IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1996 SESSION

FILED

January 30, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9508-CR-00258**
Appellee/Cross-appellant,	)	
	)	**SUMNER COUNTY**
VS.	)	
	)	**HON. JANE WHEATCRAFT and**
BOBBY VINCENT BLACKMON,	)	**FRED A. KELLY, III, JUDGES**
	)	
Appellant/Cross-appellee.	)	(State Appeal - Rule 9)

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OPINION FILED:_____

AFFIRMED IN PART; REVERSED
AND REMANDED IN PART

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for possession of cocaine with intent to sell and was convicted of this offense by a jury. Following his conviction, the defendant filed a motion for arrest of judgment on the grounds that the trial judge presided over the trial in violation of the Tennessee Constitution because she had earlier presided over the defendant's preliminary hearing while sitting as a General Sessions judge. After a hearing, the trial court granted the defendant's motion and ordered a new trial, from which the State now appeals.

Following the trial court's order of a new trial, the defendant filed a motion to dismiss the charge against him on the grounds that it was barred by double jeopardy following forfeiture of his vehicle. The successor trial judge denied this motion, from which the defendant now appeals. We now reverse the trial court's order of a new trial, and affirm the lower court's denial of the defendant's motion to dismiss.

Our Constitution provides "No Judge of the Supreme or Inferior Courts shall preside on the trial of any cause . . . in which he [or she] may have presided in any inferior Court, except by consent of all the parties." Tenn. Const., Art. VI, Sec. 11. In construing this provision, our Supreme Court has held that defendants have the right to waive the disqualification of their regular judge and to consent to his or her presiding at their trial. State ex rel. Roberts v. Henderson, 442 S.W.2d 629, 632 (Tenn. 1969). This Court has since held that a defendant's failure to raise the issue prior to trial constitutes an implied waiver of his or her right to question the trial judge's qualifications to hear the case. Woodson v. State, 608 S.W.2d 591, 593 (Tenn. Crim. App. 1980).

The defendant in this case did not raise this issue prior to trial. Rather, according to his lawyer's remarks at the hearing on the motion to arrest judgment, the

defendant and his counsel discussed the issue prior to trial. Counsel advised the defendant that he thought the judge "would be . . . fair and impartial." Counsel also stated at the hearing that it had been his opinion that the defendant's case "would be better served by going to trial" before the judge and that he (counsel) had therefore decided "to go forward and have a trial of the case" before the judge.

Thus, there is no question in this case that the defendant's lawyer -- who had been appointed to the defendant -- consented to having the judge try the case and waived any objection thereto. However, in Hamilton v. State, 403 S.W.2d 302 (Tenn. 1966), our Supreme Court voiced some concern over the efficacy of such waivers by public defenders. In that case, the judge who had signed the defendant's arrest warrant as a General Sessions judge later presided in Criminal Court over the defendant's trial. The defendant was represented by a public defender who, according to the district attorney general, had agreed that the case would be tried by this judge. The public defender did not recall such an agreement, but did not deny it. The Supreme Court determined that a retrial was necessary, noting a concern about the efficacy of the defendant's consent having been given by a "State agent." Hamilton, 403 S.W.2d at 303. This decision was later described by our Supreme Court as resting "on the fact that there was no clear evidence of waiver or consent, and on the possibility that under the record the waiver had been by state appointed counsel and so was state action, not the action of the defendant himself." State ex rel. Roberts v. Henderson, 442 S.W.2d 629, 631 (Tenn. 1969).

As set forth above, there is clear evidence in this case of defense counsel's consent and waiver by counsel. Thus, the only issue for our consideration is whether the waiver and consent are binding on the defendant.

In the recent case of House v. State, 911 S.W.2d 705 (Tenn. 1995), our

Supreme Court considered the issue of waiver in the post-conviction context. In that case, the petitioner was trying to raise grounds for relief that his lawyer had failed to raise in a prior post-conviction proceeding. The post-conviction act in effect at the time provided that grounds for relief not previously raised were presumed waived. T.C.A. § 40-30-112(b) (1990). The petitioner contended that this presumption was overcome by his allegation that he had not, with personal knowledge and choice, waived the omitted grounds for relief. The Court rejected this contention, holding instead that the efficacy of the waiver was to be determined "by an objective standard under which a petitioner is bound by the action or inaction of his attorney." Id. at 714. Significantly for our purposes in this case, the Court made no distinction between retained attorneys and attorneys provided by the State with respect to whether the client was bound.

Accordingly, we do not consider the language in Hamilton regarding the defendant's attorney as "State agent" to be dispositive of the issue before us. We are mindful that certain constitutional rights are so fundamental as to require that the defendant waive them personally. See, e.g., State v. Mackey, 553 S.W.2d 337, 340 (Tenn. 1977) (waivers in conjunction with guilty plea of right against compulsory self-incrimination, right to trial by jury, and right to confront accusers must be personally made). However, we do not consider the constitutional right at issue in this case to be within that category. Thus, we hold that defense counsel's decision was binding on the defendant and constituted consent to the judge's presiding over the trial and a waiver of this constitutional right. Therefore, we reverse the judgment below granting the defendant a new trial.

The defendant also contends that the court below erred in dismissing his motion to dismiss the charges against him on the grounds of double jeopardy.[1] The

[1]This motion was filed following the trial court's order vacating the defendant's conviction and granting a new trial. Because of our disposition of the State's appeal of the new trial, this motion is not timely. We choose, however, to address the merits.

defendant's automobile was seized incident to his arrest on the instant charges, and later forfeited. The defendant contends that this forfeiture constituted a punishment, and a separate criminal conviction is therefore barred by the State and federal constitutional protections against double jeopardy.

Relying on the United State Supreme Court's recent decision in U.S. v. Ursery, ___ U.S. ___, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), this Court has previously held that the forfeiture of a defendant's car under Tennessee's forfeiture statute, T.C.A. § 53-11-451, does not prevent a separate criminal prosecution and/or conviction on double jeopardy grounds. See, e.g., State v. Charles David Wagner, No. 03C01-9511-CC-00346, Sullivan County (Tenn. Crim. App. filed Sept. 18, 1996, at Knoxville). Specifically, we held in Wagner that "Tennessee's forfeiture statutes, T.C.A. §§ 53-11-451 and 53-11-201, are in the nature of civil in rem proceedings, and are neither punishment nor criminal for purposes of the federal Double Jeopardy Clause." We further held that Tennessee's double jeopardy clause offered no further protection. The rule we announced in Wagner applies here. Accordingly, the defendant's contention is without merit, and we affirm the judgment below dismissing the defendant's motion to dismiss.

The judgment below granting the defendant a new trial is reversed and vacated and the conviction is reinstated. The judgment below denying the defendant's motion to dismiss is affirmed. This cause is remanded to the trial court for further proceedings consistent with this opinion.

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JOHN H. PEAY, Judge

CONCUR:

_____
DAVID H. WELLES, Judge

JERRY L. SMITH, Judge