

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
December 10, 2014 Session

**PERVIS TYRONE PAYNE v. WAYNE CARPENTER, ET AL.**

**Appeal from the Chancery Court for Davidson County  
No. 131536III Ellen H. Lyle, Judge**

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**No. M2014-00688-COA-R3-CV – Filed August 2, 2016**

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Capital defendant brought a declaratory judgment action seeking to enjoin his execution, asserting that he meets the statutory criteria of being intellectually disabled and, therefore, is ineligible to be sentenced to death. Defendants, the warden of the institution where he is incarcerated and the Tennessee Attorney General, moved to dismiss the complaint on the grounds that the trial court lacked subject matter jurisdiction, that the suit was barred by the doctrine of sovereign immunity, and that the suit failed to state a claim for relief. The trial court granted the motion and dismissed the case. Finding no error, we affirm the holding of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ., joined.

Christopher M. Minton, Nashville, Tennessee, for the appellant, Pervis Payne.

Herbert H. Slatery, II, Attorney General and Reporter; Scott C. Sutherland and Nicholas W. Spangler, Assistant Attorneys General, for the appellees, Wayne Carpenter, et al.

**OPINION**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

In February 1988, Pervis Tyrone Payne was convicted of two counts of first-degree murder in Shelby County Criminal Court; he was sentenced to death for each murder. Both the Tennessee Supreme Court and the United States Supreme Court

affirmed the convictions and sentences on direct appeal; numerous post-conviction and *error coram nobis* proceedings, as well as a federal *habeas corpus* proceeding, have been denied.<sup>1</sup>

On November 1, 2013, Mr. Payne filed a declaratory judgment action in Davidson County Chancery Court naming Wayne Carpenter, Warden of Riverbend Maximum Security Institution, and Robert E. Cooper, Jr., then Tennessee Attorney General (“Defendants”), in their official capacities, as defendants.<sup>2</sup> Mr. Payne sought a declaration that he met the criteria for intellectual disability as set forth in Tenn. Code Ann. § 39-13-203(a) and was therefore ineligible to be sentenced to death and that his execution would violate the statute as well as the Tennessee and United States constitutions. The complaint also sought a permanent injunction against the execution.<sup>3</sup>

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<sup>1</sup> See *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990); *Payne v. Tennessee*, 501 U.S. 808 (1991); *Pervis Tyrone Payne .v State*, No. W2013-01215-CCA-R28-PD (Tenn. Crim. App., Order, July 29, 2013), *perm. app. denied* (Tenn. Nov. 14, 2013). Our Supreme Court recently noted:

[Mr. Payne] has pursued collateral review but has been unsuccessful in obtaining the reversal of either his convictions or his sentences. See *Payne v. State*, No. 02C01-9703-CR-00131, 1998 WL 12670, at \*21 (Tenn. Crim. App. Jan. 15, 1998) (denying post-conviction and error coram nobis relief), *perm. appeal denied* (Tenn. June 8, 1998); *Payne v. Bell*, 418 F.3d 644, 646 (6th Cir. 2005) (denying habeas corpus relief), *cert. denied* 548 U.S. 908, 126 S.Ct. 2931, 165 L.Ed.2d 958 (2006); *Payne v. State*, No. W2007-01096-CCA-R3-PD, 2007 WL 4258178, at \*1 (Tenn. Crim. App. Dec. 5, 2007) (denying motion to compel testing of evidence under the Post-Conviction DNA Analysis Act of 2001), *perm. appeal denied* (Tenn. Apr. 14, 2008).

*Payne v. State*, No. W2013-01248-SC-R11-PD, 2016 WL 1394199, at \*1 (Tenn. Apr. 7, 2016)

<sup>2</sup> During the pendency of this case, a new Attorney General took office, Herbert Slatery III. “[W]hen a state official sued in his official capacity dies or leaves office during the pendency of the action, ‘the officer’s successor is automatically substituted as a party.’” *Hamilton v. Cook*, No. 02A01-9712-CV-00324, 1998 WL 704528, at \*9 (Tenn. Ct. App. Oct. 12, 1998) (citing Tenn. R. Civ. P. 25.04(1)).

<sup>3</sup> In 1990, the Tennessee General Assembly enacted Tenn. Code Ann. § 39-13-203, which prohibited the execution of a defendant convicted of first degree murder who had an intellectual disability at the time of committing the offense from being executed. Subsection (a) of the statute defines intellectual disability as follows:

- (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
- (2) Deficits in adaptive behavior; and
- (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.

In 2001, the Tennessee Supreme Court determined that the federal and state constitutions prohibit the execution of persons who are intellectually disabled. See *Van Tran v. State*, 66 S.W.3d 790, 809 (Tenn.

Defendants moved to dismiss the complaint pursuant to Tenn. R. Civ. P. 12.02(1) and (6), asserting that the criminal court had exclusive jurisdiction over the matter and that the suit was barred by the doctrine of sovereign immunity. Mr. Payne responded to the motion and, in addition, amended the complaint to sue the Defendants in both their official and individual capacities.<sup>4</sup>

In Counts 1 through 3 of the complaint, Mr. Payne sought relief under the Declaratory Judgment Act, Tenn. Code Ann. §§ 29-14-101 – 113, requesting that the court make the following declarations:

- (1) Pervis Tyrone Payne meets the criteria for intellectual disability as that term is defined by Tenn. Code Ann. § 39-13-203(a), and he did so on June 27, 1987;
- (2) Any application of Tenn. Code Ann. § 40-23-116 to Pervis Tyrone Payne would violate Article I, §§ 8 and 16, of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution; and
- (3) Any execution of Pervis Tyrone Payne would violate Article I, §§ 8 and 16, of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

Count 4 of the complaint, based on Article I, §§ 8 and 16 of the Tennessee Constitution, and Count 5, based on the Eighth and Fourteenth Amendments to the United States Constitution, asserted that he met the criteria for intellectual disability at Tenn. Code Ann. § 39-13-203 on June 27, 1987, and sought an order to permanently enjoin his execution.

The court heard the motion to dismiss on March 14, 2014, and on March 25 entered an order granting the motion and dismissing the case. The trial court held that it lacked subject matter jurisdiction to decide the factual disputes at issue in considering Tenn. Code Ann. § 39-13-203(a) and over the claims against the Defendants because of sovereign immunity; the court also determined, in the exercise of its discretion, that the issue presented was not appropriate in a declaratory judgment action in chancery court and should be relegated to the proper criminal jurisdiction forum. Mr. Payne appeals, contending that the chancery court had subject matter jurisdiction to consider whether Mr. Payne meets the intellectual disability criteria set forth in Tenn. Code Ann. § 39-13-

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2001). Shortly thereafter, the United States Supreme Court declared that the federal constitution prohibited the execution of the intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>4</sup> The complaint, as amended, will be referred to herein as “the complaint.”

203(a) and that the sovereign immunity doctrine does not shield Defendants from Mr. Payne's suit.<sup>5</sup>

## II. DISCUSSION

### A. Sovereign Immunity

The doctrine of sovereign immunity, derived from Article I, Section 17 of the Tennessee Constitution<sup>6</sup> and codified at Tenn. Code Ann. § 20-13-102(a),<sup>7</sup> prohibits suits

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<sup>5</sup> During the pendency of this appeal, Mr. Payne was pursuing relief by writ of *error coram nobis* in the Shelby County Criminal Court and the Court of Criminal Appeals. Proceedings in this appeal were stayed pending the Tennessee Supreme Court's decision in the *coram nobis* action. On April 7, 2016, the Supreme Court rendered its decision, concluding in pertinent part:

[T]he constitutional prohibitions against executing the intellectually disabled did not arise until after the Petitioner was convicted and sentenced. The Petitioner's first opportunity for seeking to avoid the death penalty on this basis arose in 2001 with our decision in *Van Tran v. State*. The Petitioner, however, did not seek relief on this basis at that time.

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. . . We reaffirm the holding in *Van Tran* that such claims may be raised in Tennessee courts by a timely filed motion to reopen. *Van Tran*, 66 S.W.3d at 811–12. We recognize that some death-row inmates, like the Petitioner, may have failed to timely file a motion to reopen on this basis. We encourage the General Assembly to consider whether another appropriate procedure should be enacted to enable defendants condemned to death prior to the enactment of the intellectual disability statute to seek a determination of their eligibility to be executed. We hold, however, that the procedural avenues by which the Petitioner is seeking relief in this proceeding do not entitle him to the hearing he seeks.

*Payne v. State*, --- S.W.3d---, No. W2013-01248-SC-R11-PD, 2016 WL 1394199, at \*9-\*10 (Tenn. Apr. 7, 2016). After that ruling, the stay in this case was lifted, and the parties have submitted supplemental briefs.

<sup>6</sup> Article I, Section 17 of the Tennessee Constitution states:

That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

<sup>7</sup> Tenn. Code Ann. § 20-13-102(a) provides:

No court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea or demurrer of the law officer of the state, or counsel employed for the state.

against the state, including state officers acting in their official capacities, unless specifically authorized by statute. See *Colonial Pipeline Company v. Morgan*, 263 S.W.3d 827, 848-49 (Tenn. 2008). Sovereign immunity, however, does not bar suits to prevent state officers from enforcing a statute which is alleged to be unconstitutional; in those incidences the officials do not act under the authority of the state, i.e., their actions are *ultra vires*. *Id.* at 849-52 (citing *Stockton v. Morris & Pierce*, 110 S.W.2d 480 (Tenn. 1937)).

Mr. Payne does not allege that Tenn. Code Ann. § 39-13-203 is unconstitutional; he contends that *Colonial Pipeline* does not limit the *ultra vires* exception to sovereign immunity to cases which allege that a statute is unconstitutional, but that the exception “applies any time a lawsuit asserts that a State official acted or threatened to act outside the scope of his authority.” Mr. Payne alleges that he is mentally disabled as defined in the statute and, as a consequence, the Defendants will act outside the scope of their authority if they execute him.

We find nothing in *Colonial Pipeline* to support this proposition; to the contrary, *Colonial Pipeline* clearly and unambiguously held that the *ultra vires* exception articulated in *Stockton* “pertains only to suits preventing the enforcement of an unconstitutional statute.” *Id.*, 263 S.W.3d at 850. *Colonial Pipeline* held that the Declaratory Judgment Act grants a court subject matter jurisdiction to address constitutional issues and, as necessary, “issue declaratory or injunctive relief against the Defendants in their individual capacity, so long as the court’s judgment is tailored to prevent the implementation of unconstitutional legislation and does not ‘reach the state, its treasury, funds, or property,’” and that sovereign immunity is not waived in a declaratory judgment action. 263 S.W.3d at 853 (internal citation omitted; emphasis added). The allegation that the official is enforcing an unconstitutional statute is a threshold requirement to remove the immunity; that threshold is not met here.

The Defendants in this case were sued in their official and individual capacities. The only factual allegation relative to Defendant Carpenter is that he is the warden of Riverbend Maximum Security Institution and, since prisoners are executed at Riverbend, Tenn. Code Ann. § 40-23-116 “requires Warden Carpenter to cause Mr. Payne’s death.”<sup>8</sup>

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<sup>8</sup> Tenn. Code Ann. § 40-23-116(a)(2012) states:

In all cases in which the sentence of death has been passed upon any person by the courts of this state, it is the duty of the sheriff of the county in which the sentence of death has been passed to remove the person so sentenced to death from that county to the state penitentiary in which the death chamber is located, within a reasonable time before the date fixed for the execution of the death sentence in the judgment and mandate of the court pronouncing the death sentence. On the date fixed for the execution in the judgment and mandate of the court, the warden of the state penitentiary in which the death chamber is located shall cause the death sentence to be carried out within an enclosure to be prepared for that purpose in strict seclusion and privacy. . . .

The only allegation relative to Defendant Cooper is that he held the position of the Attorney General and Reporter for the State of Tennessee. These allegations, in the absence of a claim that the statute being enforced is unconstitutional, are not sufficient to state a claim against the defendants in their individual capacity for the purposes of granting relief to Mr. Payne. Accordingly, we affirm the trial court's holding that the claims were barred by sovereign immunity.

Even though we have determined that sovereign immunity bars this suit, we will address whether the Davidson County Chancery Court had subject matter jurisdiction to consider whether Mr. Payne meets the intellectual disability criteria found in Tenn. Code Ann. § 39-13-203(a).

### **B. Subject Matter Jurisdiction to Determine Intellectual Disability**

“Whether a particular court can decide certain matters is a question of subject matter jurisdiction.” *P.E.K. v. J.M.*, 52 S.W.3d 653, 658 (Tenn. Ct. App. 2001). “Tennessee’s courts derive subject matter jurisdiction from the state constitution or from legislative acts.” *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). “Courts may not exercise jurisdictional powers that have not been conferred on them directly or by necessary implication.” *Id.*

Tenn. Code Ann. § 16-11-101 grants chancery courts “all the powers, privileges and jurisdiction properly and rightfully incident to a court of equity”; Tenn. Code Ann. § 16-11-102 adds subject matter jurisdiction, concurrent with the circuit courts, over all civil cases with certain exceptions. Exclusive original subject matter jurisdiction over all crimes and misdemeanors is vested in circuit courts pursuant to Tenn. Code Ann. § 16-10-102 “unless otherwise expressly provided by statute.”

Criminal offenses are codified in Title 39 of the Tennessee Code; part 2 of chapter 13 governs criminal homicide. Tenn. Code Ann. § 39-13-201 defines criminal homicide and § 39-13-202 defines and prescribes the punishment for first degree murder, including death, life imprisonment without the possibility of parole, and life imprisonment. Tenn. Code Ann. § 39-13-203 prohibits defendants with an intellectual disability at the time first degree murder was committed from being sentenced to death, with “[t]he determination of whether the defendant had an intellectual disability. . . [to] be made by the court.” Tenn. Code Ann. § 39-13-204 provides that sentencing for first degree murder is to be fixed by the jury in a separate sentencing hearing, and sets forth the procedures to be used in the hearing and the requirement that the judge instruct the jury orally and in writing to weigh and consider the statutory aggravating and mitigating circumstances in fixing punishment. Criminal procedure is codified in Title 40, chapter 1, which governs jurisdiction and venue. Under Tenn. Code Ann. § 40-1-108 circuit and criminal courts “have original jurisdiction over all matters not exclusively conferred by law on some other tribunal.”

In addition to the absence of any statute vesting subject matter jurisdiction in the chancery courts to adjudicate any aspect of Tenn. Code Ann. § 39-13-203, the determination of whether the defendant had an intellectual disability at the time of the offense is a part of the prosecution and sentencing processes; the statute directs that the determination is to be made by “the court.” We do not agree with Mr. Payne that Tenn. Code Ann. § 39-13-203 limits the criminal court’s exclusive subject matter jurisdiction to the point where “the prosecution has concluded.” Construed together, the relevant statutes operate as a further limitation on the chancery court’s exercise of subject matter jurisdiction over this case.<sup>9</sup> In any event, Tenn. Code Ann. §§ 16-10-102 and 40-1-108 require that the grant of subject matter jurisdiction to the chancery court be express; there is no such express grant in the intellectual disability statute.

### III. CONCLUSION

For the foregoing reasons, the judgment of the Davidson County Chancery Court is affirmed.

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RICHARD H. DINKINS, JUDGE

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<sup>9</sup> As noted in *Tennessee Downs, Inc. v. William L. Gibbons*:

Courts of equity are not constituted to deal with crime and criminal proceedings. If the law be held valid, they cannot punish the complainant for the offenses committed, or compensate those injured by his wrongful action while the hands of the officers of the law are stayed by injunction. The exercise of the jurisdiction contended for would greatly confuse and embarrass the enforcement of the police power, and, upon sound principles of public policy, it ought not to be favored.

15 S.W.3d 843, 847 (Tenn. Ct. App. 1999) (quoting *J.W. Kelly & Co. v. Conner*, 123 S.W. 622, 635, (1909)).