

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs March 22, 2005

**STATE OF TENNESSEE v. MELISSA ANN LAYMAN**

**Appeal from the Criminal Court for Anderson County  
No. A3CR0257 James B. Scott, Jr., Judge**

**No. E2004-01471-CCA-R9-CD - Filed August 17, 2005**

The Appellant, Melissa Ann Layman,<sup>1</sup> seeks interlocutory review of the Anderson County Criminal Court's ruling rejecting a plea agreement between Layman and the District Attorney General. The plea agreement provided that Layman's indictment for voluntary manslaughter would be dismissed and that Layman would receive pretrial diversion for reckless homicide under a separate count of the indictment. Following a hearing, the trial court denied the State's request to dismiss Layman's indictment for voluntary manslaughter, finding dismissal "contrary to the manifest public interest" and refusing to approve the memorandum granting pretrial diversion because Layman's indictment for voluntary manslaughter statutorily disqualified her from seeking diversion. *See* Tenn. R. Crim. P. 48(a), Tenn. Code Ann. § 40-15-105(a)(1)(B)(iii)(j) (2003). Finding no error, the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed**

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH, J., joined, and JAMES CURWOOD WITT, JR., J., concurred in result only.

M. Sue White, Seymour, Tennessee, for the Appellant, Melissa Ann Layman.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; James N. Ramsey, District Attorney General; and Jan Hicks, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**Procedural History**

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<sup>1</sup> The Appellant's name is spelled "Layman" in the indictment and in various documents throughout the record. The Appellant signs her name "Laymon"; the transcript of the record uses the name "Laymon," while the technical record uses the name "Layman." Nonetheless, it is the policy of this court to utilize the name as charged in the indictment to maintain consistency in court records.

On August 5, 2003, an Anderson County grand jury returned a two-count indictment against the Appellant charging her in alternative counts with voluntary manslaughter and reckless homicide. The Appellant's pretrial diversion Memorandum of Fact recites that she and the victim, Ginger Powers, were involved in an intimate relationship and shared a residence in Oliver Springs. On July 7, 2003, an argument ensued between the Appellant and the victim at their residence. In the Appellant's statement of facts contained in the Memorandum of Understanding, she recounts that the argument turned physical when the two were in the bedroom:

I started struggling with her and we fell off the bed still fighting . . . [.] As we rolled around the floor fighting my hand touched a cord that was laying in the floor. I grabbed the cord and it went around her neck. We continued to struggle and then she was just still.<sup>2</sup>

The Appellant stated that she was scared and fled the house without calling the police or telling anyone what had happened. Approximately three days later, the Appellant returned to the residence and dragged the victim's body from the bedroom into the hall, believing the body would be discovered more quickly in that location. Eventually, the Appellant confided in her family, who called the police. Throughout her statement, the Appellant recites that the victim was the initial aggressor and that she "was just trying to keep [the victim] from killing me."

The post-mortem examination revealed that the deceased had a broken nose and a possible abrasion to the arm. The advanced decomposition of the body made pathological findings difficult. The forensic pathologist, Dr. Cleland Blake, opined that the victim's death resulted from "asphyxia" due to "blunt traumatic injury to nasal area with fractures of nasal spine" which caused "hemorrhage and aspiration."

After being informed of the Appellant's statement, that a cord was placed around the victim's neck, Dr. Blake confirmed to the prosecutor that the Appellant's version of the facts was not inconsistent with his findings. However, he reiterated that, due to the advanced degree of decomposition of the body, he was unable to make any findings "with respect to the neck or the ligature."

The trial court conducted five hearings regarding the request by the State and the Appellant for acceptance of the plea agreement. At the first hearing, the trial court refused to accept the agreement until it had an opportunity to review the autopsy report. Two of the hearings involved review of the pretrial diversion request. During several of the hearings, the trial court permitted family members to participate. It was the prosecutor's position throughout these proceedings that the State could not prevail upon the voluntary manslaughter charge because there was "no indication of any intent to kill." The prosecutor asserted, "other than a domestic argument . . . where a fight occurred . . . the victim . . . died as a result of essentially a broken nose."

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<sup>2</sup> The assistant district attorney general informed the court that the Appellant gave a statement to the police in which she stated that during the fight "she grabbed over at a lamp cord and put that cord around the deceased's neck. And after this fight, the deceased was motionless and was dead." The Appellant's statement to the police is not included in the record.

The trial court concluded that the prosecutor's argument of insufficient evidence to convict of voluntary manslaughter was unfounded. Accordingly, the court denied the joint motion for leave to dismiss the manslaughter indictment in accordance with Tennessee Rule of Criminal Procedure 48(a). This interlocutory appeal followed.

### Analysis

The Appellant has raised three issues for our review as part of this appeal: (1) whether the trial court erred by refusing to dismiss the voluntary manslaughter charge based upon the prosecutor's assertion that it was unable to prove the elements of the offense; (2) whether the court erred in ruling that the request for pretrial diversion was not legally available to the Appellant on the charge of reckless homicide; and (3) whether the trial court erred in allowing the victim's family and the family's attorney to participate and actively seek the Appellant's prosecution.

#### I. Nolle Prosequi

After an indictment has been returned, Tenn. R. Crim. P. 48(a) governs the dismissal or nolle prosequi of a criminal charge upon motion of the State, specifically stating that “[t]he state may by leave of court file a dismissal of an indictment, . . . and the prosecution shall thereupon terminate. . . .” Thus, while at common law the State was free to nolle prosequi a case at any time, this “unbridled discretion” is now restrained by requiring leave of the trial court before dismissing a charge after an indictment has been handed down. *State v. Harris*, 33 S.W.3d 767, 770 (Tenn. 2000). This rule seeks to balance the prosecutor's need for “freedom to exercise legitimate discretion with the need to prevent abuse of the power to dismiss.” *Id.* However, while the rule grants the trial court some control over the prosecutor's decision, the control is extremely limited. The Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution should be terminated.<sup>3</sup> *Id.* (quoting *United States v. Cowan*, 524 F.2d 504, 513 (5<sup>th</sup> Cir. 1975)). Thus, “[t]he exercise of its discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to the manifest public interest.” *Id.*; see also *State v. Landers*, 723 S.W.2d 950, 953 (Tenn. 1987) (applying the “manifest public interest” test to analysis of Tenn. R. Crim. P. 48(a)). Additionally, in order for an appellate court to affirm a trial court's decision to refuse the State's request to nolle prosequi a charge, the record must reflect “a clear showing of [the trial court's] reasons for denying the motion . . . .” *Harris*, 33 S.W.3d at 771.

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<sup>3</sup> The district attorneys general for this State are officers within the executive branch of government, and their decisions of whether to prosecute and what charge to bring before a grand jury are decisions that generally rest in the prosecutor's discretion. As an incident of the constitutional separation of powers, the courts are not to interfere with the free exercise of their discretionary authority in their control over criminal prosecution. See *State v. Gilliam*, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995). “[W]hen a criminal prosecution has gone beyond the charging stage, that is to say, after indictment is returned, the matter [is considered to have] left the [sole] domain of the prosecutor and . . . entered into the realm of the court.” *Pace v. State*, 566 S.W.2d 861, 868 (Tenn. 1978) (Henry, C.J., concurring).

At the March 5<sup>th</sup> hearing, the trial court expressed concern that the State's attempt to dismiss a case where death occurred after the accused had "wrapped" an "electrical cord" around the victim's neck during a physical encounter would send the wrong message to the community. Again, at the May 17<sup>th</sup> hearing, the trial court expressed "great concern" with regard to the Appellant's apparent culpability and lack of appropriate penalty.<sup>4</sup> Specifically, the trial court concluded:

I do find that within the record itself there is that which gives me great concern, and it may be to or contrary to the manifest public interest. . . .

Those facts after the crime reflect to me something that I do not want to set a precedent here where someone has taken the life of somebody and gone off and left that person. Then comes here with the circumstances where they nolle that which the Grand Jury is returned and try to divert this person without an associated punishment for crimes.

During the various hearings, the prosecutor repeatedly asserted that based upon the facts of the case, the State lacked sufficient evidence to establish an "intent to kill." Moreover, in a letter to the attorney retained by the victim's family, the district attorney general advised:

. . . Our office has submitted a notice of nolle prosequi based on the doubt that the elements of the offense of voluntary manslaughter (specifically that the requirement that the defendant acted intentionally or knowingly with respect to the death) can be proved under *State v. Page*, 81 S.W.3d 781 (Tenn. Crim. App. 2002). The State must prove [the] defendant killed intentionally or at the very least knew that her conduct was reasonably certain to cause death. . . .<sup>5</sup>

Voluntary manslaughter is defined as the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner. Tenn. Code Ann. § 39-13-211(a) (2003). Whether the victim's death resulted from knowing or accidental conduct is a question of fact for the jury. While we are cognizant of the prosecutor's concern, we also recognize that the element of intent is seldom proven by direct evidence and may be deduced by the trier of fact from the nature and character of the offense and from all of the circumstances surrounding its commission. Dismissal of an indictment pursuant to Tenn. R. Crim. P. 48(a) is warranted if the court is satisfied that the reasons advanced for dismissal are substantial, supported by a factual basis, and are compatible with the public interest. *See Korematsu v. United States*, 584 F. Supp. 1406, 1411 (N.D. Cal. 1984).

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<sup>4</sup> The plea agreement and memorandum provided that upon dismissal of the manslaughter indictment, the Appellant would be placed on probation for a period of two years for the offense of criminally negligent homicide and that, upon successful completion of the probationary period, the charge would be dismissed and the records expunged.

<sup>5</sup> In *State v. Page*, a panel of this court concluded that submission of a jury instruction which charged an incorrect culpable mental state for second degree murder constituted reversible error. 81 S.W.3d at 789-93. In *State v. Faulkner*, 154 S.W.3d 48, 57-61 (Tenn. 2005), our supreme court held that a jury instruction error, such as the error in *Page*, was harmless when all of the requisite mental states of the indicted offense are charged to the jury.

We conclude, as did the trial court, that the prosecutor's assessment that the evidence in this case is insufficient is not supported by a factual basis and is contrary to the public interest. Moreover, we conclude that the prosecutor's legal assessment of the case, based upon the holding in *Page*, has been vitiated by our supreme court's decision in *Faulkner*.<sup>6</sup> Indeed, the facts known to the prosecutor prior to indictment remained essentially the same as the facts known on the date the State moved for dismissal of the indictment.<sup>7</sup> The office of district attorney general, as an agency of the executive branch of government, is charged with the duty to see that the laws are faithfully executed and enforced in order to maintain the public's confidence in the ordered rule of law. In fulfillment of this function, we conclude that the public's interest is not served by dismissal of the manslaughter charged based upon the reasons advanced by the prosecutor.<sup>8</sup> See *United States v. Biddings*, 416 F. Supp. 673, 675 (N.D. Ill. 1976) (dismissal of the indictment by the prosecutor based upon conflicting evidence in a serious case would nullify the grand jury system). It is undisputed that voluntary manslaughter is a serious crime. Because we conclude that dismissal of the indictment is clearly contrary to manifest public interest, the Appellant's issue is without merit.

## **II. Denial of Diversion- Reckless Homicide**

A defendant who is indicted for voluntary manslaughter is disqualified from seeking suspension from the prosecution for that crime for purposes of pretrial diversion. Tenn. Code Ann. § 40-15-105(B)(iii)(j) (2003). In view of our holding that the trial court was warranted in denying dismissal of the voluntary manslaughter indictment, the Appellant's claim that the court erred in refusing to accept the memorandum of understanding is without merit.

## **III. Participation of the Victim's Family and Retained Counsel**

Finally, the Appellant contends that she was "denied due process and her right to a fair hearing where the trial court allowed the victims and the family's attorney to participate as a third party in direct opposition to both the [Appellant] and the State." During the course of the proceedings, the victim's family was present, and the trial court explained in great detail the nature of the proceedings and potential consequences. Additionally, beginning at the March 5<sup>th</sup> hearing, the trial court conducted a dialogue with members of the victim's family. When these conversations occurred, the family members were not sworn witnesses, nor were they subject to cross-examination. The Appellant's counsel objected, requesting that the statements be stricken from the record because they contained hearsay and were not taken under oath. This request was denied.

At the April 5<sup>th</sup> hearing, the trial court again consulted with various members of the victim's family and asked them if they had consulted an attorney, and an unidentified man

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<sup>6</sup> The district attorney general's letter citing to the *Page* holding was written April 27, 2004. The supreme court's decision in *Faulkner* was filed January 28, 2005.

<sup>7</sup> A prosecutor should recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law. ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION, std. 3.6(c) ( \_\_\_d ed. year).

<sup>8</sup> Notwithstanding the reasons advanced, the district attorney general advised counsel for the victim's family that should the court reject dismissal of the indictment, his office would "proceed and present proof to the jury."

responded that the family “thought the State was supposed to be” their attorney. The court then informed the family that they could present testimony at the hearing regarding the request to nolle prosequi the manslaughter charge. Prior to the May 15<sup>th</sup> hearing, the attorney for the victim’s family submitted a brief arguing against the State’s request to nolle prosequi the voluntary manslaughter charge. At the hearing, counsel participated and was allowed to argue at great length against the State’s request over the objection of both the Appellant and the State.

At the conclusion of the hearing, the trial court stated on the record that it would not consider any documents filed by the family’s attorney, and the documents were accordingly placed under seal. We acknowledge the provisions of Tennessee Code Annotated section 8-7-401 (2003), which authorize the private employment of counsel for purposes of participating as co-counsel with the district attorney general, as well as Tennessee Code Annotated section 40-38-114(c) (2003), which provides that “[t]he rights of the victim do not include the authority to direct the prosecution of the case.” Nonetheless, we conclude that the victim’s rights under the Tennessee Constitution are paramount when the State requests dismissal of the prosecution after the indictment has been returned.

Article I, Section 35 of the Tennessee Constitution, known as the Victim’s Rights Amendment, gives the victim of a crime “[t]he right to be heard, when relevant, at all critical stages of the criminal justice process as defined by the General Assembly.” *State v. Ring*, 56 S.W.3d 577, 581-82 (Tenn. Crim. App. 2001). The General Assembly enacted legislation to implement and make fully operational the provisions of the constitution, commonly known as the Victim’s Bill of Rights. Tenn. Code Ann. § 40-38-101(b) (2003).

Clearly, the hearings, which involved dismissal of the manslaughter indictment, constituted a critical stage of the criminal proceedings. Moreover, we disagree with the Appellant that the family members, who were afforded the opportunity to be heard, should first have been placed under oath. Various members of the victim’s family were permitted to speak simply to express their point of view, rather than attempting to direct the prosecution. We conclude that the testimony, albeit unsworn, was consistent with the purposes of the Victim’s Bill of Rights Act and certainly no less important than affording to victims the right to file with the sentencing court a victim’s impact statement. *See* Tenn. Code Ann. § 40-38-202 (2003). Of equal importance is the fact that the trial court did not consider the statements of the various family members of the victim as evidence nor rely on the various pleadings filed by counsel for the victim’s family. Accordingly, this issue is without merit.

#### **CONCLUSION**

For the foregoing reasons, we affirm the judgment of the Anderson County Criminal Court.

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DAVID G. HAYES, JUDGE