to know, that they were appointed to represent this man, that they have discharged their duties with the utmost ability. In my opinion, no better defense could have been rendered for him, whatever the result is, gentlemen. Until you are better paid, you have my and the public's thanks.

(Transcript of Trial Proceedings, Vol. 21, p. 88) (Attachment B)

In October 1990, after his conviction and sentence were affirmed by this Court on direct appeal, Thompson initiated post-conviction proceedings pursuant to Tenn. Code Ann. §40-30-101 *et seq.* (repealed 1995). Among the claims raised in Thompson's petition for post-conviction relief was ineffective assistance of counsel in violation of his Federal and State constitutional rights. In post-conviction cases challenging the effectiveness of counsel, the post-conviction statute in effect at that time provided that the petition "shall be heard and determined by the trial judge who presided at trial in which the conviction and sentence occurred" if such trial judge is "available." Tenn. Code Ann. §40-30-103(b)(1). Thus, in accord with State law, Judge Ewell was assigned initially to hear Thompson's post-conviction proceeding. In April 1992, however, Thompson filed a motion for disqualification of Judge Ewell from presiding at the post-conviction evidentiary hearing pursuant to Rule 10 Canon 3 of the Rules of the Supreme Court. (Attachment C) As cause for disqualification, Thompson alleged that Judge Ewell was not "available" within the meaning of the statute because he had "prejudged" the ineffective assistance issue during trial and in his Rule 12 report to this Court. On June 30, 1992, Judge Ewell filed a request with this Court for designation of another judge to hear Thompson's post-conviction petition. (Attachment D) On July 14, 1992,

the Court designated Judge Buddy D. Perry to hear the petition for post-conviction relief.¹ (Attachment E) Judge Ewell took no further adjudicative action in Thompson’s post-conviction proceeding, which concluded on October 20, 1997, when this Court denied an appeal from the decision of the Tennessee Court of Criminal Appeals affirming the denial of post-conviction relief. *Thompson v. State*, 958 S.W.2d 156 (Tenn. Crim. App. 1997) (app. denied).

Thompson now asks this Court to vacate Judge Ewell’s March 8, 2004, competency determination and remand this case to the trial court with direction that another judge be designated to hear the competency proceeding. He contends that Judge Ewell was without authority to determine the current competency petition, because he previously recused himself from Thompson’s post-conviction proceeding. As a result, according to Thompson, the March 8th order is void.

The State does not dispute the general principle that a recusal order disables the trial judge from further adjudicative responsibility in the proceeding in which it is entered. But that disqualification does not extend to subsequent proceedings absent a determination that some disqualifying factor exists in those proceedings as well. Because Thompson has not alleged, nor can he establish, any basis justifying recusal of Judge Ewell from the present competency proceeding under Canon 3E of Rule 10 of the Rules of this Court, his motion should be denied.

Tenn. R. Sup. Ct. 10, Code of Judicial Conduct, Canon 3E provides that “[a] judge shall disqualify himself or herself *in a proceeding* in which the judge’s impartiality might reasonably be questioned” Although the rule does not define the term “proceeding,” that term is often used synonymously with “action” or “suit” to describe an entire course of action at law or suit in equity

¹For unrelated reasons, this Court subsequently assigned the late Judge William Russell, Special Judge, to hear Thompson’s post-conviction case to conclusion. (Attachment F)

from the filing of a complaint until entry of final judgment. *See, e.g., Black's Law Dictionary*, 1083 (5th Ed. 1979); *Blew v. United States*, 13 U.S. (Wall.) 581, 595, 20 L.Ed. 638 (1872) (“The words ‘case’ and ‘cause’ are constantly used as synonyms in statutes and judicial decisions, each meaning *a proceeding in court*, a suit, or action.”) (emphasis added); *Hohn v. United States* 524 U.S. 236, 241, 118 S.Ct. 1969 (1998) (same; quoting *Blew*). Likewise, the federal judicial recusal statutes, 28 U.S.C. §§144 and 455, both speak of a federal judge being reassigned or disqualified from a “proceeding.” Section 455 defines “proceeding” to include “pretrial, trial, appellate review, or other stages of litigation.” *United States v. Feldman*, 983 F.2d 144, 145 (9th Cir. 1992) (holding that remand to the district court following reversal by appellate court is a “stage of litigation”).

Under Tennessee law, a prisoner’s challenge to his or her conviction or sentence under the Post-Conviction Procedure Act is a separate proceeding unto itself, initiated by the filing of a petition for post-conviction relief and culminating in a final judgment appealable as of right to the Tennessee Court of Criminal Appeals. Tenn. Code Ann. §§40-30-102, -112, -116. A competency proceeding under *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), is likewise an independent action, initiated by a different initial “pleading,” *i.e.*, the prisoner’s written response to the motion of the State Attorney General to set an execution date, and culminating in a final order appealable as of right to this Court according to the procedures established in *Van Tran. Id.*, at 267, 271-72. It is not a continuation of the post-conviction or any other collateral proceeding challenging the validity of a criminal judgment. Rather, competency to be executed “is a question independent of the validity of trial and sentencing proceedings.” *Id.*, at 264. Indeed, in *Van Tran*, this Court held that “a proceeding for post-conviction relief is not the appropriate avenue for litigating the issue of competency to be executed.” *Id.* In establishing a procedure to enable a prisoner to exercise his constitutional right

under *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court specifically provided that the determination of competency shall be by the trial court where the prisoner was originally tried and sentenced. *Van Tran*, 6 S.W.3d at 267.

Under a plain reading of Canon 3E of Rule 10, Judge Ewell's recusal in Thompson's post-conviction case is limited to that "proceeding" absent some showing that a disqualifying factor exists in the separate competency proceeding, a showing he cannot make, since the basis for Judge Ewell's recusal on post-conviction was limited to a particular claim in that case. As the Court of Criminal Appeals noted in Thompson's post-conviction appeal, "[Judge Ewell] recused himself out of his desire to assure the petitioner the perception of a neutral arbiter, absent any personal bias as to his [ineffective assistance of counsel] claims." *Thompson*, 958 S.W.2d at 171-72. Thus, even assuming Judge Ewell's recusal from Thompson's post-conviction proceeding was justified in that case (a matter that was, in fact, called into question in the opinion of the Court of Criminal Appeals²), that justification does not extend to the present "proceeding[] to determine Thompson's discrete claim that he currently is not competent to be executed." *See* Order of March 9, 2004, denying "Motion to Withdraw as Counsel." (Attachment G) *See also State v. Thornton*, 10 S.W.3d 229, 237 (Tenn. Crim. App. 1999) (no app. sought) (action of trial judge in criminal case upheld despite recusal of judge in previous divorce case because of his acquaintance with the defendant and his wife at that time). And this competency proceeding obviously does not involve a claim of ineffective assistance of trial counsel, the claim concerning which the recusal issue arose in the first place.

None of the cases Thompson cites in his present motion requires a different result. Although

²*See also Liteky v. United States*, 510 U.S. 540, 551, 114 S.Ct. 1147, 1155 (1994) (opinions held by judges as a result of what they learned in earlier proceedings not "bias" or "prejudice" requiring recusal).

the cases all recite the general principle that a judge may take no further action in a proceeding from which he has been recused, none stands for the proposition that the disqualification extends beyond “the proceeding” in which the recusal occurred. In *El Fenix de Puerto Rico v. M/Y Johanny*, 36 F.3d 136 (1st Cir. 1994), for example, the First Circuit Court of Appeals held that “the recusal order [under 28 U.S.C. §455(e)] disabled the trial judge from further adjudicative responsibility in the *present case.*” (emphasis in original) *See also Feldman*, 983 F.2d at 145 (“recusal statutes require complete recusal *from a proceeding*”) (emphasis added); *Arnold IV v. Eastern Air Lines, Inc.*, 712 F.2d 899, 904 (4th Cir. 1983) (“a judge who is disqualified from acting must not be able to affect the determination *of any cause from which he is barred*”) (emphasis added).

Thompson has failed to allege, nor can he establish, any basis justifying a determination under Tenn. R. Sup. Ct. 10, Code of Judicial Conduct, Canon 3E that Judge Ewell’s “impartiality might reasonably be questioned” in the present competency proceeding. Accordingly, this Court should deny Thompson’s motion to vacate the trial court’s order.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JENNIFER L. SMITH
Associate Deputy Attorney General
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3487
B.P.R. No. 16514

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response of the State of Tennessee has been forwarded via Facsimile and First-Class U.S. mail, postage prepaid, on this the _____ day of April, 2004, to:

Michael Passino
323 Union Street, 3rd Fl.
Nashville, TN 37201
Fax: (615) 244-3009

B. Campbell Smoot
14th Jud. District Public Defender
P.O. Box 260
605 E. Carroll St.
Tullahoma, TN 37388-0260
Fax: (931) 454-1932

Dana C. Hansen Chavis
Federal Defender Services of Eastern
Tennessee, Inc.
530 Gay St., Suite 900
Knoxville, TN 37902
Fax: (865) 637-7999

JENNIFER L. SMITH
Associate Deputy Attorney General

copy: C. Michael Layne
District Attorney General
14th Judicial District