

4 Nashville criminal cases overturned in 35 days



Stacey Barchenger, sbarchenger@tennessean.com 10:02 p.m. CDT August 16, 2015



(Photo: Illustration by Martha Stroud and Bill Campling / The Tennessean)

STORY HIGHLIGHTS

- In just more than a month, four Davidson County criminal cases were overturned.
- Legal analysts say the reasons why are rare, but the timing probably is just a coincidence.
- The last case to be overturned because of prosecutorial misconduct was in 2012.
- Only one case had been overturned because of prosecutor error between 2010 and 2014.

The Tennessee Court of Criminal Appeals overturned four Nashville criminal cases in a 35-day period this summer, a series of decisions legal analysts say is unusual in such a short span of time.

The four cases involved men who were convicted of murder, sexual battery of a child, aggravated rape and child neglect. The Court of Criminal Appeals ordered new trials in three of the cases and threw out the conviction in the child neglect case.

Even more unusual is the reasons the cases were overturned.

The appeals court judges ruled that the prosecutors in three cases committed misconduct or made errors that warranted new trials. In the fourth, the judges said there was insufficient evidence to support the child neglect conviction.

A review of online Criminal Court of Appeals summaries shows it is rare that entire cases in Davidson County are overturned because of misconduct or insufficient evidence.

Since January 2010 — not including the current string of reversals — the appeals court overturned only one other case because of insufficient evidence. In the same time, the judges overturned only one other case because of prosecutorial misconduct.

Don Cochran, a Belmont University College of Law professor and former federal prosecutor, reviewed the recent appeals court opinions at The Tennessean's request. He said it was unusual to have so many reversals from one county in such a short time. It was even more rare to have three cases overturned because of prosecutor mistakes made in closing arguments, he said.

But he hesitated to draw a broader conclusion about whether the appeals court was sending a message to local prosecutors. Instead, Cochran chalked it up to coincidence.

He said the appeals court appeared to be taking a conservative interpretation of rules about what can and cannot be said during closing arguments. He said law students are taught that in opening statements, lawyers can talk only about what evidence will show. But in closing arguments, it's more than a recitation of facts, he said. Closing arguments are a chance to put pieces together in a way that makes sense to a jury, he said.

"It's what makes it hard to teach, there's no formula, but you have to be persuasive," he said. "It seems like a limited view the Court of Appeals is taking on it, a limited view almost like opening statements."

David Raybin, a Nashville attorney who regularly reviews appeals court decisions, said an August 2014 Tennessee Supreme Court case could have prompted the appeals court to tighten up on closing arguments.

In that case, the state's highest court reversed a Shelby County woman's murder conviction because the prosecutor directly asked the woman to tell the jury where she was the night of the murder. The court said that violated rules related to a person's right not to testify.

Raybin said the case "changed the toleration level for improper argument."

"I think in the future you may see more reversals as the courts find prosecutors exceed the bounds of propriety," he said.

All five of the prosecutors involved in the recent cases no longer work in the Davidson County District Attorney's Office. Some left during District Attorney Glenn Funk's first days in office in September. Funk fired others.

Rob McGuire, a former candidate for district attorney who ran against Funk but left the office to start his own firm, helped prosecute two of the cases that were overturned because of misconduct. In one case, McGuire used rap lyrics during closing arguments. The appeals court said that was an attempt to appeal to racial prejudice to paint the defendant in a bad light.

McGuire said he'd used rap lyrics before without a problem. He estimated he argued more than 100 trials during his 13 years in the District Attorney's Office. These opinions came late in his career there.

"If you try as many cases as I did, at the high level I did, they're serious cases, you're going to get reversed," he said. "Everybody does. The greatest judges in the courthouse have been reversed.

"It's not that I'm sort of saying I can't learn from (the appeals rulings). Even though I disagree with their rulings, I certainly take what they say to heart. That's how you improve the law."

Torry Johnson, the former district attorney who ran the office when these cases went to trial, said the prosecutors' errors were mistakes during closing arguments, and not reflections of a chronic problem or intentional wrongdoing.

"Obviously you don't ever want to see decisions that are reversed for any reason," he said. "Ones that are reversed for arguments are really difficult to glean much from because a lot of this comes in the heat of the moment in a hotly contested case. Sometimes things are said or done that otherwise you wouldn't do in another case.

Whether that's serious enough to warrant a reversal, sometimes it is, sometimes it isn't."

Verna Wyatt, executive director of Tennessee Voices for Victims, said the reversals will take a "devastating" toll on victims, who may have to go through a second trial. She said the rulings were a reminder that prosecutors should stay focused.

"They have to be really careful," she said. "If they step over the line at any time that can be devastating to the victim. It's tough. They have a tough job."

The appeals court judgments may not be final. The four men convicted in the cases are still in prison serving their sentences, according to the Tennessee Department of Correction.

Davidson County District Attorney's Office spokeswoman Dorinda Carter said the office is communicating with victims in each of the cases, but it will be up to the Tennessee attorney general to appeal the decisions to the Tennessee Supreme Court. The attorney general has 60 days to do so.

"If no application is filed, the judgment of the Criminal Court of Appeals becomes final and the case can be set back on the trial court's docket," she said in an email.

Reach Stacey Barchenger at 615-726-8968 and on Twitter @sbarchenger.

Here's more on the four cases:



Adam W. Robinson (Photo: Metro Nashville Police Department)

Adam W. Robinson: Robinson was convicted by a jury of three counts of aggravated sexual battery involving an elementary-school-age girl at an apartment complex where he worked. Rob McGuire and Kristen Menke prosecuted the case; Bernie McEvoy represented Robinson. The Court of Criminal Appeals opinion says the prosecutor improperly commented during closing arguments about Robinson's right not to testify at trial and "engaged in a persistent pattern" of other improper argument. McGuire and Menke said they disagreed with the appeals court decision, and were responding to defense arguments that were within trial court rules. The appeals court issued its opinion June 23 and ordered a new trial.



Deandre Rucker (Photo: Metro Nashville Police Department)

Deandre D. Rucker: Rucker was convicted of first-degree premeditated murder and sentenced to life in prison for killing Demetrius O. Riley in 2009. The admitted gang member went to trial with another co-defendant. Rob McGuire and Dina Shabayek prosecuted the case; Georgia Sims and Aisha McWeay represented Rucker. The Court of Criminal Appeals opinion says that in the closing argument, prosecutors committed misconduct when they used rap lyrics that included racial epithets that "appear to have had no purpose other than to place the defendant in a bad light, appeal to racial prejudice, and, apparently, suggest the defendant occupied a position superior to that of the co-defendant." The appeals court issued its opinion July 9 and ordered a new trial.



James Thomas Jr. (Photo: Metro Nashville Police Department)

James Thomas Jr: Thomas was convicted of aggravated rape and domestic assault of a woman with whom he was living and had a prior relationship. The victim's testimony was the "linchpin" of the case, the Court of Criminal Appeals opinion says. Hugh Ammerman prosecuted the case; Robert Vaughn represented Thomas. The appeals court ruled Judge Monte Watkins should not have allowed a detective to testify about the woman's credibility and said Ammerman made an error in closing arguments by expressing his personal beliefs about the defendant not telling the truth. The appeals court issued its opinion July 23 and ordered a new trial.



Donald W. Higgins (*Photo: Metro Nashville Police Department*)

Donald W. Higgins: Higgins was convicted of aggravated child neglect based on prosecutors' assertions he aided in the neglect of a woman's daughter. In 2011, the girl was admitted to a hospital with second- and third-degree burns on her body, like she had been placed into a tub of hot water. The case was prosecuted by Brian Holmgren; Higgins' attorneys were Kelly Young and Holly Troutman. Prosecutors charged Higgins, who is not related to the girl, with neglect, saying he was criminally responsible because he knew of the injuries but did not report them or encourage the child's mother to seek help. The jury found Higgins guilty and Higgins was sentenced to 28 years in prison. The Court of Criminal Appeals opinion overturned the convictions, saying the state failed to prove Higgins was legally responsible for the child and thus could not be guilty of neglect. The appeals court issued its opinion July 27 and overturned Higgins' conviction.

Court of Criminal Appeals

There are 12 judges on the court who review cases involving felony and misdemeanor crimes. The judges sit in three-member panels when considering cases. The court was created by the Tennessee legislature in 1967.

By the numbers

The Tennessee Court of Criminal Appeals reversed or reopened the following Davidson County cases in each of the respective years. These are cases in which all charges were reversed; more cases had only one or some of the charges overturned. For the most part, cases were reversed because of errors made by judges. Any reversals because of prosecutor error are noted below.

2015: 5 cases: three for prosecutor error or misconduct, one because of insufficient evidence

2014: 2 cases

2013: 2 cases

2012: 5 cases: one because of prosecutor misconduct, one because of insufficient evidence

2011: 2 cases

2010: 5 cases

Source: Tennessee Administrative Office of the Courts summaries reviewed by The Tennessean