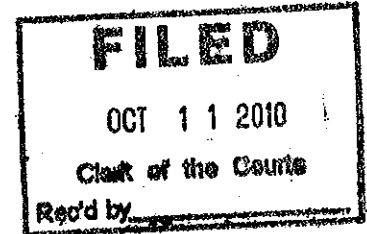


IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. MICHAEL YOUNGER

Criminal Court for Bradley County
No. M-08-457

No. E2010-01541-CCA-R9-DD



ORDER

The defendant, Michael Younger, through counsel, has filed an application for interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, from the July 8, 2010 ruling of the trial court denying the defendant's "Motion to Bar Retrial and Dismiss." Although the trial court denied the motion, the court granted a Rule 9 interlocutory appeal. In the motion before this court, the defendant asserts that interlocutory appeal is appropriate under the facts presented in view of the severity and irreparable nature of the potential injury to the defendant that would result if he is retried in violation of the constitutional protections against double jeopardy. The State opposes the application, arguing that no basis exists on which to grant a Rule 9 interlocutory appeal.

In the motion before this court, the defendant asserts that he has been indicted in the instant case four times, with each indictment relating to murders that occurred in 1999. The latest indictment, which was issued on October 8, 2008, charged the defendant with conspiracy to commit especially aggravated robbery, robbery, and three counts of felony murder. The trial began on May 5, 2010.

Prior to and during trial, the defendant filed two motions to dismiss the indictment, arguing prosecutorial misconduct in the form of Brady violations. One of the violations concerned the State's failure to turn over evidence of a State's witness, Anita Wilson, facing multiple charges for check fraud. The trial court found that violation egregious enough to order defense counsel to report the prosecutors to the Board of Professional Responsibility and the prosecutors to self-report the violation. Nevertheless, the court denied the defendant's motion to dismiss the indictment.

As trial progressed, the State, on redirect examination, asked a witness, Pam Upton, a question about the defendant being a "drug dealer," which question had been specifically prohibited by the trial court prior to trial during a Rule 404(b) hearing. When the defendant

objected, the prosecutor admitted he "decided" to ask the question based upon the defense's cross-examination of the witness. The defendant again requested the trial court dismiss the indictment. The court recognized the State's error but refused to dismiss the indictment. At that point, the defendant requested a mistrial, arguing that the defendant had been "goaded" into making the request by the State's continued bad behavior.

The trial court found that the "improper testimony [about the defendant's and co-defendant's drug dealing] was directly solicited by the state's question" against the trial court's ruling prohibiting that line of questioning. The court further noted that there was little proof in the record linking the defendant with the crime. The court found that a curative instruction would be insufficient to mitigate the error, stating, "I can't put the prejudicial proof back in the mouth of the witness." Accordingly, the trial court granted the defendant's motion for mistrial.

Subsequently, the defendant filed a "Motion to Bar Retrial and Dismiss." The defendant argued that because he had been goaded into requesting a mistrial, the bar against double jeopardy prohibited retrial. The trial court found:

[The State] has admitted to two intentional violations of the Court's Orders and the rules of evidence. [The State] admitted [it] did not turn over exculpatory evidence [it] was aware of relative to the State's critical witness Anita Wilson. [The State] also admitted [thinking] before [asking] the question of Pam Upton that was in violation of the Court's Order relative to proof of Drug Dealing entered 5/3/10. The Court has already made a finding on the record that the State of Tennessee has committed Prosecutorial Misconduct. That misconduct resulted in the Mistrial.

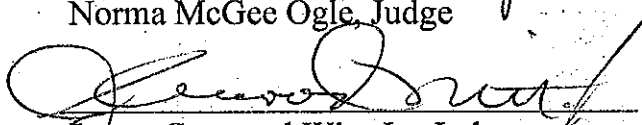
However, the trial court did not "find that the State was seeking a Mistrial or attempting to goad the defense into asking for a mistrial." Therefore, the court denied the defendant's motion. Regardless, the trial court granted the defendant's request for a Rule 9 interlocutory appeal, challenging the trial court's denial of the motion to dismiss the indictment against the defendant on double jeopardy grounds.

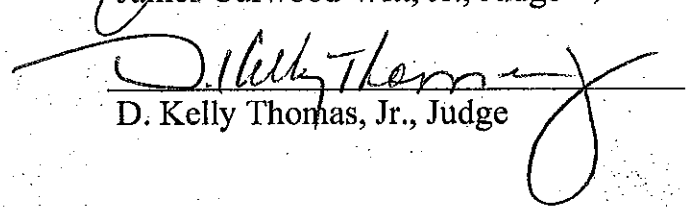
In assessing whether or not an interlocutory appeal should be granted, this court may look to the probability of occurrence of irreparable injury in the challenged order. See Tenn. R. App. P. 9(a)(1). In this case, upon due consideration of the application and the asserted need to prevent irreparable injury to the defendant should his double jeopardy claim demonstrate merit, this court agrees that interlocutory appeal of the issue is appropriate.

Accordingly, it is ORDERED that the application for interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure is GRANTED. The record on appeal shall be prepared and transmitted to this court within forty-five days from the date of the filing of this order. The parties shall then file briefs and the appeal shall proceed in accordance with the rules of appellate procedure and the rules of this court.

A copy of this order shall be sent to the Clerk of the Criminal Court for Bradley County.


Norma McGee Ogle, Judge


James Curwood Witt, Jr., Judge


D. Kelly Thomas, Jr., Judge