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**IN DIVISION V CRIMINAL COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE**

STATE OF TENNESSEE)
)
vs.) **Case No. 2011-A-779**
)
TIMOTHY GUILFOY)

**TRANSCRIPT OF THE PROCEEDING
Post Conviction Hearing
June 18, 2014**

THE HONORABLE MONTE WATKINS, PRESIDING JUDGE

APPEARANCES:

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1 THE COURT: Mr. Martin, how long do you anticipate?

2 MR. MARTIN: Judge, I have got two witnesses. The
3 first one should be very brief. About an hour.

4 THE COURT: Max.

5 MR. MARTIN: I don't know about the State's
6 examination.

7 THE COURT: Well, the reason I am inquiring I have to
8 leave at three. I'm going to an oral surgeon at three-thirty.

9 MR. MARTIN: I don't believe that my examination will
10 last more than an hour. I'm not sure about the State's cross.

11 MR. MOORE: And, Judge, I don't know if you want to
12 bring Mr. Guilfoy out, before this or not, but it's come to
13 the State's attention, in coming in, that there is one of the
14 jurors outside, that, I understand, has been subpoenaed by Mr.
15 Martin. And I would ask the Court to -- Rule 606 (d), that
16 subpoenaing a juror certainly is, I submit, highly irregular,
17 but very, very limited under Rule 606 (b).

18 THE COURT: Yes, it is.

19 MR. MOORE: And I would like to address that first, if
20 at all possible. And I don't know if he's going to join us or
21 not.

22 (Mr. Guilfoy was brought into the courtroom.)

23 THE COURT: All right.

24 We have Mr. Guilfoy before the Court now. And you
25 want to deal with the jury issue.

1 MR. MOORE: Well, certainly, Your Honor. I think,
2 again, as I say, subpoenaing a trial juror to a post
3 conviction petition is highly irregular, as well as, since it
4 is limited to only whether or not the jury received any
5 extraneous --

6 THE COURT: Outside influence.

7 MR. MOORE: And I don't know that there has been
8 anything that I have seen -- and, I apologize, maybe it's in
9 the pleadings and I just overlooked it, but I don't recall
10 seeing any allegation of that occurring.

11 MR. MARTIN: Your Honor, that's not the allegation.
12 can explain it fairly briefly.

13 It is an unusual thing to do, but the Court of
14 Criminal Appeals ruling, in this case -- one of the issues
15 that's raised here as an ineffective assistance of counsel
16 claim, was, also, attempted to be raised as plain error on
17 direct appeal.

18 The Court of Criminal Appeals, the sole reason they
19 declined to review the issue for plain error -- it's the issue
20 dealing with the videotapes as substantive evidence -- is
21 because they could not tell from the record, whether or not
22 the jury watched the video, despite the fact that the record
23 was clear that they had received the video in evidence, as
24 substantive evidence.

25 The examination is not to get into the deliberations

1 at all. The examination is, essentially: "Were you a juror
2 in this case, did the jury watch the videos?" Just to be able
3 to satisfy the Court of Criminal Appeals and establish the
4 record in this case.

5 MR. MOORE: And, Judge, that is exactly what the Rule
6 says, cannot be asked.

7 THE COURT: Right. About their deliberations.

8 MR. MOORE: Or, about anything that -- any matter that
9 occurred behind their closed doors.

10 THE COURT: Right, and that's -- well, specifically,
11 under inquiry into -- well, (as read:) *"On inquiry a juror
12 may not testify as to any matter, or statement occurring
13 during the course of the jury's deliberations; or, to the
14 effect of anything upon the juror's mind or emotions as
15 influencing that jury, that juror.*

16 MR. MARTIN: Your Honor, and that is precisely the
17 argument that we made at the Court of Criminal Appeals when
18 this issue was, actually, raised by the State as to why this
19 issue couldn't be considered as plain error. The State is the
20 one that raised this issue on appeal and made this an issue in
21 the case. Obviously, not this office but the Attorney
22 General's Office. And that was our argument, is that we're
23 not allowed to get into jury deliberations. We argued that at
24 oral argument when it came up. We submitted that in a reply
25 brief.

1 I understand the position of the State here. And I
2 understand Your Honor's concerns with it. What I would
3 suggest to the Court is if the testimony is not going to be
4 allowed that I, at least, be allowed to make an offer of
5 proof. It's, essentially, three questions that I need to ask
6 Ms. McCurdy. And I, at least, need to be able to make an
7 offer of proof in the case.

8 MR. MOORE: And, Judge, I would submit, why this is
9 "No, you do not do this," whether you style it as "offer of
10 proof," or whatever. A juror may not testify.

11 THE COURT: I mean, the Rule is pretty clear. I don't
12 know how -- why it came up in the appeal, at all. But, you
13 know, we just -- that's just something we just can't do, get
14 into jury deliberations and what they did during their
15 deliberations.

16 I know you see these crazy things on TV sometimes.
17 But, in a court of law we cannot get into those kinds of
18 things. And I just, simply, can't allow it. I just can't do
19 it, under the Rule.

20 MR. MARTIN: Judge, will Your Honor allow me to make
21 that offer of proof? Obviously, the offer of proof is not for
22 Your Honor to consider as evidence, but I need to be able to
23 preserve the record.

24 And, again, this isn't an issue that we originated.
25 This came from, not only the Attorney General's Office, but

1 from the Court of Criminal --

2 THE COURT: And how did it come from the Attorney
3 General? I am not privy to that.

4 MR. MARTIN: The Attorney General's Office, they filed
5 in their response brief, to our direct appeal, said that it is
6 unclear from the record whether or not the jury watched the
7 videos, therefore, that issue can't be addressed as plain
8 error, because one of the five grounds for addressing a claim
9 as plain error is that the record is complete as to what
10 occurred in the trial.

11 MR. MOORE: And, Judge, I think -- and I didn't go
12 back and read with a fine tooth comb, but the record as to
13 whether the jury was brought out into open court or watched in
14 open court, or whatever happened there, may well have been
15 what the State Attorney General's Office was dealing with,
16 because, I would assume, they know Rule 606 (b), as well; and,
17 that would not have been something that would be reasonably
18 raised.

19 But the idea of going back to what I just said -- he
20 says he wants to make an offer of proof, that would be by
21 having the juror testify, and that is exactly what the Rule
22 says "a juror may not testify," period.

23 THE COURT: Right. And I'm inclined to go with that.
24 I understand your dilemma, Mr. Martin, but I just can't go
25 against the Rule, as I read it. I can't do that.

1 MR. MOORE: Judge, if I could, I do have the -- the
2 Appellate Court, on page twenty says (as read:)
3 *"Additionally, comma, because the record contains no*
4 *indication that the jury watched either of the recordings or*
5 *the forensic interviews, comma, the defendant cannot*
6 *demonstrate that the erroneous admission of this evidence*
7 *adversely effected one of his substantial rights,"* et cetera.
8 Not that we need to have more evidence in the record. They
9 ruled on what was in the record.

10 MR. MARTIN: Your Honor, substantial right is one of
11 the five grounds for plain error review. What the Court is
12 saying is that they -- we can't establish that a substantial
13 right was affected, that's one of the five grounds, because we
14 can't demonstrate that the jury watched the video.

15 MR. MOORE: And that's just the State of the record.

16 THE COURT: That may be another issue for appealing,
17 appeal of whatever I may rule, but -- well, I am ruling now.
18 I can't allow it. So, that's an issue that can be taken up.

19 MR. MOORE: Thank you, Your Honor. May the juror be
20 excused?

21 THE COURT: Yes.

22 MR. MARTIN: Thank you, Ms. McCardy. Thank you for
23 being here.

24 THE COURT: Okay. I do need to finish up my morning
25 docket, very quickly, and, then, we'll go right into the PCR.