

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL SESSION, 1994

FILED

September 27, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)	
)	No. 01C01-9303-CR-00105
Appellant)	
)	Davidson County
v.)	
)	Hon. Walter C. Kurtz, Judge
BYRON LEWIS BLACK,)	
)	(Post-Conviction)
Appellee)	

For the Appellant:

Charles W. Burson
Attorney General & Reporter

Kathy M. Principe
Senior Counsel
450 James Robertson Parkway
Nashville, TN 37243-0485

Victor S. Johnson, III
District Attorney General

Cheryl Blackburn
Assistant District Attorney
102 Metropolitan Courthouse
Nashville, TN 37201

For the Appellee:

Brock Mehler
Attorney at Law
704 18th Avenue South
Nashville, TN 37203

OPINION FILED: _____

AFFIRMED

Penny J. White
Judge

O P I N I O N

In this case we are called upon to determine whether a trial judge acted improperly in granting funds for support services in a post-conviction proceeding involving a capital case based on **ex parte** requests. The state contends: that the court is without authority to grant funding and that **ex parte** requests are impermissible. We disagree and affirm the judgment of the trial court.

Appellee is a convicted inmate, having been found guilty of first-degree murder and sentenced to death. He filed a **pro se** post-conviction petition and requested appointment of counsel. Counsel was appointed and filed an **ex parte** motion for support services with accompanying affidavits.

The trial court awarded \$5,500 for "psychiatric and/or psychological and/or investigative services" in the case. Thereafter, the state filed a Motion to Reconsider and the defense submitted an **ex parte** letter to the judge. In response the court issued a Memorandum setting forth the following:

- 1) Tennessee Code Annotated Section 40-14-207 is not applicable to a post conviction proceeding.
- 2) "[C]ircumstances [exist] in which counsel should be allowed to seek supportive services in an **ex parte** proceeding. Counsel should not be required to divulge [the] theory of defense or the rational[e] in support of needed services to the State."
- 3) The court is not required to hold a hearing, but may rule based on affidavits.
- 4) Courts should act **ex parte** only if "absolutely necessary to

protect a litigant['s] right to
a fair trial or hearing."

The state disputes most of the judge's holding based upon Teague v. State, 772 S.W.2d 915 (Tenn. Crim. App. 1988), perm. to appeal denied, (Tenn. 1989). In Teague, this court denied funds for an investigator on post-conviction to a petitioner who already had a privately employed investigator. The court based its conclusion on its reading of Tennessee Code Annotated Sections 40-14-207(b), 40-30-121, and Rule 13 of the Tennessee Supreme Court rules.

In later-cases in which the issue was more squarely presented, this court held that trial courts were authorized to grant support services in capital post-conviction cases upon a demonstration of necessity to the fair determination of the issues. Gaile K. Owens v. State, No. 02C01-9111-CR-00259 (Tenn. Crim. App., Jackson, Mar. 25, 1994), perm. to appeal granted, (Tenn. 1994); Pervis Tyrone Payne v. State, No. 02C01-9204-CR-00094, (Tenn. Crim. App., Jackson, Mar. 225, 1994), perm. to appeal granted, (Tenn. 1994). Although one member of the court expressed the opinion that **ex parte** motions might be essential to the fairness sought, the court specifically concluded that neither the rule nor the statute allowed that procedure at the post-conviction level.

While both parties and the court attempted to thoroughly review the applicable statutes, rules, and history, significant legislative history was not discovered or considered in those cases. Additionally, that history was not originally noted in this case. At oral argument, however, appellee detailed for the court essential legislative history which impacts greatly the determination of this issue. That

legislative history found in a careful review of Section 40-30-121 and its predecessors, is essential to our efforts to accomplish what the legislature intended.

As we noted in Owens-Payne, several statutes and rules are relevant to this issue. The Post-Conviction Procedure Act provides for the appointment and compensation of counsel and court reporters for indigent petitioners as "provided for criminal and habeas corpus cases by chapter 14, parts two and three of this title." Tenn. Code Ann. § 40-30-121 (1990 Repl.). Chapter 14, originally chapter 20, of Title 40 is entitled "Rights of Defendants." In addition to enumerating trial rights in part one, parts two and three address the rights and methods of securing representation, transcripts, and court reporters for indigent defendants. Section 206 delegates to the Supreme Court the obligation to "prescribe by rule the nature of the expenses for which reimbursement may be allowed . . . as it deems appropriate in the public interest." Tenn. Code Ann. § 40-14-206 (1990 Repl.). Section 207(b) addresses the procedure by which a "defendant [who] has been found to be indigent" in "capital cases" may petition the court **ex parte** for authorization for investigative or expert services "necessary to ensure that the constitutional rights of the defendant are properly protected." Tenn. Code Ann. § 40-14-207(b) (1994 Supp.).

In its original form, chapter 14 had thirteen provisions. Tenn. Code Ann. §§ 40-2001 - -40-2013 (1955). In 1965, chapter 14 was expanded. One of the added provisions set rates for counsel's compensation and authorized reimbursement for "reasonable and necessary expenses." Tenn. Code Ann. § 40-2023 (1965).

Two years later, with the passage of the Post-Conviction Procedures Act, chapter 14 (then chapter 20) took on additional importance. Its provisions regarding indigency, counsel, and court reporters were deemed applicable to post-conviction proceedings. Tenn. Code Ann. § 40-3821 (1967). The specific reference "as now provided for criminal and habeas cases" arguably created identical treatment on these issues for trial and collateral matters.

In 1981, both the "Rights of Defendants" chapter and the Post-Conviction Act were amended. The provisions in the former regarding compensation and reimbursement of counsel and in the latter incorporating that provision remained unchanged except for numbering.¹

In 1984, one provision in the "Rights of Defendants" chapter, Section 40-14-207, was amended. Subsection (b) provided for **ex parte** hearings in which counsel could seek authorization for support services "necessary to ensure that the constitutional rights of the defendant are properly protected." Tenn. Code Ann. § 40-14-207(b) (1984). The original section of the Post-Conviction Procedure Act, which incorporated the provisions of the "Rights of Defendants" chapter, continued to provide for reimbursement "as now provided for criminal and habeas corpus cases." The reference was changed only to specify "parts 2 and 3 of th[e] title" rather than chapter 14. Part 2 then and now contains Section 40-14-207 including the **ex parte** provisions.

Our examination reveals, as counsel suggests, that the Post-Conviction Procedure Act has, since its adoption,

¹Former section 40-3821 became section 40-30-121; former section 40-2023 became section 40-14-207.

inclusively referenced all of the provisions of the "Rights of Defendants" chapter pertaining to appointment and reimbursement of counsel and court reporters generally and, specifically, in capital cases, including Section 40-14-207. Supreme Court Rule 13 also refers to Section 40-14-207.

We conclude that the provisions of section 207, including the authority of a trial judge to grant authorization for support services after an **ex parte** hearing, are applicable to capital cases at the trial or appellate level, or on collateral attack. Our conclusion is supported by legislative history as well as notions of fairness and reasonableness.

As we said in Owens-Payne:

The sole purpose of a hearing to seek authorization for supports services is to allow the court to determine whether support services are "necessary to ensure the protection of . . . constitutional rights." Tenn. Sup. Ct. R. 13(2)(B)(10); Tenn. Code Ann. § 40-14-207(b)(1993 Supp.). The facts presented at that hearing in no way affect the trial of the case. A petitioner is still bound to prove the allegations of the petition by a preponderance of the evidence through testimony and evidence at the hearing. The trial judge cannot consider any of the testimony offered in support of the motion on the merits of the case. The state's defense of the petition is in no way affected by the testimony or evidence presented to the court in support of the request for support services.

The state's interest in requiring the indigent petitioner to appear in open court to request services is, at best, unpersuasive. The state's ostensible motive is a financial one. Obviously, the trial judge, as a neutral participant, is much better equipped than the state to evaluate need and to determine limits. Thus, the state's financial interest will be fairly protected by the proper exercise of judicial discretion. The only other interest which can be identified as important to the state is the limited interest in assuring that all parties to

lawsuits are equally involved with all formal aspects of the proceedings. While important, this interest gives way to more significant concerns in a variety of contexts. See Tenn. R. Civ. P. 65 (**ex parte** restraining order; Tenn. Code Ann. § 29-16-107 (1980 Repl.) (**ex parte** order of possession). The interests here are equally significant. The state is not entitled to disclosure of petitioner's theory of the case. Additionally, the trial courts in these appeals specifically found that the state would gain access to "highly confidential matters simply because of [petitioner's] indigency" if the motions were heard in open court.

It is not inconsequential that the state and non-indigent litigants are not placed in the position of having to reveal their case in order to receive support services. Our adversary system presupposes similarly balanced opponents. Since the state is not required to seek court approval in the presence of its opponent before hiring an expert or conducting an investigation it upsets the balance to require that of the state's opponent.

Our courts are obligated to treat indigents and non-indigents as similarly as possible. Non-indigents are not required to reveal their investigative or support service needs to the court in the presence of the state. A system that requires indigents to do that, simply because they are indigent, is . . . patently unjust and offensive to the ideal of equal justice under the law.

The standard by which we measure the judge's action in this case is an abuse of discretion standard. We must determine, given our legal conclusions, whether the judge erred in authorizing support services based on an **ex parte** motion. We hold that under the circumstances of this case, the court did not err.

In his Memorandum Opinion the judge noted that **ex parte** motions should be used sparingly when it is "absolutely necessary to protect the litigant[']s right to a fair . . .

hearing." He further found, in a subsequent order, that this appellee's fair trial rights required the procedures employed. Having reviewed the sealed motion and exhibits, we concur in that factual finding.

Ex parte motions are for the limited purpose of assuring that petitioners are not required to divulge their case in order to get the resources to have a fair hearing. It follows then that all motions for support services should not be **ex parte**. Counsel should not seek the protection of secrecy when the request and accompanying affidavits do not tend to reveal strategies or defenses. At times, the court receiving an **ex parte** motion may determine that it is inappropriately categorized and may order it unsealed and disclosed. On the other hand, at other times, counsel simply must be at liberty to seek the cloak of an **ex parte** hearing in order to attempt to adequately, competently, and ethically represent the client. On these occasions, the court is justified in allowing **ex parte** filings and conducting an **ex parte** hearing if necessary.

We, therefore, affirm the judgment of the trial court. Our holding is consistent with Owens-Payne in that we conclude that support services are authorized for capital post-conviction cases upon a finding that services are necessary to ensure the protection of constitutional rights. Additionally, we hold that trial judges may allow **ex parte** motions and hearings if necessary to insure fairness. Any motions or exhibits allowed to be filed **ex parte** should be filed and sealed and should form a part of the appellate record. **Ex parte** hearings should be preserved in an appropriate manner as well.

Accordingly, we affirm the judgment of the trial court.

Penny J. White, Judge

CONCUR:

Gary R. Wade, Judge

David H. Welles, Judge