

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
MAY SESSION, 1996

FILED

Dec. 2, 1996

No. 02C01-9512-CR-00374
Cecil W. Crowson
SHELBY COUNTY
Appellate Court Clerk
Hon. W. Fred Axley, Judge

STATE OF TENNESSEE,)
)
 Appellee)
 vs.)
)
 JACKIE H. MARTIN,)
)
 Appellant)

No. 02C01-9512-CR-00374
SHELBY COUNTY
Hon. W. Fred Axley, Judge
(Petition For Discharge From
Involuntary Commitment)

SEPARATE CONCURRING OPINION

I concur in the majority's results. However, I write separately to address the recusal issue.

The majority correctly concludes that the mere fact that the trial judge formerly prosecuted the appellant did not summarily disqualify him from hearing this case. A judge, however, shall avoid even the appearance of impropriety. Tenn. R. Supr. Ct., Rule 10, Canon 2. Accordingly, a judge formerly a party at interest in a pending case should exercise heightened caution to avoid even the appearance of impropriety before hearing the case. Judges should disqualify themselves when their impartiality may reasonably be questioned. Tenn. R. Supr. Ct., Rule 10, Canon 3.

I feel that given the totality of the circumstances, this case does not pass the "smell test" of increased caution. The expert's testimony was uncontroverted. Ruling contrary to uncontroverted testimony may lend an appearance of impropriety. Prudence dictates that the judge should not have heard the case originally. He certainly should not continue to do so. These types of problems are then avoided.

PAUL G. SUMMERS, Judge