IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1998 SESSION

FILED

December 31, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
Appellee	)	No. 01C01-9607-CC-00139
	)	Lawrence County
vs.	)	
	)	Honorable Jim T. Hamilton, Judge
ROGER DALE BENNETT,	)	
	)	(Second degree murder)
Appellant.	)	

CONCURRING OPINION

As indicated by the majority, the trial court committed error by failing to provide instructions on the lesser included offense of reckless homicide. The defendant had claimed to the police that the pistol accidentally discharged when he "bumped" against the victim. As unlikely as it may have been for the jury to accredit that account, the trial judge had the statutory duty to inform the jury of the theory of that defense. To do otherwise violates the terms of Tenn. Code Ann. § 40-18-110:

> **Charge as to included offenses--No disclosure that trial involves Class X felony**.--(a) It is the duty of all judges charging juries in cases of criminal prosecutions for any felony wherein two (2) or more grades or classes of offense may be included in the indictment, to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so.

(Emphasis added).

Moreover, the Tennessee Constitution not only provides that the right to jury "shall remain inviolate" but also that "the jury shall have the right to determine the law and the facts, under the direction of the court...." See Tenn. Const. art. I, §

6, 19; Wright v. State, 394 S.W.2d 883 (Tenn. 1965).[1] The recent holding of our supreme court in State v. Williams, 977 S.W.2d 101 (Tenn. 1998), adopting a Rule 36(b), Tenn. R. App. P., harmless error standard for the failure to include a full instruction, appears to have departed from a long line of cases beginning as early as McGowan v. State, 17 Tenn. 84 (1836), that suggest that the statutory mandate is actually founded in the terms of our state Constitution.[2] To trivialize the importance

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[1]Scott v. State, 338 S.W.2d 581 (Tenn. 1960); Henson v. State, 72 S.W. 960 (Tenn. 1903); Ford v. State, 47 S.W. 703 (Tenn. 1898); Harris v. State, 75 Tenn. 538 (1881); Poole v. State, 61 Tenn. 288 (1872); Dale v. State, 18 Tenn. 551 (1837); McGowan v. State, 17 Tenn. 184 (1836).

[2]See State v. Staggs, 554 S.W.2d 620 (Tenn. 1977); Strader v. State, 362 S.W.2d 224 (Tenn. 1962). Recent cases stating rule that failure to charge lesser offense is a constitutional deprivation rely on State v. Wright, 618 S.W.2d 310 (Tenn. Crim. App. 1981)(Joe D. Duncan, Judge, author), and include the following: State v. Belser, 945 S.W.2d 776 (Tenn. Crim. App. 1996); State v. Howard, 926 S.W.2d 579 (Tenn. Crim. App. 1996); State v. Summerall, 926 S.W.2d 272 (Tenn. Crim. App. 1995); State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995); State v. Lewis, 919 S.W.2d 62 (Tenn. Crim. App. 1995); State v. Boyce, 920 S.W.2d 224 (Tenn. Crim. App. 1995); State v. King, 905 S.W.2d 207 (Tenn. Crim. App. 1995); State v. McKnight, 900 S.W.2d 36 (Tenn. Crim. App. 1994); State v. Vance, 888 S.W.2d 776 (Tenn. Crim. App. 1994); State v. Banes, 874 S.W.2d 73 (Tenn. Crim. App. 1993); State v. Richard Darrell Miller and Johnny Wayne Garner, C.C.A No. 01C01-9703-CC-00087 (Tenn. Crim. App., at Nashville, Sept. 11, 1998); State v. George Rose, C.C.A. No. 02C01-9710-CR-00405 (Tenn. Crim. App., at Jackson, July 2, 1998); State v. Harvey Phillip Hester, C.C.A. No. 03C01-9704-CR-00144 (Tenn. Crim. App., at Knoxville, June 4, 1998); State v. Becky Davis, C.C.A. No. 03C01-9701-CR-00027 (Tenn. Crim. App., at Knoxville, May 1, 1998); State v. Willie D. Graham, C.C.A. No. 03C01-9707-CC-00314 (Tenn. Crim. App., at Knoxville, May 7, 1998); State v. Warren Tyrone Fowler, C.C.A. No. 03C01-9709-CC-00391 (Tenn. Crim. App., at Knoxville, Apr. 29, 1998); State v. Harvey D'Hati Moore, C.C.A. No. 03C01-9704-CR-00131 (Tenn. Crim. App., at Knoxville, Mar. 18, 1998); State v. Daniel Joe Brown, C.C.A. No. 02C01-9611-CC-00385 (Tenn. Crim. App., at Jackson, Dec. 3, 1997); State v. Michael Tyrone Gordon, C.C.A. No. 01C01-9606-CR-00213 (Tenn. Crim. App., at Nashville, Sept. 18, 1997); State v. George Brooks, C.C.A. No. 02C01-9602-CR-00050 (Tenn. Crim. App., at Jackson, May 15, 1997); State v. Janice Hansbrough-Eason, C.C.A. No. 02C01-9504-CR-00098 (Tenn. Crim. App., at Jackson, Dec. 19, 1996); State v. Hollis Ray Williams, C.C.A. No. 03C01-9406-CR-00209 (Tenn. Crim. App., at Knoxville, July 23, 1996); State v. Randall Scott, C.C.A. No. 01C01-9307-CR-00240 (Tenn. Crim. App., at Nashville, Jan. 5, 1996); State v. Deborah Gladish, C.C.A. No. 02C01-9404-CC-00070 (Tenn. Crim. App., at Jackson, Nov. 21, 1995); State v. Eric J. Fair, C.C.A. No. 02C01-9403-CR-00055 (Tenn. Crim. App., at Jackson, Nov. 15, 1995).

of the statutory mandate is cause for concern. To limit the application of the Tennessee Constitution is cause for alarm.

Only weeks ago, our supreme court specifically referred to the right to trial by jury in the context of the trial court's failure to instruct on a lesser included offense and ruled that such an omission on the part of the trial court must be subjected to error analysis under the constitutional standard of harmless beyond a reasonable doubt. State v. Steven Bolden, No. 02S01-9711-CC-00102, slip op. at 11 (Tenn., at Jackson, Nov. 16, 1998). I prefer the view expressed in Bolden. Because the right to trial by jury is too precious to abridge, I would respectfully reject the interpretation espoused in Williams. I would tend to trust a well-informed jury, which has seen and heard firsthand of the quantity and quality of the evidence, rather than an impartial tribunal of judges exposed only to the written record of the trial.

While I share in the goal that all reasonable measures within the power of the judiciary should be utilized to minimize crime and the impact of crime upon the good citizens of this state, I am unwilling to denigrate the importance of the right to a jury of peers, as to either the primary charge or as to any lesser included offenses supported by the evidence in the trial. That is too great a sacrifice in the battle.

In Robert Bolt's A Man for All Seasons, the following is attributed to Thomas More:

> Would you cut a great road through the law to get after the devil? ... and when the last law was down, and the devil turned round on you -- where would you hide ... the laws all being flat?

> Yes, I'd give the devil benefit of law, for my own safety's sake.

As the majority points out, however, the evidence of guilt in this case is overwhelming. The claim made by the defendant that the crime should have been reckless homicide was feeble, unsupported by the physical evidence and uncorroborated by the testimony of the witnesses. I can concur in the affirmance only because there has been no abrogation of the constitutional standard; that is, the error here can be classified as harmless beyond a reasonable doubt. In my view, the jury would have considered and dismissed out of hand the defendant's retrospective assertion that the death of the victim must have been the result of negligence. Thus, I can agree that the judgment should be affirmed.

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Gary R. Wade, Presiding Judge