

The Tennessee Supreme Court Keeps Reversing Itself, and Criminal Defense Attorneys Are Worried

Ron Ramsey's 2014 election gambit might have failed, but the state has a right-leaning court now anyway

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In 2012, the Tennessee Supreme Court ruled that a defendant who pleads guilty to a crime can appeal the judgment if exculpatory evidence is discovered later.

Four years later, the same court changed its mind.

What occurred in the intervening four years to necessitate such a pivot by the state's highest court? Nothing, according to Justice Sharon G. Lee.

In the 2016 case — *Frazier v. State of Tennessee* — “there is no reason for this Court to reverse its previous finding,” Lee, then the court's chief justice, wrote in her dissent from

the majority. Instead, she argued, the court should have relied on *stare decisis*, the legal doctrine of precedent, in upholding the 2012 decision in *Wlodarz v. State of Tennessee*.

But something had changed over the four years separating *Wlodarz* and *Frazier* — the people who make up the court. Gov. Bill Haslam appointed three justices to the five-member body during an 18-month period beginning in July 2014. (The last of the three, Roger Page, was not seated on the court until just after oral arguments in the *Frazier* case, and thus did not participate in the decision.)

In 2015, then-Lt. Gov. Ron Ramsey heralded Justice Gary Wade’s impending retirement as a “historic opportunity to give Tennessee its first ever Republican Supreme Court majority.” Though Ramsey’s 2014 effort to unseat Wade and other Democratic appointees to the court in a high-profile retention election was unsuccessful, the former speaker of the Senate and current Blountville farmer is surely enjoying the fruits of his labor.

The rapid makeover of the court has caused a noticeable and nearly instantaneous shift in its ideology — a shift that a growing number of criminal defense attorneys say threatens the civil liberties of Tennesseans both guilty and innocent. Concern among members of the criminal defense bar has been bubbling up for a few years, but it came to a head last week following two decisions by the Tennessee Supreme Court.

In *State of Tennessee v. Christensen*, handed down Friday, a majority of the court ruled that a man’s numerous “No Trespassing” signs were not sufficient to revoke the implied public (and police) right to enter the property. Without a search warrant, police officers had driven down James Robert Christensen Jr.’s driveway, past the “No Trespassing” signs posted there, then knocked on his door, and when Christensen opened it, reportedly smelled the odor of methamphetamine being manufactured, resulting in his

arrest and eventual conviction. Lee, appointed to the court by former Democratic Gov. Phil Bredesen, again dissented from the majority, which argued that a fence or locked gate would be required to prevent police officers from approaching the home without a warrant, rather than mere “No Trespassing” signs.

Earlier in the week, the state Supreme Court overturned a longstanding precedent that law enforcement must satisfy a two-pronged test of an informant’s veracity and basis for knowledge when securing a search warrant. Now, thanks to the Supreme Court’s decision, a judge may consider “the totality of the circumstances” when determining probable cause for a search warrant.

“These opinions have broadened police powers and limited the freedom from governmental searches and seizures that Tennessee citizens have traditionally enjoyed,” says Sara Compher-Rice, president of the Tennessee Association of Criminal Defense Lawyers and an attorney in Knoxville. “So while the relaxation of these constitutional protections may have served to uphold one conviction today, it may cost us all liberty tomorrow.”

It’s a sentiment echoed by other defense attorneys and state Supreme Court watchers. According to David Raybin, a Nashville attorney with Raybin & Weissman, it’s easiest to see the Supreme Court’s ideological shift in its rulings on Fourth Amendment cases.

“You’re granting the police more and more authority with less and less oversight,” Raybin says. “Ultimately, it’s allowing the police the discretion to stop people, search their homes, seize their property.”

The court’s newfound law-and-order bent does not exist solely in the imaginations of hard-charging liberal reformers. State Rep. William Lamberth, a Republican from

Cottontown, himself an attorney and chairman of the House Criminal Justice Committee, has noticed it too — and he’s a fan.

“What the change in the court in the last few years is going to ensure is that the guilty are actually held accountable and that the innocent are still protected,” Lamberth says.

“I’m very proud of the work the court’s done in the past few years to undo some previous decisions that have been overly protective of sex offenders and repeat violent felons. Unfortunately, I think our court in Tennessee in the past has made rulings that have leaned too much towards protecting individuals that have been convicted of some very heinous crimes.”

But critics argue that increased police powers are inherently detrimental to innocent citizens, who are now more likely to be subjected to search and seizure.

David Raybin’s son Ben, who also practices with Raybin & Weissman — where he runs the firm’s Tennessee Supreme Court Hot List blog — cites several examples of the court’s changing ideology, including the *Wlodarz/Frazier* reversal. He also lists the court’s 2016 reversal of its 2013 decision on the so-called “community caretaking” doctrine.

The court ruled in 2013 that a police officer was not justified in arresting a man asleep in his car on a suspected DUI charge, because the officer was acting “absent probable cause or reasonable suspicion and was not otherwise acting in a community caretaking role.” Just three years later, the judges changed their minds (this time with Justice Lee signing on). They said the 2013 decision was wrongly decided and held that police officers checking on similarly parked cars were exempt from warrant requirements in the

Fourth Amendment and the Tennessee Constitution because the officer was reasonably checking on the welfare of the defendant.

This whiplash-inducing jurisprudence will lead to the pendulum swinging further toward prosecutors and law enforcement officials and away from criminal defendants, some lawyers say. The Tennessee Supreme Court's shift is part of a national trend to more closely adhere to the federal Constitution, eliminating state-level rights that historically have extended beyond those promised by the federal government.

“Since 2014, the Tennessee Supreme Court has aggressively sought to federalize Tennessee law by striking down state-specific protections that prior iterations of the court had developed under Tennessee’s state constitution and civil rules,” says Daniel Horwitz, a Nashville attorney and the editor of ScotBlog, a website devoted to the state Supreme Court. “A few significant state-level protections still remain. However, given that prior precedent — no matter how recent or firmly established — has had virtually no influence on the Tennessee Supreme Court’s decisions to overturn its previous rulings, it stands to reason that these protections are vulnerable to being abandoned as well.”