

**IN THE CRIMINAL COURT OF APPEALS OF TENNESSEE
FOR THE WESTERN DIVISION AT JACKSON**

Kristina Cole,

Appellant,

W2023-01307-CCA-R3-ECN

vs.

Shelby County Criminal Court Case: 17-01568

**State of Tennessee,
Appellee.**

**ON APPEAL OF RIGHT FROM JUDGMENT OF THE CRIMINAL
COURT OF SHELBY COUNTY**

Oral Argument Requested

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JURISDICTIONAL STATEMENT

This matter is on appeal as of right, under The Tennessee Rules of Appellate Procedure Rule 3, from a final Order entered on September 7, 2023, denying Appellant’s Writ of Error Coram Nobis. **Vol. 1, Pages 16-18.** Appellant filed a timely Notice of Appeal to the Tennessee Court of Appeals, pursuant to the Tennessee Rules of Appellate Procedure 4(a) (2023). **Volume 1, Pages 19-20.**

Appeal is proper with this Court, and this Court has jurisdiction to hear the issues presented in this appellate brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT’S WRIT OF ERROR CORAM NOBIS WITHOUT A HEARING AND FAILED TO GIVE APPELLANT A NEW TRIAL.

STATEMENT OF THE CASE

Appellant filed a document labelled as a Writ of Error Coram Nobis on August 25, 2023. **Vol. 1, Pages 1-15.** The State filed no response in opposition. The trial court entered an Order denying the Writ of Error Coram Nobis without a hearing, on September 7, 2023. **Vol. 1, Pages 16-18.**

Based on this denial, Appellant filed a Notice of Appeal with this Court on September 15, 2023. **Vol. 1, Pages 19-20.**

STATEMENT OF FACTS

Appellant filed a document labelled as a Writ of Error Coram Nobis on August 25, 2023. **Vol. 1, Pages 1-15.** The document included a transcript of a Hearing that Appellant was not aware of, in which the trial court and the State engaged in an ex parte conversation about the relevant facts and issues of the case. **Id.** at Pages 6-12. The matter was heard on May 16, 2016, when the case was not even set to be heard. **Id.** at Page 8 Lines 15-17.

At the ex parte Hearing, the State provided the trial court with specific facts about the case, explicitly telling the trial court, “I think the Court will enjoy the facts on this case.” **Id.** at Page 9, Lines 1-3.

The State also went on to tell the trial court that the shipper was not involved in the case because they did not know who the shipper was. **Id.** at Page 9 Lines 6-

15. The State informed the trial court that tracking of the package might have been encrypted had Appellant not been getting cell phone calls from co-defendant Jason White the entire time the police were there. **Id.** at Pages 9 Line 19 to Page 10 Line 2.

The State also informed the trial court that co-defendant Jason White was a ranking member of the Vice Lords for reasons unexplained. **Id.** at Page 10.

In her request for relief, Appellant also stated that this interaction between the State and the trial court was concerning since the trial court appeared to be attempting to suggest to the State to find out who shipped the package in order to strengthen its case. **Vol. 1, Page 2.**

After reviewing the Petition, the trial court denied the Petition without a hearing. **Vol. 1 Pages 16-18.** The trial court reviewed the matter on its merits. **Id.**

The trial court did not dispute that the ex parte Hearing was evidence that Appellant had never received before, nor did the trial court suggest that the conduct between the State and the trial court was appropriate. **Id.** Instead, the trial court seemed to suggest that the information was not the type of information that would qualify as a basis to grant a writ of error coram nobis. **Id.**

The trial court entered an Order on September 7, 2023. **Vol. 1, Pages 16-18.** Petitioner appealed the decision on September 15, 2023. **Vol. 1, Pages 19-20.**

This matter is now properly before this Court for consideration.

ARGUMENT

I. The Trial Court Erred In Denying Appellant’s Writ of Error Without A Hearing and Failed to Give Appellant a New Trial.

Review of the trial court’s application of the law to the facts is a de novo review, with no presumption of correctness. State v. Walton, 41 S.W. 3d 75, 81 (Tenn. 2001).

A writ of error coram nobis lies “for subsequently or newly discovered evidence relating to matters which were not litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.” T.C.A. § 40-26-105(b) (2022); State v. Hart, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995).

The decision to grant or deny such a writ rests within the sound discretion of the court. Jones v. State, 519 S.W.2d 398, 400 (Tenn. Crim. App. 1974).

On appeal, the trial court’s findings of fact will be upheld unless the evidence preponderates against the trial court’s findings. Fields v. State, 40 S.W. 3d 450, 456 (Tenn. 2001).

In this case, this matter should be remanded back to the trial court, as it appears that this matter was not fully considered.

The ultimate issue before the trial court, and this Court is: whether Appellant received Due Process under the law regarding the ex parte Hearing that the trial court engaged in; separate and apart from whether or not there was newly discovered evidence.

Furthermore, because the trial court made credibility determinations at Appellant's Motion to Suppress Hearing, if the trial court was making these determinations while either being bias, or having the appearance of impropriety, then the Motion to Suppress Hearing should never have been heard before the trial court to begin with.

So, the newly discovered evidence should have been reviewed based on the trial court's obligation to be fair and impartial, and analyzed based on the impact of the trial court's Ruling on the Motion to Suppress Hearing, when it made determinations as to credibility of a witness, that cannot be challenged or reversed on appeal.

Finding the officers credible at the Suppression Hearing is what prevented the Motion from being granted, or, in the alternative, is what most likely or may have prevented the Motion from being granted. Therefore, the newly discovered evidence directly impacted the outcome, or may have impacted the outcome of the case,

because it dealt with whether there would even be admissible evidence against Appellant to convict her.

So, the ex parte Hearing is vital to this case, and Appellant implores this Court to remand this matter so that Appellant can receive a new trial before a neutral and detached judge.

“Tennessee litigants are entitled to have cases resolved by fair and impartial judges. Davis v. Liberty Mut. Ins. Co., 38 S.W.3d 560, 564 (Tenn. 2001); Leighton v. Henderson, 414 S.W.2d 419, 421 (Tenn. 1967) (stating that the Tennessee Constitution entitles litigants to the “cold neutrality of an impartial court”); Kinard v. Kinard, 986 S.W.2d 220, 227 (Tenn. Ct. App. 1998) (same); Alley v. State, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994) (same). Judges must be fair and impartial both in fact and in perception. State v. Reid, 213 S.W.3d 792, 815 (Tenn. 2006) (“[T]he preservation of the public’s confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial.” (quoting Kinard, 986 S.W.2d at 228)). As this Court declared more than one hundred years ago, “it is of immense importance, not only that justice shall be administered . . . but that [the public] shall have no sound reason for supposing that it is not administered.” In re Cameron, 151 S.W. 64, 76 (Tenn. 1912); see also State v. Lynn, 924 S.W.2d 892, 898 (Tenn. 1996) (“It is the appearance that often undermines or resurrects faith in the system. To promote

public confidence in the fairness of the system and to preserve the system's integrity in the eyes of the litigants and the public, 'justice must satisfy the appearance of justice.'" (quoting Offutt v. United States, 348 U.S. 11, 13 (1954)). To these ends, the Tennessee Rules of Judicial Conduct declare that judges must "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Tenn. Sup. Ct. R. 10, R.J.C. 1.2." **Id.** at *8.

At a minimum, this matter should be remanded, and a Hearing should be conducted so that the State and the trial court judge can be subjected to questioning, and cross-examination, as to why this ex parte Hearing occurred, and why no one notified Appellant of the Hearing.

A failure to address this issue would give the appearance that the trial court and State are allowed to engage in conduct that no one is defending, but that is allowed to occur with no relief to the defendants who are having their constitutional rights violated.

In other words, Appellant is seeking an analysis from this Court as to whether the ex parte Hearing was appropriate. Appellant believes that there is nothing to support that the Hearing was appropriate. If the ex parte Hearing is concluded not to be appropriate, a new trial is the only reasonable remedy available.

In the ex parte Hearing, the trial court heard relevant facts about the evidence and the case, prior to Appellant's Suppression Hearing or Trial. Appellant was not present, nor notified to be present. Appellant did not have her attorney present, nor was her attorney notified to be present. The trial court commented on the case and seemed to give advice about the State pursuing the shipper of the package in order to make the case stronger. **Vol. 1, Pages 9-10.**

In fact, the State seemed to know that the trial court would allow the ex parte Hearing, stating to the trial court at one point, "I think the Court will enjoy the facts on this case." **Id.** at Page 9, Lines 1-3.

It is hard to imagine how this does not show a bias or gives the appearance of impropriety.

This is the area that the trial court failed to address thoroughly in its Order denying the Petition. **Id.** at 16-18. This is the area that is sacred to the Tennessee and United States Constitution and should not be glossed over so that the confidence in our justice system is not eroded or tarnished.

This issue does not just impact Appellant. It impacts all of us. A trial court judge holds a tremendous amount of power and has a very important function in our justice system. Several determinations that it makes, such as the credibility of

a witness and how it interprets the demeanor and attitude of a witness, are not even allowed to be challenged on appeal.

Appellant was not previously made aware of the ex parte Hearing, nor was her attorney made aware of the Hearing. Therefore, the matter is properly and timely before this Court.

“Equitable tolling is likewise triggered when circumstances beyond a prisoner's control prevent the prisoner from filing his or her petition on time.”

Whitehead v. State, 402 S.W.3d 615, 626 (Tenn. 2013).

We all know the phrase, “with great power, comes great responsibility.” With a defendant’s life and liberty in the hands and at the mercy of a trial court judge, it is imperative that a trial court judge administer the law, and to operate in a way that provides every defendant with all their constitutional rights and protections. It is also important that when a trial court is reviewed by the public, or society at large, that what is witnessed is conduct that gives us all a peace and security of knowing that the trial court has not engaged in any conduct that is bias or appears to be bias.

In this case, there was a bias, or an appearance of bias. Appellant is asking that this Court step in and correct this bias, or appearance of bias, and to restore the confidence in our great justice system.

CONCLUSION

Wherefore, premises considered, Appellant moves this Court to reverse the ruling of the trial court and to remand this matter back to the trial court so that Appellant may receive a new trial. A trial in which all of her constitutional rights are honored and protected.

CERTIFICATE OF COMPLIANCE

I, Terrell Tooten, certify that this brief has been submitted in compliance with Supreme Court Rule 46 regarding electronic filing and there are 2,333 words.

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served on all parties through the electronic filing system on April 23, 2024.

Respectfully Submitted,

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