IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	FOR PUBLICATION
	)	
Appellee,	)	
	)	
v.	)	WARREN CRIMINAL
	)	
CLARK LYNN,	)	Hon. Charles D. Haston, Judge
	)	
	)	
Appellant.	)	
	)	
	)	
	)	No. 01S01-9503-CC-00034

DISSENTING OPINION

DROWOTA, J.

I agree with the majority that the clerk erred in this case by failing to choose the special venire in accordance with Tenn. Code Ann. § 22-2-308(a)(2); I also agree that the clerk erred by failing to publish the names of the venire in accordance with Tenn. Code Ann. § 22-2-306(b). I cannot agree, however, with the majority's conclusion that these errors require reversal of the defendant's conviction. Therefore, I respectfully dissent from the majority opinion.

As noted by the majority, it is undisputed that defense counsel, on November 16, 1992, filed a motion challenging the procedures by which the special panel had been selected. This motion contained, moreover, a specific request that the trial court quash the special panel. After the process of jury selection was completed, but before the jury was sworn, the trial court heard arguments on the motion to quash. Instead of insisting that the trial court rule upon his motion at that time, however, defense counsel asked the trial court to defer the decision until the trial was completed. The trial court accepted this suggestion, over a timely objection by the State. It was only after his client was convicted that defense counsel, in his motion for new trial, demanded that the trial court rule upon the issue.

It is clear, therefore, that defense counsel could have secured a ruling on this issue before the trial even began. That he did not do so can only be explained, in my opinion, in terms of trial strategy: counsel wished to delay obtaining a ruling in order to preserve a ground for appeal in case his client was convicted.[1]

[1]Even if defense counsel had not marshaled all his evidence on this issue as of the date the motion was first argued, he could have asked for a continuance in order to prepare. There was simply no reason to conduct the entire trial before litigating the technical jury selection issues.

This sort of "trial strategy," however astute, is directly contrary to Tennessee law, for it is well established that an appellant "will not be permitted to take advantage of errors which he himself committed, or invited, or induced the trial court to commit, or which were the natural consequence of his own neglect or misconduct." Norris v. Richards, 193 Tenn. 450, 246 S.W.2d 81, 85 (Tenn. 1952) (emphasis in original). See also Gentry v. Betty Lou Bakeries, 171 Tenn. 20, 100 S.W.2d 230 (Tenn. 1937); Howard Sober, Inc. v. Clement, 372 S.W.2d 202 (Tenn. App. 1960); Pickard v. Ferrell, 325 S.W.2d 288 (Tenn. App. 1959); C.J.S. Appeal and Error § 745 (1995).

Norris, supra, is an excellent example of the "invited error" rule. In that case, the plaintiff brought an action against several defendants after a building collapsed and killed her husband; and the jury returned a verdict of $50,000 in her favor. Although Tennessee law at that time required a single assessment against all defendants jointly sued for a single tort, the jury foreman, when asked to read the verdict, began attributing precise amounts to each of the individual defendants. The trial court interrupted the foreman, telling him that the law forbade such a division; and he asked the foreman to simply give the total amount of damages attributed to all the defendants. The foreman did so, but counsel for each of the defendants made formal exceptions. The defendants then filed a motion for new trial, asserting that the apportionment undertaken by the jury contravened Tennessee law and thus rendered the verdict illegal. The trial court denied the motion.

On appeal, this Court, after citing the "invited error" rule, rejected the defendants' argument. We reasoned that:

> If the verdict complained of is illegal, it results more from the counsels' own positive 'neglect' or 'misconduct' than the action of the trial judge in pronouncing judgment upon it. No one could doubt for a moment that had any of the counsel asked leave to poll the jury, or that the jury be permitted to retire and give further consideration to its case, but that request would have been granted. The counsel had it completely in their power to have the jury retire and re-examine their verdict and decide if the amount of damages should be $50,000, or for a lesser amount against all defendants ....
>
> [W]e think it is crystal clear that [counsel] should not be permitted to capitalize on their silence to the prejudice of the trial court.

Norris, 246 S.W.2d at 85.

Similarly, here defense counsel "had it fully within his power" to secure a ruling on the jury selection issues before the trial. Yet he chose to postpone the ruling until after the conclusion of a five day trial, thereby making it much more difficult for the trial court to simply throw out the special venire and begin anew. Because such action represents, in my view, a manipulation of the trial court in violation of the above-quoted rule, I would affirm the judgments of the Court of Criminal Appeals and the trial court.

_____

FRANK F. DROWOTA III
JUSTICE