

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

PHILIP R. WORKMAN v. STATE OF TENNESSEE

**Criminal Court for Shelby County
No. B-81209**

No. W2001-01920-CCA-R10-PD

ORDER/OPINION - Filed August 10, 2001

In this capital case, Petitioner Philip R. Workman seeks interlocutory review of the Shelby County Criminal Court's August 9, 2001, denial of a continuance of the August 13 coram nobis evidentiary hearing. Specifically, Workman challenges the following rulings of the trial court:

- (1) the evidentiary hearing scheduled for August 13, 2001, remains unchanged "despite the unavailability of the majority of witnesses Petitioner intends to present";
- and
- (2) the Tennessee Rules of Civil Procedure relating to discovery do not apply to a criminal coram nobis proceeding.

See Tenn. R. App. P. 10. Petitioner asserts that the lower court's rulings have resulted in the deprivation of his due process rights under Article I, sections Eight and Sixteen of the Tennessee Constitution and under the Eighth and Fourteenth Amendments of the United States Constitution.

I. Background

The Criminal Court for Shelby County originally set an August 13, 2001, date for an evidentiary hearing on Workman's petition for writ of error coram nobis. On July 31, 2001, Workman filed in the trial court a motion for default judgment. In support of his motion, Workman asserts that he was entitled to default judgment pursuant to Rule 55.02, Tennessee Rules of Civil Procedure, based upon the State's failure to timely answer the petition.¹ *See also* Tenn. R. C. P. 8.02 (party must state in plain terms his defense to each claim asserted and to admit or deny the averments upon which adverse party relies); Tenn. R. C. P. 12.01 (respondent must file an answer within 30

¹Petitioner seeks default judgment under the Rules of Civil Procedure. Rule 55.04, Tennessee Rules of Civil Procedure, precludes the entry of default judgment against the State of Tennessee unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. As of this date, no evidence has been presented in this matter.

days after service of the complaint). On August 1, 2001, the trial judge, by letter, advised counsel for Petitioner that the hearing scheduled for August 13, 2001, "has been postponed in light of additional pleading filed by [Workman], and no proof in this matter will be taken on that date. However, arguments on [Workman's] Motion for Default Judgment will be heard on August 13, 2001."² In reliance upon the trial judge's letter, counsel for Petitioner notified Dr. Cyril Wecht, a forensic pathologist and resident of Allegheny County, Pennsylvania, that the hearing was postponed and he should cancel his plane reservations. On Friday, August 3, 2001, the trial court notified Workman that, due to objection by the State, it would change its earlier position and hear proof on August 13, 2001, and that counsel should be ready to proceed with its proof. Counsel for Petitioner informed the trial court that he had already released his witnesses from subpoena.

On August 8, 2001, Workman filed a motion requesting a continuance of the August 13, 2001, hearing (1) due to the unavailability of four witnesses; and (2) in order to obtain discovery of the State's expert witnesses as provided under the Rules of Civil Procedure. A hearing was held before the trial court on August 9, 2001. After receiving argument of counsel for both Workman and the State, the trial court denied Workman's motion for a continuance, noting that the court had previously informed the parties that it would receive the proof as the witnesses became available. Moreover, although the court acknowledged that piecemeal proceedings are extremely difficult, it would so proceed as it is impossible to obtain all witnesses before the court at one time. The court also found that "both sides will proceed under the Rules of Criminal Procedure. . . . [T]his court will rule at this point that it will not allow and doesn't believe that interrogatories should be used in this case and, barring anything that the court has before it at this time, I see no reason to allow any outside deposition to be taken."

Petitioner's Issue 1: Court's Denial of Continuance

Rule 10 review is permitted (1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules. *See* Tenn. R. App. P. 10(a). The trial court denied the continuance, acknowledging that the court had previously informed both the Petitioner and the State that evidence would be accepted whenever the witnesses became available.³ The decision to grant or deny a continuance, even if the denial of such results in

²The trial court later noted at the August 9 hearing that the original postponement was made because the court was of the opinion that "it would be very difficult to get these matters out of the way before August the 13th."

³The trial court stated with regard to Petitioner's unavailable witnesses, "If they can get [the witness] here August the 13th that's fine. If they can't, we will try and get [the witness] in at a later time." The court continued, "[w]e can bring that witness in at some later date if he is not available Monday."

"piecemeal" litigation, does not so far depart from the accepted and usual course of judicial proceedings as to require this Court's involvement.⁴ In general, the course and conduct of trial proceedings rests within the sound discretion of the trial court. State v. King, 40 S.W.3d 442, 449 (Tenn. 2001). Since it does not appear to this Court that the issue of the trial court's denial of a continuance is a proper matter for Rule 10 Extraordinary Appeal consideration, we find that Petitioner's motion with respect to this issue is not well-taken and this Court declines review.

Petitioner's Issue 2: Applicable Procedural Rules for Coram Nobis Proceedings

With regard to the issue of whether civil discovery devices authorized under the Tennessee Rules of Civil Procedure are available to a Petitioner in a coram nobis proceeding, Workman's application for extraordinary appeal on this issue is GRANTED. *See generally* Tenn. R. App. P. 10(a)(1).

II. Rules Applicable to Discovery in a Coram Nobis Proceeding

Civil writs of error coram nobis were abolished by Rule 60.02, Tennessee Rules of Civil Procedure. *See also* State v. Mixon, 983 S.W.2d 661, 668 (Tenn. 1999). Notwithstanding, the right to pursue the writ of error coram nobis has been preserved in criminal cases by Tennessee Code Annotated, Section 40-26-105. This provision provides, in pertinent part:

There is hereby made available to convicted defendants in criminal cases a proceeding in the nature of a writ of error coram nobis, to be **governed by the same rules and procedure applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith.**

(Emphasis added).⁵ "The anomalous result is that the writ of error coram nobis continues to be

⁴Although not prohibited, piecemeal litigation is not encouraged as it interferes with the orderly introduction of evidence, is disruptive to the parties, and oftentimes delays, rather than expedites, the finality of judicial proceedings. *See Troxel Manufacturing Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 970 (6th Cir. 1973); *see also Nance v. City of Knoxville*, 883 S.W.2d 629 (Tenn. App.), perm. to appeal denied, (Tenn. 1994).

⁵The writ of coram nobis, as with all civil actions, is commenced by the filing of a complaint with the clerk of the court. *See* Tenn. R. C. P. 3. As provided by Rule 8, Tennessee Rules of Civil Procedure, the State is required to file an answer within thirty days. *See* Tenn. R. C. P. 12.

an available remedy in criminal actions, but the procedure governing the remedy is based upon the civil writ of error coram nobis which has been abolished for almost twenty-eight years." Mixon, 983 S.W.2d at 668. Relying upon the provision in Tenn. Code Ann. § 40-26-105, Workman contends that the broad civil rules of discovery are applicable in proceedings involving a petition for writ of error coram nobis. Thus, the question before this Court is whether civil discovery devices authorized under the Tennessee Rules of Civil Procedure are available to a petitioner seeking the issuance of a writ of error coram nobis in a criminal proceeding.

Although a petition for writ of error coram nobis, as a post-judgment proceeding attacking a criminal conviction, is deemed civil in nature, it is but a step in the criminal case and, not, the beginning of a separate civil matter. *See generally* United States v. Morgan, 346 U.S. 502, 74 S. Ct. 237 (1954); United States v. Balistreri, 423 F. Supp. 793 (S.D. Ill. 1976); United States v. Tyler, 413 F. Supp. 1403, 1404 (M.D. Fla. 1976); United States v. Bursey, 515 F.2d 1228, 1233 (5th Cir. 1975); United States v. Flanagan, 305 F. Supp. 325, 327 (E.D. Va. 1969); United States v. Marcello, 202 F. Supp. 694, 696 (E.D. La. 1962). Therefore, the parties are not entitled to civil discovery procedures. *See* 18 Am.Jur.2d *Coram Nobis* § 27 (1985) (citing Marcello, 202 F. Supp. at 694); *see also* Deborah F. Harris, Annotation, *Application of Civil or Criminal Procedural Rules in Federal Court Proceeding on Motion in Nature of Writ of Error Coram Nobis*, 53 A.L.R. Fed. 762 (1981). Moreover, since the Rules of Civil Procedure have specifically abolished and do not recognize the writ of error coram nobis, discovery under rules of civil procedure is not authorized. Balistreri, 423 F. Supp. at 794 (citing Marcello, 202 F. Supp. at 696); *see also* Peterson v. State of Missouri, 355 F. Supp. 1371 (W.D. Mo. 1973); McDonald v. United States, 356 F.2d 980 (10th Cir. 1966); Abel v. Tinsley, 338 F.2d 514 (10th Cir. 1964). Rather, the scope of discovery in matters arising from a petition for writ of error coram nobis is properly limited to the scope of discovery available under Rule 16, Tennessee Rules of Criminal Procedure. *See generally* 18 Am.Jur.2d *Coram Nobis* § 27

The common law writ of coram nobis sought to have a judgment revoked for errors of fact outside the record. Justice demands such a procedure. Justice does not demand however that civil discovery methods be employed to allow a defendant to fish for facts that may or may not exist. Balistreri, 423 F. Supp. at 794.

Accordingly, we hold that Petitioner is not entitled to the broad discovery rules afforded by the Tennessee Rules of Civil Procedure. Additionally, we find that discovery in a coram nobis proceeding is governed by Rule 16, Tennessee Rules of Criminal Procedure.

III. Conclusion

It is therefore ORDERED that Petitioner's application for interlocutory review of the trial

court's denial of a continuance based upon the unavailability of witnesses is DENIED. It is further ORDERED that the Rules of Criminal Procedure shall govern discovery in coram nobis proceedings. This case is hereby remanded to Division III of the Shelby County Criminal Court for proceedings consistent with this opinion.

All of which is so ordered by the Court.

Enter, this the 10th day of August, 2001.

FOR THE COURT:

**(HAYES, RILEY, WILLIAMS, JJ.)
PER CURIUM**