Appellate Retroactivity Rules: The Pipeline Doctrine

By David Raybin

It is important to be aware of developing legal issues so that if the Tennessee Supreme Court creates some new right or remedy you can take advantage of the ruling even though your case has already been adjudicated. This is known as the "pipeline doctrine" which grants limited retroactive relief if the litigant has preserved the issue in anticipation of a change in the law. This is a tricky process which requires anticipatory litigation and adequate record preservation for pending cases and appeals.

When the Supreme Court releases an opinion involving an entirely new doctrine of law, the Court frequently articulates how that doctrine will impact pending cases and appeals. For example, in *State v. Dyle*, 899 S.W.2d 607 (Tenn. 1995), the Supreme Court discussed a new jury instruction on witness identification. At page 612, the Court held that "this ruling is applicable to cases now on appeal and those cases tried after the release of this opinion." This meant that the opinion was given "*pipeline*" application.

In *State v. Walker*, 905 S.W.2d 554 (Tenn. 1995), the Court held that persons under criminal sentence who present themselves for incarceration but are turned away by the sheriff, may consider the sentence satisfied under certain circumstances. The Supreme Court held, at page 557, that "*we are also persuaded that the rule announced today should be prospective only and should apply only to cases tried or retried after the date of this opinion and in cases on appeal in which the issue has already been raised*."

In *State v. Enochs*, 823 S.W.2d 539 (Tenn. 1991), the Court found that the thirteenth juror rule applied to all cases which were pending on direct review at the time the rule was reinstated and became effective. Lawyers who raised the issue prior to the release of *Enochs*, obtained a new trial for their clients after *Enochs* was rendered. See e.g., *State v. Barone*, 852 S.W.2d 216, 218 (Tenn. 1993).

Conversely, the Court may exclude pipeline application to cases which raise an issue only on collateral relief. See, *Demonbreun v. Bell*, 226 S.W.3d 321 (Tenn.2007) ("In *State v. Burns*, 6 S.W.3d 453 (Tenn.1999), we clarified the paradigm for determining lesser included offenses. However, *Burns* is not applied retroactively on collateral review and is relevant in post-conviction cases only

where the issue is ineffective assistance of counsel and the direct appeal would have been in the appellate "pipeline" for review under *Burns. See Wiley v. State*, 183 S.W.3d 317, 327-30 (Tenn.2006).").

This "pipeline" doctrine is not limited only to criminal cases. In *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the Supreme Court adopted new rules regarding comparative fault. At page 58, the Court held that the opinion would apply to "all cases tried or retried after the date of this opinion and ***all cases on appeal in which the comparative fault issue has been raised at an appropriate stage in the litigation***." Identical language can be found in *McClung v. Delta Square Partnership*, 937 S.W.2d 891, 905 (Tenn. 1996) (landlord liability for crimes committed against innocent third parties by criminals on the premises); *Broadwell v. Holmes*, 871 S.W.2d 471, 477 (Tenn. 1994) (parental immunity); and *Hataway v. McKinley*, 830 S.W.2d 53, 60 (Tenn. 1992) (the "lex loci delicti" choice of law doctrine in a wrongful death action). See also, *Cole v.Woods*,548 S.W.2d 640 (Tenn. 1977)("We limit the retrospective application of this decision to this case and to those others wherein the issue of imputed contributory negligence was raised in the trial court by appropriate pleadings and proof, now pending motions for new trial or in the pipeline of appellate review. In fairness to the trial judge and to the Court of Appeals, it should be stated that in this regard they were prompted by existing decisional law of the state and it would be unfair to charge them with error.").

On occasion a Court neglects to articulate how a decision will "run" and must resolve the question in a later appeal:

> "We are constrained to note, however, that the absence of language directing the retroactivity of the *Jordan* decision was a product of oversight rather than the result of a judicial decision to limit Jordan to prospective application only. ... We hold that Jordan [loss of consortium damages were recoverable under wrongful death statute] applies retroactively to: (1) all cases tried or retried after the date of our decision in Jordan; and (2) to all cases pending on appeal in which the issue decided in Jordan was raised at an appropriate time. We are aware that our holding will require retrial of some cases and the expenditure of additional judicial resources. Still, we cannot perpetuate denial of retroactive application of Jordan when that result was not our intention."

Hill v. City of Germantown, 31 S.W.3d 234, 240 (Tenn. 2000).

More frequently the appellate courts give a new decision pipeline application even without an express decision articulating retroactivity. For example, *State v. Rickman*, 876 S.W.2d 824 (Tenn. 1994) (limitations on proof-of-other-crimes in child sex abuse cases) did not articulate how it would apply in the future. Yet, the Supreme Court itself applied *Rickman* to pipeline appeals. See e.g. *State v. McCary*, 922 S.W.2d 511 (Tenn. 1996), and *State v. Dutton*, 896 S.W.2d 114 (Tenn. 1995), *State v. Woodcock*, 922 S.W.2d 904 (Tenn. Crim. App. 1995). See also *State v. Stokes*, 24 S.W.3d 303 (Tenn.2000) (*State v. Burns* applied to determine lesser- included offense in case which was in appellate "pipeline" prior to release of Supreme Court's *Burns* opinion).

The lesson to be learned here is that attorneys should be aware of pending issues in the Tennessee Supreme Court and preserve the issue in anticipation of a possible change in the law so the client can retroactively take advantage of the new ruling. See, State *v. Wallen*, 1995 WL 702611,Tenn.Crim.App.,1995. ("The Supreme Court released its opinion in *Brown* on June 1, 1992, approximately one month after appellant's trial. While the holding in *Brown* is not to be applied retroactively, *see e.g., State v. Willie Bacon, Jr.*, No. 1164 (Tenn.Crim.App., Knoxville, Aug. 4, 1992), *perm. to appeal denied*, (Tenn.1992), it is applicable to cases that were "in the pipeline." *See State v. Brooks*, 880 S.W.2d 390 (Tenn.Crim.App.1993), *perm. to appeal denied*, (Tenn.1994). Counsel raised the *Brown* issues in appellant's motion for new trial and has once again raised them on appeal.").