

## STATE of Arkansas v. TIEN Ngoc Doan and Trung Do

CR 96-348

933 S.W.2d 369

Supreme Court of Arkansas  
Opinion delivered November 11, 1996

1. APPEAL & ERROR — MERITS OF TRIAL COURT'S SUPPRESSION ORDER NOT CONSIDERED IN PREVIOUS APPEAL — ORDER WAS NOT SUSTAINED IN ITS ENTIRETY. — Where the supreme court had not considered the merits of the trial court's suppression order in the previous appeal in the same matter but, instead, had affirmed the trial court's order on the sole basis that the State's brief was not timely filed, the supreme court did not sustain the trial court's order "in its entirety" in order to effect a complete bar to subsequent prosecution as contemplated by Ark. R. App. P. — Crim. 3(d); the previous decision was more akin to a dismissal of the State's appeal.
2. APPEAL & ERROR — PETITION FOR REHEARING GRANTED IN PART — PETITION FOR REVERSAL OF DISMISSAL ORDER DENIED. — The supreme court granted rehearing for the purpose of holding that the State's appeal was dismissed and that the court was not affirming the trial court's suppression order so as to bar further proceedings in the matter, noting that the effect of its decision was to allow the State to prosecute the respondents but without the suppressed statements available as evidence; the court also denied the State's petition that it reverse its order of dismissal.

Petition for Rehearing; granted in part; denied in part.

*Winston Bryant*, Att'y Gen., by: *Kelly K. Hill*, Asst. Att'y Gen.,  
for petitioner-appellant.

*Sam Sexton III* and *Jeanne Ann Whitmire*, for respondents-appellees.

PER CURIAM. Petitioner State of Arkansas requests rehearing on several grounds and seeks clarification of whether this court's

decision in *State v. Tien*, 326 Ark. 71, 929 S.W.2d 155 (1996) (*Tien I*), affirmed the trial court's decision to suppress confessions or, alternatively, dismissed the State's appeal. As the State points out, the difference between affirmance of the trial court's order and dismissal of the State's appeal in this context is important in that if our decision in *Tien I* affirmed the trial court's suppression order "in its entirety," this would bar further proceedings against respondents Tien and Trung under Arkansas Rule of Appellate Procedure — Criminal 3(d).

In *Tien I*, the respondents filed a motion to affirm the trial court's order in this court due to the State's failure to file its appellate brief in timely fashion, and the State responded and simultaneously moved that we accept its late brief. Because the State's brief had not been filed by the final extension date, we quoted from *State v. Parkman*, 325 Ark. 35, 923 S.W.2d 281 (1996), where we warned of future dismissals in the event the State's brief in State appeals was not filed by the date of the final extension. In light of the fact that the State's brief had not been filed by the final-extension date in this case, we affirmed the order of the trial court in *Tien I* and dismissed the appeal.

[1] It is clear from the history of this matter outlined above that we did not consider the merits of the trial court's suppression order in *Tien I*. Rather, we affirmed the trial court's order on the sole basis that the State's brief was not timely filed. Thus, we did not sustain the trial court's order "in its entirety" in order to effect a complete bar to subsequent prosecution as Appellate Rule — Criminal 3(d) contemplates. Our decision in *Tien I* is more akin to a dismissal of the State's appeal as we discussed in *State v. Parkman*, *supra*.

[2] We, therefore, grant rehearing for the purpose of holding that the State's appeal is dismissed and that we are not affirming the trial court's suppression order so as to bar further proceedings in this matter. The effect of our decision is to allow the State to prosecute the respondents, should it so desire, but without the availability of the suppressed statements as evidence. At the same time, we deny the State's petition that we reverse our order of dismissal.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. The State asks this court to correct its earlier mistakes in dismissing this case because the Attor-

ney General filed a late brief. The State points out that this court's earlier opinion granted the defendants' request to affirm the trial court's suppression order on its merits, thereby barring the State from further prosecuting defendants. Without actually saying it had erred by using the word "affirm," the majority court now says, "It is clear from the history of this matter outlined above that we did not consider the merits of the trial court's suppression order in *Tien I*." In short, even when the majority court recognizes its mistake, it cannot concede the mistake in plain terms. I submit that when this court sends mixed signals in the same opinion such as "affirm" and "appeal dismissed," nothing about that opinion can be considered clear.

However, the primary problem with the majority court's supplemental opinion is that it fails to concede its failure to follow its rules and long-established precedent when dismissing the state's appeal. As I previously have emphasized, this court has *never* dismissed a criminal appeal because an attorney failed to file a timely brief. See Glaze, J., dissenting opinions, *State v. Tien*, 326 Ark. 71, 72, 929 S.W.2d 155 (1996); *Bowden v. State*, 326 Ark. 266, 931 S.W.2d 104 (1996). This court's unwillingness to admit its errors in this case does little to preserve the integrity of its decisions. In my sixteen years on the appellate bench, this decision is undoubtedly the worst I have seen from this court. I would reverse *Tien I* before its precedential value causes further harm.