

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

**STATE OF TENNESSEE v. LETALVIS COBBINS, LEMARICUS
DAVIDSON and GEORGE THOMAS**

**Criminal Court for Knox County
Nos. 86216A, 86216B & 86216C**

No. E2012-00448-SC-R10-DD - Filed May 24, 2012

ORDER

On May 9, 2012, the State of Tennessee filed an application for an extraordinary appeal pursuant to Tenn. R. App. P. 10. On May 15, 2012, this Court directed counsel for Letalvis Cobbins, LeMaricus Davidson, and George Thomas (the “defendants”), to file responses to the application by no later than May 18, 2012. The Court has carefully considered the State’s application and supporting documents, and the responses filed by each defendant. Because Tenn. R. App. P. 1 encourages appellate courts to provide a “just, speedy, and inexpensive determination of every proceeding on its merits,” we grant the State’s application and invoke our power under Tenn. R. App. P. 2 to suspend the rules requiring further briefing and oral argument in order to address the question of whether the successor judge erred by requiring new trials based on his findings that (1) the original trial judge’s misconduct outside the courtroom amounted to structural error and (2) credibility issues concerning the original trial judge prevented the successor judge from acting as thirteenth juror.

Former Judge Richard Baumgartner presided over the separate trials and sentencing hearings of these three defendants. Each defendant was convicted of multiple non-capital offenses. In addition, Mr. Davidson and Mr. Thomas were convicted of the first-degree murders of Channon Christian and Christopher Newsom, and Mr. Cobbins was convicted of the first-degree murder of Ms. Christian. After capital sentencing hearings before a jury in each case, Mr. Davidson received the death penalty, and Messrs. Cobbins and Thomas received sentences of life without the possibility of parole. On March 10, 2011, before hearing the respective motions for a new trial, former Judge Baumgartner resigned from the bench after pleading guilty to one count of official misconduct. The Chief Justice designated Senior Judge Jon Kerry Blackwood to serve as the successor judge to hear the motions for new trial and perform all other duties required of a trial judge on these cases.

Tenn. R. Crim. P. 25(b) addresses the duties and authority of a successor judge in these circumstances. The rule provides as follows:

- (1) After a verdict of guilty, any judge regularly presiding in or who is assigned to a court may complete the court's duties if the judge before whom the trial began cannot proceed because of absence, death, sickness, or other disability.
- (2) The successor judge may grant a new trial when that judge concludes that he or she cannot perform those duties because of the failure to preside at the trial or for any other reason.

The original trial judge did not expressly approve the jury verdicts of these defendants as thirteenth juror. *See State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995) (holding that Tenn. R. Crim. P. 33 imposes upon a trial judge the mandatory duty to serve as the thirteenth juror in every criminal case). Thus, as required by Tenn. R. Crim. P. 25(b)(2), the successor judge considered whether he could perform the thirteenth-juror review. *See State v. Brown*, 53 S.W.3d 264, 275 (Tenn. Crim. App. 2000).¹

A successor judge, assessing whether he or she is able to act as thirteenth juror, must “determine the extent to which witness credibility was a factor in the case and the extent to which he had sufficient knowledge or records before him in order to decide whether the credible evidence, as viewed by the judge, adequately supported the verdict.” *State v. Brown*, 53 S.W.3d at 275. A successor judge may perform the thirteenth-juror review if the record is available and if witness credibility is not an overriding issue. *State v. Brown*, 53 S.W.3d at 275. “When witness credibility is the *primary* issue raised in the motion for new trial, the successor judge may not approve the judgment and must grant a new trial.” *State v. Biggs*, 218 S.W.3d 643, 654 (Tenn. Crim. App. 2006) (emphasis added) (citing *State v. Brown*, 53 S.W.3d at 275).

The successor judge in these cases determined that he could not perform the thirteenth-juror review because the credibility of the original trial judge had been called into question by his misconduct outside the courtroom. Notably, the successor judge did not find that witness credibility was the primary issue raised in the motions for new trial or that

¹The State argues that comments of the original trial judge at the defendants' non-capital sentencing hearings indicate that he approved the jury verdicts as thirteenth juror. We need not decide in this appeal whether a successor judge may construe comments of an original trial judge at a sentencing hearing as implicitly approving a jury's verdict as thirteenth juror. Where, as here, an original trial judge has not explicitly approved the jury's verdict as thirteenth juror, a successor judge does not err by concluding that the thirteenth-juror review has not been performed and by considering whether he or she may fulfill that obligation.

witness credibility was an overriding issue in these trials. We are aware of no authority holding that an original trial judge's credibility is an appropriate factor for a successor judge to consider when determining whether he is able to perform the thirteenth-juror review.

The successor trial judge also determined that new trials were required because the original trial judge's misconduct constituted structural error. At a June 9, 2011 hearing, the successor trial judge, after extensively reviewing the record, listening to a recording of one defendant's testimony, and reviewing all of the physical evidence, stated that he "[could not] find in any way that the trial court was in any way impaired or not capable of discharging professional responsibilities that were required of him as trial judge in this case. Couldn't find it at all." Later, at a hearing on December 1, 2011, the successor judge reaffirmed this finding when he stated, "I can't point to any part of the transcript and say, as I'm reading this, he's drunk. He's intoxicated. I can't do that."

We are aware of no authority holding that a trial judge's misconduct outside the courtroom constitutes structural error when there is no showing or indication in the record that the trial judge's misconduct affected the trial proceedings. "Structural constitutional errors are errors that compromise the integrity of the judicial process itself." *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008) (citing *State v. Garrison*, 40 S.W.3d 426, 433 n.9 (Tenn. 2000)). A structural error "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9 (1999). Accordingly, "[s]tructural constitutional errors are not amenable to harmless error review, and therefore, they require automatic reversal when they occur." *State v. Rodriguez*, 254 S.W.3d at 361.

Examples of structural constitutional errors include the complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable-doubt jury instruction. *See Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006). As these examples illustrate, structural error, by definition, deprives a defendant of the right to a fair trial *because* such error fundamentally compromises the trial process.

One hundred years ago, this Court observed that "[i]t is of lasting importance that the body of the public should have confidence in the fairness and uprightness of the judges created to serve as dispensers of justice." *In re Cameron*, 126 Tenn. 614, 658-59, 151 S.W. 64, 76 (1912). The public's confidence in the judiciary is undermined by irresponsible and improper conduct of judges. Accordingly, Tenn. Sup. Ct. R. 10, Canon 2A requires that all judges "shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The requirement applies to judges' professional and personal conduct. Tenn. Sup. Ct. R. 10, Canon 2A cmt. It also obligates judges to avoid not only impropriety but also the appearance

of impropriety. An appearance of impropriety arises when a judge’s conduct “would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.” Tenn. Sup. Ct. R. 10, Canon 2A cmt.

The original trial judge’s conduct outside the courtroom amounted to a clear and palpable violation of Tenn. Sup. Ct. R. 10, Canon 2A, and this order should not be construed as condoning or excusing the original trial judge’s conduct which has called into question the integrity of Tennessee’s judiciary. However, at its core, Due Process requires a “‘fair trial in a fair tribunal,’ before a judge with no actual bias against the defendant or interest in the outcome of his particular case.” *Smith v. State*, 357 S.W.3d 322, 342 (Tenn. 2011) (quoting *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997)). Although given the opportunity, the defendants failed to offer any proof that the original trial judge’s misconduct outside the courtroom affected the integrity of the trials. No such proof exists in the record before this Court.² Accordingly, in the absence of controlling authority otherwise, we decline to hold that a trial judge’s out-of-court misconduct, by itself, constitutes structural error unless there is proof that the misconduct affected the trial proceedings. *Cf. State v. Benson*, 973 S.W.2d 202, 206 (Tenn. 1998) (requiring proof that the trial judge, who engaged in acts of corruption at the time of the petitioner’s trial, actually solicited a bribe from the petitioner). We conclude, therefore, that the successor trial judge erred by requiring new trials on the grounds of structural error and his inability to carry out the thirteenth-juror review due to credibility issues concerning the original trial judge.

Accordingly, we vacate the successor judge’s orders granting the defendants’ motions for new trial, and we remand these cases to the trial court for the successor trial judge to determine expeditiously, under the standards articulated herein, whether he is able to fulfill his duty to perform thirteenth-juror review. Should the successor trial judge determine that he is unable to fulfill this duty “because of the failure to preside at the trial or for any other reason,” Tenn. R. Crim. P. 25(b)(2) obligates him to grant the defendants new trials. However, should the successor trial judge find that he is able to fulfill his duty as thirteenth juror and to rule on the motions for a new trial, he may do so.

PER CURIAM

²In contrast, the State conceded that during the trial of Vanessa Coleman, a fourth defendant in this criminal episode and whose re-trial is not being challenged, the original trial judge “seemed disoriented, speech was very slow . . . he barely read the verdicts He was confusing the defendants’ names.”