

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

SEPTEMBER SESSION, 1996

FILED

February 28, 1997

**Cecil W. Crowson
Appellate Court Clerk**

STATE OF TENNESSEE,
APPELLANT

VS.
00121

C.C.A. NO. 01C01-9504-CR-

DAVIDSON COUNTY
HONORABLE THOMAS A.

SHRIVER
MARIO PENDERGRASS,
APPELLEE

(EXTRAORDINARY APPEAL)

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OPINION FILED: _____

REVERSED IN PART; AFFIRMED IN PART

L. T. LAFFERTY, SPECIAL JUDGE

OPINION

On April 27, 1995, the state filed an application for extraordinary appeal by permission pursuant to T.R.A.P. Rule 10 in this Court. This Court, on June 27, 1995, granted the State's application for extraordinary appeal. The State has presented two issues for review. (1) A trial court for Davidson County, subject to a motion to suppress, granted the suppression of a portion of a first statement made by the defendant, Mario Pendergrass, but refused to suppress two additional statements. Subsequently, the trial court held that although his suppression ruling was legally correct, the trial court did not feel it fair to introduce these legally admissible statements in a capital case and would not admit these statements unless the State withdrew its notice of intent to seek the death penalty. Did the trial court commit error? (2) Did the trial court commit error in denying the, State's motion to recuse itself based on its ruling that the trial court would suppress the legally admissible statements unless the State, withdrew its notice of intent to seek the death penalty?

After a review of the record, this Court holds the trial court committed error in denying the State, the right to seek the death penalty. The trial court's holding is reversed. This Court affirms the, trial court's denial of the State's Motion to Recuse itself from this trial.

On September 21, 1993, the Davidson County Grand Jury returned an indictment against the defendant, Mario Pendergrass, charging him with premeditated murder first degree, first degree felony murder, especially aggravated kidnapping and especially aggravated robbery. On February 17, 1994, the State filed its notice of intent to seek the death penalty relying on four aggravating factors: Tenn. Code Anno. § 39-13-204(i) (2), (5), (6), and (7). On October 11, 1994, the defendant through his attorneys, filed a motion to suppress his statements. After a lengthy hearing the trial court held that any part of the defendant's initial exculpatory statement made prior to *Miranda* warnings should be suppressed, As to all

subsequent statements, however, the trial court found a valid waiver of the defendant's rights and overruled the motion to suppress. On December 19, 1994, the defendant filed a motion to strike the State's notice of intent to seek the death penalty on the basis such notice violated fundamental fairness. On January 20, 1995, the trial court held a hearing to determine the merits of the motion to strike. In making his ruling, the trial court stated in Exhibit one, Transcript of Evidence, January 29, 1995, beginning at page 29, line 23:

"He asserted his rights and those rights--that assertion was respected by Detective McElroy; but it was also very carefully--uh--manipulated by Detective McElroy. And, by using his, own--uh--albeit vague--uh--promises of 'help', and the same kinds of promises suggested to the mother and the use of her inducing the confession. I think puts you in the position that--uh --either--my--first thought was that I don't see--I think it's fundamentally unfair to ask for the death penalty under those circumstances. * *
* I think I'm gonna make my ruling this way. You either--you got your choice. Uh--you can either drop the death penalty or the confession is suppressed. You can't have it both ways. * * *
So, the ruling, then, is either you don't use the death penalty--either you don't ask for the death penalty or you don't use this confession."

The trial court, sua sponte, announced that it would not grant an interlocutory appeal by permission pursuant to T.R.A.P. Rule 9 regarding this ruling. Based on this ruling the State, on March 29, 1995, filed a motion to have the trial court recuse itself from this capital case. After a hearing, the trial court denied the State's motion for recusal on April 17, 1995.

CONCLUSIONS OF LAW

The trial court's decision to make his suppression ruling conditional upon whether the State would seek the death penalty is reversed because it is the sole function of the District Attorney General, subject to capricious decision, to decide which cases he will seek the death penalty.

Tennessee Authorities

The office of the District Attorney General is created by Article VI, Sec. 5 of the 1870 Tennessee Constitution. it is well established in Tennessee that the

duty of the district attorney general is to seek justice. The Supreme Court of this State in *Foute v. State*, 4 Tenn. (3 Haywood) 98 (1816) described the responsibilities of the office of district attorney general as follows:

“He is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed any more than those who deserve prosecution to escape; he is to pursue guilt; he is to protect the innocent; he is to judge the circumstances, and, according to their true complexion, to combine the public welfare and the safety of the citizens, preserving both and not impairing either.”

In a concurring opinion in *Pace v. State*, 566 S.W. 2d 861 (Tenn. 1978) the late Chief Justice Joe Henry, at page 866, held that the district attorney general is an officer of the executive department and apparent problems of separation of powers stem from the fact that the district attorney general and the trial judge are members of different branches of government. The ABA standards relating to the **Prosecution Function, § 1.1(a)** is clear on the jurisdiction and duties of the prosecuting authority. In *Dearborn, v. State*, 575 S.W. 2d 259 (Tenn. 1978), Chief Justice Henry, speaking for the Supreme Court stated at page 262;

"He or she is answerable to no superior and has virtually unbridled discretion in determining whether to prosecute and for what offense. No court may interfere with his discretion to prosecute, and in the formulation of this decision he or she is answerable to no one. In a very real sense this is the most powerful office in Tennessee today. Its responsibilities are awesome; the potential for abuse is frightening. Indeed, as incident of separation of powers, the Courts may not interfere with the discretion of the District Attorney in their control over prosecutions. See *U.S. v. Cox*, 342 F.2d 167 at 171 (5th Cir. 1965)."

Justice Anderson in *State v. Superior Oil, Inc.* 875 SW.2d 658 (Tenn. 1994) at page 660 stated:

"Although there are various statutes, which assign duties to the elected constitutional office of district attorney general, there are no statutory criteria governing the exercise of the prosecutorial discretion traditionally vested in the officer in determining whether, when, and against whom to institute criminal proceedings. Indeed it has been often recognized that

'prosecutorial discretion in the charging process is very broad.'
Citing *Cooper v. State*, 847 S.W.2d 521 (Tenn. Crim. App.
1992).”

The sole discretion whether to seek a sentence of death under the appropriate circumstances is vested in the prosecutor. *State v. Cazes*, 875 S.W.2d 253, 268(Tenn. 1994; *State v. Brimmer* 876 S.W.2d 75, 86 (Tenn. 1994).

U.S. Supreme Court

Mr. Justice White in *Gregg v. Georgia*, 96 S.Ct. 2909 (1976) stated at page 2949:

"Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide, whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is unsufficiently (sic) strong. This does not cause the system to be standardless...”

The Tennessee Supreme Court adopted this statement in *State v. Cazes*, *supra*, and *State v. Brimmer*, *supra*.

Foreign Jurisdictions

In *State v. Bloom*, 497 So.2d (Fla. 1986), the State of Florida petitioned the Supreme Court for a writ prohibiting the respondent, a circuit judge, from determining prior to trial the appropriateness of the death penalty in the event the defendant was convicted of first degree murder. The state argued in the petition that the judge has no authority to prejudge the appropriateness of the death penalty because such a ruling unconstitutionally infringes on an executive function exclusively within a prosecutor's discretion. Under Florida's constitution the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute. Art. II, § 3. The court granted the writ of prohibition and held that a circuit judge lacks the

authority to decide pretrial whether the death penalty will be imposed in a first degree murder.

The district attorney general in Tennessee has very broad discretion in determining who to prosecute and what charges to bring. The decision to seek the death penalty under the appropriate circumstances is solely within the discretion of the prosecutor. The trial court has no authority to condition a ruling on whether or not the prosecutor seeks the death penalty. In a case where the death penalty is appropriate, based on the existence of the aggravating factors set forth in Tenn. Code Anno. § 39-13-204(I) 1, the prosecutor has the discretion to decide to seek the death penalty. The jury in this case, under proper facts and instructions, and not the trial judge, has the responsibility to determine whether or not it will sentence the defendant to death.

MOTION TO RECUSE

From a review of the record, the State has failed to carry its burden in establishing that the trial court abused its discretion in refusing to recuse itself. The State strongly contends the trial court demonstrated its bias against the State seeking the death penalty. The State alleges that the trial court's unique ruling, the admissibility of the defendant's statements conditioned on the State not seeking the death penalty, establishes such bias. It is correct that the trial court on January 20, 1995, made a statement, "It--there's no question this is a terrible murder; but, I'm having grave doubts that you've got a death penalty case here in the first place." A review of the transcript of evidence reveals the trial court was discussing not only its position on the admissibility of the statements versus the death penalty, but the trial court's duty and responsibility in weighing the evidence as to all applicable aggravating circumstances. In its ruling on April 13, 1995, the trial court let it be known that it generally supported the concept of the death penalty. Do such

statements by the trial court establish a clear, abuse of discretion in denying the State's motion to recuse? We believe not.

A motion for recusal based upon the alleged bias or prejudice of the trial court addresses itself to the sound discretion of the trial court and will not be reversed on appeal unless clear abuse appears on the record. *State ex rel. Phillips v. Henderson*, 423 S.W.2d 489 (Tenn. 1968). In *Alley v. State*, 882 S.W.2d 810, the Tennessee Court of Criminal Appeals addressed the question of the standard to be applied on motions for trial courts to recuse itself. At page 822, Judge Penny White set out several circumstances where trial judges should recuse themselves.

“When a trial court's comments indicate that the judge has prejudged factual issues, Tennessee courts have required disqualification, 'In the trial of any lawsuit the judge must be careful not to give an expression to any thought, or to infer what his opinion would be in favor or against either of the parties in the trial.' *Leighton*, 414 S.W.2d 419 (Tenn. 1967).”

Supreme Court Rule 10, Canon 3 (C)(1) mandates that the trial judge disqualify himself in a proceeding in which his impartiality might be reasonably questioned.

This Court adopted an objective test for determining whether recusal was warranted. This Court stated that recusal was necessary when a person of ordinary prudence in the judge's position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality. Applying the objective test set forth in *Alley, supra*, recusal is not warranted. A reasonable person in the trial court's position would not find a reasonable basis for questioning the trial court's impartiality. Furthermore, a motion for recusal addresses itself to the sole discretion of the trial court and only upon a showing of clear abuse in the record will the ruling be reversed on appeal. This record lacks evidence of clear abuse of discretion on the trial court's decision to deny the motion to recuse. The denial of the trial court in the motion to recuse is affirmed.

L. T. Lafferty, Special Judge

CONCUR:

Gary R. Wade, Judge

Paul G. Summers, Judge