

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FILED
July 24, 1996
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellant,

VS.

STEPHEN JOHN ABBOTT,

Appellee.

)
) C.C.A. NO. 01C01-9607-CC-00293
) (No. 7686 Below)
) GILES COUNTY
) The Hon. William B. Cain
) (State Appeal Pursuant to T.R.A.P. 9)
)

OPINION

This matter is before the Court upon the state's application for an interlocutory appeal pursuant to T.R.A.P. 9. Specifically, the state challenges the trial court's appointment of counsel after an outside party retained counsel on behalf of the indigent defendant. The defendant opposes the application and requests that this Court either remand the matter to the trial court to supplement the record, allow supplementation of the record with an attached affidavit, suspend the Rules and allow defense counsel to testify in this Court, or dismiss the state's appeal.

Having reviewed the state's application and the defendant's response, we find that the state's application is well taken and is, therefore, granted. Due to the nature of this case, the Court suspends the requirements of T.R.A.P. 9(e) and shall base its decision on the pleadings. See Rule 2, Tennessee Court of Criminal Appeals Rules; T.R.A.P. 2.

On or about November 15, 1995, the defendant was indicted by a grand jury for first-degree murder. Counsel, Hershell Koger, was appointed to represent the defendant in juvenile proceedings, and he was later appointed in March of 1996, to represent the defendant in circuit court. It appears that private counsel, Larry Roberts, was retained by an anonymous, non-family member to also represent the defendant during juvenile proceedings. The record is unclear whether Mr. Roberts was initially retained to represent the defendant in all subsequent proceedings. Regardless, at some point, he was

also retained to represent the defendant in circuit court.

On June 26, 1996, at a pretrial motions hearing, the state made a motion that appointed counsel be removed pursuant to Rule 13, Tennessee Supreme Court Rules, because “with retained counsel, the taxpayers of the state of Tennessee should not be required to pay appointed counsel.”

In denying the motion, the trial court stated in part:

Rule 13 provides for the appointment and compensation of counsel for indigent defendants, and sets forth a fee structure. Only one counsel has been appointed for the indigent defendant. The purpose of the rule is to provide adequate counsel for the defense, at the expense of the State.

Given the circumstances of the case, any hourly submissions made by Mr. Koger should be substantially reduced from what would otherwise have to be made by the presence of Mr. Roberts, as the Court will assume that they are not simply duplicating work.

On appeal, the state submits that the district attorney’s reliance on Rule 13¹ was inappropriate. Instead, the state asserts that the defendant is not entitled to appointment of counsel under T.C.A. § 40-14-202(a), which provides:

In all felony cases, if the accused be not represented by counsel, and the court determines by the manner provided in subsection (b) that the accused is an indigent person who has not competently waived the accused’s right to counsel, the court shall appoint [counsel] to represent the accused.

Arguing that the “matter seems clear and the statute unambiguous,” the state contends that the defendant was already represented when counsel was appointed by the trial court, and, therefore, the defendant failed to meet the first requirement under T.C.A. § 40-14-202(a) to be eligible for appointment of counsel.

¹Rule 13 § 1, Tennessee Supreme Court Rules, provides that in every criminal case in which an adult is charged with a felony and “the party states that he is financially unable to obtain counsel and desires the appointment of counsel, it shall be the duty of the judge to conduct an inquiry and to make a proper finding as to the indigency of the accused in compliance with the provisions of Tenn. Code Ann. § 40-14-202. Upon a finding of indigency, counsel shall be appointed.”

In response, the defendant contends that the record before this Court is inadequate because the state has changed the basis of its motion on appeal. Specifically, the defendant contends that had he been given notice, he would have presented testimony regarding the issue of when Mr. Roberts was retained in relationship to when Mr. Koger was appointed. Under the present record before this Court, the defendant submits that it is unclear as to whether Mr. Roberts was retained to represent the defendant in circuit court prior to the appointment of Mr. Koger.

It is well established in this state that a party may not take one position regarding an issue in the trial court, change its strategy or theory in midstream, and advocate a different ground or reason in this Court. See State v. Aucoin, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988), cert. denied, 489 U.S. 1084, 109 S.Ct. 1541, 103 L.Ed.2d 845 (1989); State v. Dobbins, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988). In the present case, the state concedes that it has changed its theory on appeal. Consequently, the trial court was not given an opportunity to consider proof relative to the state's argument on appeal. Nor was the defendant given an opportunity to present testimony on this issue.

Regardless of the fact that we are unable to determine from the record before us whether Mr. Roberts was retained first, we do not interpret T.C.A. § 40-14-202(a) to mean that an indigent defendant is not entitled to appointment of counsel where an outside party decides to retain counsel on behalf of the indigent defendant. Although this issue has not been previously addressed by our Courts, a similar issue was considered in State v. Gardner, 626 S.W.2d 721 (Tenn. Crim. App. 1981). In Gardner, this Court held that the "question in inquiries as to insolvency is not whether the defendant's friends or spouse or relatives have the ability or readiness or willingness to provide the funds, but whether the defendant personally has the means, or property which can be converted to the means to employ an attorney to represent him." Id. at 724.

Based on the above-discussion, we find that the trial court did not err in

appointing counsel to represent the defendant, who was found to be indigent, nor did the trial court err in denying the motion to dismiss appointed counsel. Accordingly, the trial court's appointment of counsel is affirmed. Costs of this appeal are taxed to the state.

JERRY L. SMITH, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

DAVID H. WELLES, JUDGE