

**IN THE CRIMINAL COURT FOR SHELBY COUNTY, TENNESSEE
THIRTIETH JUDICIAL DISTRICT, AT MEMPHIS
DIVISION III**

JASON WHITE

vs.

STATE OF TENNESSEE

)

)

)

)

)

Docket No. 17 01568

Filed 5.4.21

Heidi Kuhn, Clerk

BY [Signature] D.C.

**STATE'S RESPONSE
TO DEFENDANT'S MOTION TO DISQUALIFY**

This matter came to be heard upon petitioner, JASON WHITE's Motion to Disqualify Assistant District Attorney General Scruggs and the entire Shelby County District Attorney General's Office from involvement in his post-conviction proceedings. In Response the State contends defendant has failed to demonstrate an actual conflict of interest or appearance of impropriety on the part of any particular Assistant District Attorney General and further contends there is no specific Rule and no appearance of impropriety requiring the disqualification of the entire Office. In the event, the court determines an actual conflict of interest or an appearance of impropriety exists requiring the disqualification of any particular Assistant, the State further submits defendant has failed to demonstrate such conflict would require the disqualification of the Shelby County District Attorney General's Office as a whole. Thus, the State moves this court to deny the petitioner's Motion.

I. Procedural and Historical Background

Petitioner was convicted of one count of conspiracy to possess methamphetamine with the intent to sell within a drug-free zone and one count of conspiracy to possess methamphetamine with the intent to deliver within a drug-free school zone. Following his conviction, the trial court sentenced petitioner to sixty years as a career offender with release after service of 100% of his sentence. Thereafter, petitioner file a *pro se* petition for post-conviction relief and indicated he wished to represent himself in this matter. Petitioner is currently housed in a facility in New Mexico. The court appointed elbow counsel to assist him

with his post-conviction claims. Thereafter, petitioner filed the instant *pro se* motion seeking to disqualify the prosecutor who tried his case and the entire Office of the Shelby County District Attorney General.

II. Tennessee's Analytical Framework for Evaluating Potential Conflict of Interest

Disqualification of a district attorney general, an assistant district attorney general, or an entire district attorney general's office can result from the existence of an actual conflict of interest or an appearance of impropriety. Tennessee Courts have established an analytical framework for evaluating claims that an individual prosecutor and/or an entire District Attorney General's office should be disqualified from handling the prosecution of a specific case. The Courts have held, in determining whether to disqualify a prosecutor in a criminal case, the trial court must determine whether there is an actual conflict of interest, which includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of "compromising interests and loyalties," See State v. Culbreath, 30 S.W.3d 309, 313 (Tenn. 2000).

In addition, appellate courts have provided the following definitions for a conflict of interest:

An actual conflict of interest is usually defined in the context of one attorney representing two or more parties with divergent interests. A test for determining a disqualifying conflict in that situation is whether the attorney "made a choice between possible alternative courses of action [that were] helpful to one client but harmful to the other." Thomas v. Foltz, 818 F.2d 476, 481 (6th Cir.), cert. denied, 484 U.S. 870, 108 S. Ct. 198, 98 L. Ed. 2d 149 (1987) (citing United States v. Mers, 701 F.2d 1321 (11th Cir. 1983)). The term has been described as "a situation in which regard for one duty tends to lead to [the] disregard of another." State v. Reddick, 230 Neb. 218, 222, 430 N.W.2d 542, 545 (1988); see Gardner v. Nashville Housing Authority, 514 F.2d 38 (6th Cir.), cert. denied, 423 U.S. 928, 96 S. Ct. 274, 46 L.Ed.2d 255 (1975). In Ford v. Ford, 749 F.2d 681, 682 (11th Cir.), cert. denied, 474 U.S. 909, 106 S. Ct. 278, 88 L. Ed. 2d 243 (1985), the court declared a conflict of interest when an "attorney was placed in a position of divided loyalties." Once an actual conflict of interest is shown, disqualification is the appropriate remedy. See Moran v. State, 4 Tenn. Crim. App. 399, 472 S.W.2d 238 (1971).

State v. Tate, 925 S.W.2d 548, 552 (Tenn. Crim. App. 1995). The Court in Culbreath further held, "if there is no actual conflict of interest, the court must nonetheless consider whether conduct has created an appearance of impropriety." Id.¹

An appearance of impropriety exists when "an ordinary knowledgeable citizen acquainted with the facts would conclude that the . . . representation poses substantial risk of disservice to either the public interest or the interest of one of the clients." Clinard v. Blackwood, 46 S.W.3d 177, 187 (Tenn. 2001) (citation and internal quotation marks omitted). However, an unrealistic or purely subjective suspicion of impropriety does not require disqualification of an attorney or firm, and the existence of an appearance of impropriety should be determined from the perspective of a reasonable layperson who has been informed of all the facts. Id.; see also State v. Coulter, 67 S.W.3d 3, 30 (Tenn. Crim. App. 2001). "Objective public perception rather than the subjective and 'anxious perceptions of litigants' governs. Id. at 31. The facts and circumstances of each case should be evaluated independently to determine whether such a conflict exists. Culbreath, 30 S.W.3d at 315. Courts have held, disqualification of an attorney grounded in the appearance of impropriety "is a drastic remedy and is ordinarily unjustifiable based solely on the appearance of impropriety." Clinard, 46 S.W.3d at 187 (footnote omitted).

¹ The State notes Culbreath and Tate were decided at a time when Tennessee attorneys were bound by the Code of Professional Responsibility. Canon 9 of the Code required attorneys to avoid, "the appearance of impropriety." However, in 2003, Tennessee adopted the Rules of Professional Conduct. see Tenn. Sup. Ct. R. 8, Tenn. Code of Prof'l Resp. (replaced 2003); Tenn. Sup. Ct. R. 8, RPC (effective Mar. 1, 2003) (amended 2011); see also In Re: Tenn. Rules of Prof'l Conduct, No. M2000-02416-SC-RL-RL (Tenn. Aug. 27, 2002) (order). The Rules do not specifically adopt an appearance of impropriety standard. See State v. Casteel, 2004 Tenn. Crim. App. LEXIS 814, *43-44 (Tenn. Crim. App. September 24, 2004). However, the courts have continued to apply many of the principles and legal framework outlined in disqualification cases decided prior to the adoption of the Rules of Professional Conduct.

Court have held the Rules allow for screening procedures to be implemented where an actual conflict of interest exists against one government employee to prevent the need for disqualification of the entire government Office and have determined that, under either standard, it appears any determination of whether a prosecutor's disqualification must be imputed to the entire District Attorney General's office depends upon a case-by-case evaluation of the screening mechanisms employed. State v. Coulter, 67 S.W.3d 3, 30 (Tenn. Crim. App. 2001). The State notes that most such cases involve a situation where the potentially conflicted attorney is "switching sides;" has in some way presided over issues affecting potential defendants in a way that gave the offending attorney special knowledge of the case; or, where the potentially conflicted attorney has some pecuniary interest that is at odds with the professional and ethical responsibilities unique to a prosecutor.

Finally, if individual disqualification is required under either theory, the trial court must also determine whether the conflict of interest or appearance of impropriety requires disqualification of the entire District Attorney General's office. See State v. Tate, 925 S.W.2d 548, 550 (Tenn. Crim. App. 1995). More recent opinions have addressed the holding in Clinard and found it is more applicable to civil cases, providing a "framework for determining whether an attorney's prior involvement in a case mandates disqualification of the attorney's new law firm in a subsequent representation. State v. Davis, 1'41 S.W.3d 600, 613 (Tenn. 2004), overruled on other grounds by State v. Jackson, 173 S.W.3d 401, 407 (Tenn. 2005)). Courts has taken a different approach to examining the need for disqualification of an entire government office in the context of a criminal proceeding primarily because there is a "distinction between lawyers in government service and those in private practice" as well as a "difference between criminal proceedings and civil proceedings." Coulter, 67 S.W.3d at 32 (quoting Clinard, 46 S.W.3d at 188). Indeed,

[p]rivate and public practice have significant distinctions, such that screening procedures for attorneys in government service are generally viewed with less skepticism: 'The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice.'

State v. Ricky Raymond Bryan, No. M1999-00854-CCA-R9-CD, 2000 WL 1131890, at *6 (Tenn. Crim. App. Aug. 4, 2000) (quoting United States v. Caggiano, 660 F.2d 184, 191 (6th Cir. 1981), perm. app. denied (Tenn. Dec. 11, 2000)). When determining whether disqualification of a prosecutor or the entire district attorney general's office is required, courts must consider the following three questions:

(1) Do the circumstances of the defendant's case establish an actual conflict of interest that requires the disqualification of a prosecutor? (2) Do the circumstances of the defendant's case create an appearance of impropriety that requires the disqualification of a prosecutor? (3) If either theory requires the disqualification of a prosecutor, is the entire District Attorney General's office likewise disqualified?

Coulter, 67 S.W.3d at 29 (citing Culbreath, 30 S.W.3d at 312-13; Tate, 925 S.W.2d at 550; State v. Steve Mason, No. 01C01-9603-CC-00103, 1997 Tenn. Crim. App. LEXIS 526, 1997 WL 311900, at *6 (Tenn. Crim. App., at Nashville, June 6, 1997)). When considering disqualification in a criminal case, "[t]he trial court's determination requires an inquiry into whether the

prosecutor who has the conflict of interest has participated in the ongoing prosecution, including the disclosure of any confidences, and whether the prosecution has established that the prosecutor has been screened from the prosecution.” Davis, 141 S.W.3d 613 (citing Coulter, 67 S.W.3d at 30). A prosecutor’s disqualification need not be imputed to the “entire district attorney general’s office . . . so long as the attorney at issue does not disclose confidences or otherwise participate in the prosecution.” State v. Tate, 925 S.W.2d 548, 556 (Tenn. Crim. App. 1995) (citing Matress v. State, 564 S.W.2d 678, 680 (Tenn. Crim. App. 1977)); see also State v. Thomas Paul Odum, No. E2017-00062-CCA-R3-CD (Tenn. Crim. App., November 20, 2017).

III. Petitioner’s Claims

Petitioner asserts that the prosecutor who tried his case should be disqualified from further participation in his post-conviction proceedings because of statements made by the prosecutor on the record during a status date in his case and because, he asserts, the prosecutor and the District Attorney General were involved in having him transferred from the custody of TDOC to a facility in New Mexico. In addition to seeking the disqualification of the individual prosecutor who tried his case, he contends the actions of the trial prosecutor create such an appearance of impropriety that the disqualification of the entire Office of District Attorney General is required. Specifically, he asserts, in its response to TDOC’s request for input on the transfer of the petitioner to another facility out of state, the State falsely accused him of conspiring to kill the trial prosecutor. He contends such information was false; but, even if true, this very circumstance would necessitate disqualification of the Office from further participation in his case.

IV. Actual Conflict of Interest

The State submits that Petitioner has failed to present evidence of an actual conflict of interest. He provides no evidence that the trial prosecutor, ADA Scruggs, has “compromising interests and loyalties,” relating to his representation of the State in this matter which would necessitate his disqualification. See State v. Culbreath, 30 S.W.3d 309, 313 (Tenn. 2000). Petitioner cites no authority to support his position that the trial court and ADA Scruggs participated in *ex parte* communications. Rather, the transcript he attaches indicates all such complained of communication was on the record. Moreover, the petitioner provides not

authority supporting his position that the statements of ADA Scruggs,' in which he provided the court with a brief recitation of the facts while requesting the transfer of Petitioner to Shelby County, were in any way inappropriate or would give rise to an actual conflict of interest. ADA Scruggs was representing the interest of the people of Shelby County when addressing the court. There was no competing interest or divided loyalties which created an actual conflict of interest for ADA Scruggs. Moreover, the State submits there was nothing inappropriate about ADA Scruggs brief description of the circumstances of the offense. Despite petitioner's repeated reference to the comments as *ex parte* communication, as the State notes that the comments were made on the record, as demonstrated by the attached transcript to petitioner's Motion.

Secondly, the State contends ADA Scruggs did not initiate the transfer of petitioner post-trial from TDOC custody to New Mexico. The transfer of petitioner was made according to the Interstate Corrections Compact. Moreover, despite petitioner's assertion that such move was made to thwart his first tier appellate review, the State notes that the request was not made until after the Tennessee Court of Criminal Appeals had denied his appeal. The communication relating to transferring the petitioner was initialed by TDOC not the State. Although, the Office was asked for the input regarding the transfer and indicated they agreed such a transfer was appropriate, that decision was made through a process governed by the respective institutions and not at the request or insistence of the Attorney General. Moreover, it is not even clear ADA Scruggs was aware of TDOC's request. Thus, the State submits nothing about that process created an actual conflict of interest for ADA Scruggs. Rather, it appears that the petitioner's own conduct is the cause of the transfer.

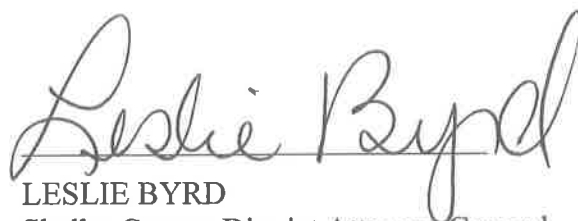
V. Appearance of Impropriety

The case law is clear, the mere possibility of impropriety is insufficient to warrant disqualification. State v. Coulter, 67 S.W.3d 3, 30 (Tenn. Crim. App. 2001), citing State v. Clinard, No. M1998-00555-Sc-R11-CV, 2001. "The existence of an appearance of impropriety is to be determined from the perspective of a reasonable lay person. Id. Moreover, "the reasonable lay person is deemed to have been informed of all the facts. Id. The facts and circumstances of each case should be evaluated independently to determine whether such a conflict exists. Culbreath, 30 S.W.3d at 315. The State submits, for the reasons set forth above, that a reasonable lay person, evaluating all the facts, would not conclude that an appearance of impropriety arises

from ADA Scruggs' comments to the court during the May 16, 2016, or the State's providing input regarding TDOC's request for transfer of Petitioner.

VI. Imputation of Conflict to Entire District Attorney General's Office

The State submits that, since there is no actual conflict of interest regarding ADA Scruggs' representation of petitioner and no appearance of impropriety arising from his actions either pre-trial, during trial or post-trial, then the court need not determine whether the conflict is imputed to the entire District Attorney General's Office, thereby, necessitating the disqualification of the Office as a whole. However, should the court determine something about ADA Scruggs comments at the May status date or his actions relating to the transfer of petitioner from TDOC custody to a facility in New Mexico necessitate his disqualification; the State contends petitioner has failed to demonstrate any such actions should be imputed to the Office as a whole. The undersigned prosecutor was not a party to the trial litigation and has very limited discussions with ADA Scruggs regarding the facts or issues presented at trial. Similarly, ADA Scruggs is not assigned to handle the post-conviction proceedings in this case. Should the court determine that ADA Scruggs should be further screened from participation in the State's defense of petitioner's post-conviction claims, the State is prepared to ensure he does not participate in the pending post-conviction proceedings. Thus, the State contends there is no basis to disqualify the entire Shelby County District Attorney General's Office and moves this court to deny not only as it relates to ADA Scruggs; but, to likewise deny petitioner's request to disqualify the entire Office of the Shelby County District Attorney General.



LESLIE BYRD
Shelby County District Attorney General
201 Poplar Avenue, Suite 301
Memphis, TN
(901) 222-1300