IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

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Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

v.

ROBERT GLEN COE,

Appellant

No. M1999-01313-SC-DPE-PD
Shelby County
No. B73812

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE SHELBY COUNTY CRIMINAL COURT

REPLY BRIEF OF ROBERT GLEN COE

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REPLY BRIEF

Counsel for Appellant, Robert Glen Coe, hereby submits this reply brief responding to both the State's brief and assertions made by the State in oral argument.

I. The Solicitor General Incorrectly Stated That All Witnesses But Dr. Merikangas Found Robert Coe Competent.

The issue before the trial court was whether Robert Coe will be competent to be executed on March 23, 2000. The evidence presented overwhelmingly preponderated towards a finding of incompetency to be executed. A brief outline of the overwhelming proof is stated below:

A. Dr. William Kenner.

Dr. Kenner testified that in December, 1999, and January, 2000, he examined Robert Coe on four occasions (VII, 297- IX, 327) and from those examinations along with a review of his medical records, was able to diagnose Robert Coe with Dissociative Identity Disorder ("DID") (IX, 340-341, 390). Dr. Kenner testified that "stressors" cause Robert Coe to dissociate and become psychotic such that he

would not understand the fact of his impending execution (IX, 344-345). Dr. Kenner testified within a reasonable degree of medical certainty that Robert Coe would dissociate under the stress of the imminent execution which would render him incompetent on March 23, 2000. In other words, Dr. Kenner diagnosed Robert Coe as having a severe mental illness which causes Robert Coe to phase in and out of competency dependent upon the presence of stressors in his life. A good analogy would be the case wherein a court is trying to determine whether an Alzheimer patient was competent when the patient executed a will. The question is not whether the Alzheimer patient was competent on some occasion when she was seen by a doctor, but whether she was lucid at the time of the will making. By analogy, the issue before this Court is not whether Robert Coe was competent at the moment he was seen by a health professional, but whether Robert Coe will be competent to be executed on March 23, 2000. Dr. Kenner clearly testified that Robert Coe's DID coupled with the stress of an impending execution will within a reasonable degree of medical certainty cause Robert Coe to be incompetent on March 23, 2000. Thus, the State's simplistic recital of the fact that when Dr. Kenner last saw Robert Coe in January (approximately three months before his scheduled execution date) he appeared lucid is absolutely irrelevant to the question before this Court.

B. <u>Dr. James Merikangas</u>

Dr. James Merikangas, a board certified neurologist and psychiatrist and professor of medicine at Yale, testified that in his opinion Robert Coe is incompetent to be executed (VII, 111, 120-121). Dr. Merikangas opined that Robert Coe suffered from delusions and hallucinations and diagnosed him as suffering from chronic paranoid

schizophrenia (VII, 111, 120-121). Dr. Merikangas opined that Robert Coe's degree of incompetency will increase as the stress of the execution date approaches and that Robert Coe will be incompetent to be executed on March 23, 2000 (VII, 162, 163, 168; VIII, 245).

C. Dr. John Pruett

Dr. John Pruett, a Tennessee licensed psychiatrist who had treated Robert Coe at Riverbend was called in rebuttal (XIV, 1030-1031). Dr. Pruett had published concerning DID (XIV, 1031) and testified that DID was a legitimate diagnosis within the psychiatric field. Dr. Pruett rebutted Dr. Matthews' bald assertion that DID did not exist in prisoners in the United States (XIV, 1032). Dr. Pruett agreed from a review of Dr. Kenner's report and Robert Coe's medical records that a diagnosis of DID made sense (XIV, 1034). Thus, contrary to the State's assertion, Dr. Pruett did not render an opinion stating Robert Coe was competent to be executed. Rather, Dr. Pruett bolstered Dr. Kenner's findings of DID and Robert Coe's incompetency on March 23, 2000. This testimony was especially credible sense Dr. Pruett was a treating psychiatrist employed by the State to work at Riverbend.

D. Dr. James Walker

Dr. James Walker, a neuropsychologist was called to rebut Dr. Martell's diagnosis of malingering (XIII, 916-917). Dr. Walker clearly testified that psychological tests performed on Robert Coe by Dr. Martell do not support a finding of malingering (XV, 1091). Dr. Walker also testified consistent with Dr. Kenner that it is very difficult to diagnose DID without having seen a dissociative episode. Dr. Walker further testified

that with the stress of an impending execution he believed Robert Coe would deteriorate (XIV, 1112). Dr. Walker clearly testified that Robert Coe suffers from a mental disease (XIV, 1114), and it is reasonable that Robert Coe will deteriorate under the stress of an impending execution (XIV, 1114). Dr. Walker indicated that he did not feel qualified to make a competency determination and testified that he honestly could not say what Robert Coe understood due to his idiosyncratic thought process (XV, 1114-1116, 1108).

E. Dr. Herbert Meltzer

Dr. Herbert did not testify. A report which was not subject to cross-examination was erroneously ordered disclosed to the State and the trial court, and it was relied upon by the trial court in its final order without the court ever introducing it into evidence. Consequently, no weight or significance should be placed on Dr. Meltzer's report.

F. Dr. Daryl Matthews

Dr. Daryl Matthews relied heavily upon Dr. Daniel Martell to form his diagnosis of malingering and severe borderline personality disorder. Dr. Matthews testified that he did not know whether Robert Coe had psychotic episodes in the past (XII, 819). Furthermore, Dr. Matthews does not foreclose the possibility that Robert Coe will be psychotic in the future (XII, 820).

Q. But he could in fact be legitimately psychotic in the future as a result of his borderline personality?

A. Yes. I believe that's possible.

Q. And you concur with Dr. Kenner that the stress of his impending

execution could exacerbate that possibility?

A. Well, what I essentially said, is that the stress would raise the possibility. That the stress of his execution may - - may make it possible that it would happen.

(XII, 821).

Thus, even though Dr. Matthews believed Robert Coe to be competent when he interviewed him, Dr. Matthews acknowledged Robert Coe suffers from mental illness which may have rendered him psychotic in the past and could, under the stress of an impending execution, render him psychotic in the future.

G. Dr. Daniel Martell

Dr. Daniel Martell's testimony should not be considered since he failed to comply with State law and obtain written permission from the Tennessee Board of Psychological Examiners to testify as an expert witness in this State or perform a psychological evaluation in this State. *See* TCA 63-11-211(b)(5). *See also* XIII, 859 (Dr. Martell is not licensed in Tennessee and had not received written authorization from the Tennessee Board of Psychological Examiners to perform psychological evaluations or give expert testimony in Tennessee). Quite simply, he committed a crime when he evaluated Robert Coe and testified in proceedings below. Allowing Robert Coe to be executed on the basis of criminal conduct facilitated by the State and the trial court below offends any sense of fairness, justice and decency. *Cf. Wong Sun v. United States*, 371 U.S. 471 (1963).

Furthermore, Dr. Martell engaged in what amounted to junk science by erroneously diagnosing malingering on behalf Robert Coe by the performing of various

psychological tests which had not been peer reviewed or studied as to rate of error for determining malingering in death row inmates. *See* Opening Brief, pp. 30-33. Amazingly, the State implicitly conceded in oral argument that Dr. Martell was not to be believed. The State asserted that many of appellant's arguments were moot since the trial court rejected Dr. Martell's contention that Robert Coe was malingering. Since malingering was the heart of Dr. Martell's testimony, it follows that Dr. Martell's testimony was not deemed credible by the trial court. Consequently, this Court should give Dr. Martell little credence.

Thus, the overwhelming medical proof preponderated against the trial court's finding of competency. Two experts (Dr. Merikangas and Dr. Kenner) testified with medical certainty that Robert Coe will be incompetent to be executed on March 23, 2000. One additional expert (Dr. Pruett) concurred with Dr. Kenner's report based upon a review of Robert Coe's medical records. Two experts (Dr. Matthews and Dr. Walker) conceded that although they did not find Robert Coe incompetent at their particular interviews, Robert Coe's mental condition could deteriorate under the stress of an impending execution. Dr. Martell was totally incredible and, according to the Solicitor General's own admission, was not believed by the trial court. Dr. Meltzer's report should not be considered since it is not in evidence. Thus, the admissible proof heavily

preponderates towards Robert Coe being incompetent to be executed on March 23, 2000.

II. The Trial Court Correctly Concluded Robert Coe Satisfied the Threshold Standard Elaborated in *Van Tran*.

Van Tran provides that the trial court must find a threshold showing of incompetency before conducting a hearing. Specifically, *Van Tran* provides:

> Therefore we adopt a rule that places the burden on the prisoner to make a threshold showing that he or she is presently incompetent. The burden may be met by the submission of affidavits, depositions, medical reports or other credible evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present competency. In most circumstances, the affidavits, depositions, or medical reports attached should be from psychiatrists, psychologists or other mental health professionals. If the trial court is satisfied there exists a genuine disputed issue regarding the prisoner's present competency, then a hearing should be held.

Van Tran v. State, 6 S. W. 3d 257, 269 (Tenn. 1999).

Robert Coe complied with the requirements of *Van Tran*. Proof was submitted that Robert Coe had been treated for years at Riverbend by psychiatrists with medication for mental illness and had been involuntarily hospitalized for approximately three years prior to his present incarceration (I, 39-41). Thus, there was a history of severe mental illness. Furthermore, Dr. William Kenner, a Tennessee licensed psychiatrist, examined Robert Coe on December 22, 1999 and formed a professional opinion that Robert Coe was incompetent to be executed (I, 44). Dr. Kenner elaborated that he reviewed numerous medical and psychiatric records of Robert Coe, was familiar with the *Van Tran* standard of competency for execution, and in his professional opinion

Robert Coe was incompetent under that standard (I, 44). *Van Tran* states a threshold may be met by an affidavit from a psychiatrist that a defendant is presently incompetent to be executed. Here, Robert Coe satisfied the threshold by submitting the affidavit of Dr. Kenner, a psychiatrist, stating that Robert Coe is presently incompetent to be executed. Robert Coe complied with the threshold as elaborated in *Van Tran*. It would violate Due Process for the Court now to require some higher threshold standard than stated in *Van Tran*, and retroactively hold the trial court committed error for failing to hold Robert Coe to a threshold standard higher than that expressly elaborated in *Van Tran*. *Van Tran* tells counsel for Robert Coe that a threshold is met with psychiatric proof by affidavit of Robert Coe's present incompetency which was complied with in this case. The State cannot now ask for some higher threshold showing to be placed on Robert Coe after the fact. Furthermore, the issue is moot since a hearing has been conducted and clearly the trial testimony overwhelmingly established Robert Coe's incompetency to be executed.

III. Allowing Discovery of the Files of Consulting Experts Retained by Robert Coe's Attorneys for the Purpose of Preparing for and Conducting *Van Tran* Litigation in His Case Wholly Undermines Any Conceivable Notion That Robert Coe Was Afforded Due Process Below.

The Ninth Circuit Court of Appeals in a case remarkably on point discussed at length the effect that mandatory disclosure of the reports and opinions of non-testifying experts retained by the defense in criminal prosecutions would have upon basic notions of due process, upon the right to the assistance of counsel, and upon the adversarial process as a whole. The Ninth Circuit held:

> We further note that since defense counsel cannot predict the outcome of a psychiatric evaluation, to grant court-appointed psychiatric assistance only on condition of automatic full disclosure to the fact finder impermissibly compromises presentation of an effective defense, by depriving him of … an adequate opportunity to present [his] claims within the adversary system. Competent psychiatric assistance in preparing the defense is a basic tool that must be provided to the defense. To impose such a condition as full disclosure takes away the efficacy of the tool…. The issue here is whether a defense counsel in a case involving a potential defense of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases…. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness…. We reject the contention that the assertion of insanity at the time of the offense waives the attorney-client privilege with respect to psychiatric consultations made in preparation for trial.

Smith v. McCormick, 914 F.2d 1153, 1159-60 (9th Cir. 1990) (quoting *Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974); *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975)). *Ake v. Oklahoma*, 470 U. S. 68 (1985) and due process under the Fourteenth Amendment demand that experts appointed to the indigent be independent from both the court and the State.

In the present case, Robert Coe's attorneys recognized that they were not experts in the fields of psychiatry or psychology. As a result, they understood that they needed expert assistance to prepare for and litigate claims involving his mental competency to be executed and sought out qualified experts to provide the same. To do otherwise, Robert Coe submits, would be to render ineffective assistance of counsel at a critical (to put it mildly) stage of the proceedings. The assistance of counsel (if it means anything) means the effective assistance of counsel with the tools necessary to

present claims on behalf of the client and confront contrary proof offered by the prosecution.

Allowing the discovery of and reliance upon the files of non-testifying, consulting experts by prosecution experts and the trier of fact wholly deprived Robert Coe of the effective assistance of counsel and due process and wholly undermined the adversarial system in his case. What was done in his case, Coe submits, is unprecedented within the whole of civil and criminal jurisprudence heretofore known in the State of Tennessee. It converted his attorneys from his advocates into information gatherers for the prosecution and the trier of fact. It also allowed the trier of fact to become a court of inquisition which (when incanting the phrase "the free flow of information") could disregard well-settled principles of evidence (relying upon hearsay (the so-called Meltzer report) that was never even made an exhibit to the proceedings); could disregard well-settled principles of adversarial procedure (each side presents its own case and confronts the opponent's case and the trier of fact makes a decision); and could completely hamstring one side's presentation through its own discovery of materials (the confidentiality of which was previously sacrosanct) by forcing it to call witnesses not previously intended (Dr. Jim Walker) and otherwise scramble to explain hearsay statements (the Meltzer report) whose declarant was not subject to cross examination.

There is an old legal saying that tough cases make bad law. Allowing the violations of the right to counsel, due process and the adversarial process outlined above to escape reversal would result in, Coe submits, the creation of a very dangerous and detrimental precedent.

IV. The Trial Court Should Have Been Recused.

Justice Birch asked a question at oral argument as to whether it was counsel's position that a trial court must be recused because the trial court took steps to maintain courtroom decorum such as gagging a noisy defendant.

Our position is that a trial judge of course may take steps to maintain decorum if the need arises – as long as he uses the least restrictive means. Judge Colton, however, displayed his bias when he ordered the violent gagging of Robert Coe even when (1) there were lesser restrictive alternatives (X, 506); (2) the trial judge ignored the serious health risks (X, 512); and (3) the trial judge made the statements that he did (i.e. We have a paramedic if he has problems from the gagging,(X, 530-532); "there will be no medical exam first," (X, 514-515) etc.). It is not that Judge Colton took steps to maintain decorum that mandates recusal; rather, it was the extreme manner in which he did so that warranted recusal.

V. Dr. Martell's Testimony Should be Stricken Either Under *Daubert* or *McDaniel*.

Justice Holder asked at oral argument whether Dr. Martell's psychological testing given to Robert Coe would be admissible under the test outlined by the court in *McDaniel v. CSX Transportation*, 955 S. W. 2d 257 (Tenn. 1997). *McDaniel* requires a court to determine whether scientific evidence will substantially assist the trier of fact which requires a determination as to the scientific validity or reliability of the evidence. *McDaniel*, 955 S. W. 2d at 265. In determining reliability, the court is to consider *inter alia* (1) whether scientific evidence has been tested and the methodology with which it

has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation. *Id.* The court must assure itself that opinions offered in evidence are based on relevant scientific methods, processes and data and not upon an expert's mere speculation. *Id*. In the present case, Dr. Martell was questioned extensively as to the psychological testing performed upon Robert Coe. Dr. Martell admitted with respect to the tests performed that he did not know whether they had ever been subjected to scientific investigation as it pertains to determining malingering in death row inmates; he did not know whether the testing had ever been subject to publication or peer review on this issue; and he did not know whether the rate of error as it pertained to determining malingering in death row inmates had ever been calculated; etc. *See* Opening Brief, pp. 36-41. Thus, following *McDaniel*, Martell's testimony should have been stricken due to the failure of the trial court to properly apply *McDaniel* and determine that Dr. Martell's opinions were based upon real science. It therefore does not matter whether *McDaniel* or the more stringent *Daubert* standard is applied: Martell's opinions are based upon junk science either way.

VI. Free Flow of Information.

One of the questions asked of counsel at oral argument was whether the free flow of information discussed in *Van Tran* required disclosure of information which would otherwise not be provided in an adversarial proceeding. First of all, both *Van Tran* and *Ford* require that competency proceeding be adversarial in nature. Thus, any

reading of the "free flow of information" language should not be read to eviscerate the adversarial nature of the hearing and fundamental due process safeguards.

Secondly, counsel would like to point out that the "free flow of information" utilized by the trial court always flowed in one direction – namely out of the defense files and into the hands of the State prosecutors. Counsel made numerous requests for Jencks material and prior statements (written or oral) of witnesses which were not provided. When counsel moved for discovery under the Federal Rules of Criminal Procedure, the State objected. Numerous prison guards (agents of the State) refused requests for interview. When counsel sought information as to the past cases and work performed upon the past cases with which Dr. Matthews and Dr. Martell had been involved, the State objected. Counsel was never provided a list of all the experts which the State consulted who did not testify. In sum, the only free flow information that took place below was out of the hands of the defense and into the hands of the prosecutor. This is fundamentally unfair and violates due process. Surely, the "free flow of information" cannot mean the free abrogation of the work product and other privilege of a man facing execution -- especially when the street does not run both ways. Failure to reverse, Coe submits, will -- as the old saying goes – create some very bad law.

VII. The Admissibility of Hearsay Is A Right of the Defendant Under *Van Tran* and Does Not Void The Right of Confrontation.

Justice Drowota at oral argument asked whether *Van Tran's* allowing hearsay to be admissible rendered it proper for the trial court to consider Dr. Meltzer's report as substantive evidence. *Van Tran* allows the defendant to admit hearsay but does not give the same right to the State. In *Van Tran*, this court held "next, the prisoner must be afforded an opportunity to be heard and to present evidence relevant to the issue of competency at an adversarial proceeding at which the prisoner is entitled to cross-examine the State's witnesses." *Van Tran*, 6 S. W. 3d at 271. The right to cross-examine precludes the wholesale admission of hearsay by the State. Rather the discussion of the admissibility of hearsay in *Van Tran* is in the context of the defendant's right to put on all relevant proof:

> Any procedure that unreasonably precludes the prisoner from attending and presenting material relevant to [the question of] his sanity bars consideration of that material by the fact finder is necessarily inadequate
>
> * * *
>
> Therefore the rules of evidence should not be applied to limit the admissibility of reliable evidence that is relevant to the issue of the prisoner's competency.

Van Tran 6 S. W. 3d at 271.

Van Tran is establishing a rule similar to that in a capital sentencing hearing where a defendant is not barred by the hearsay rules from presenting relevant evidence to the court. (*See* TCA § 39-13-204(c)). However, the defendant maintains his Sixth

Amendment confrontation rights prevent the State from presenting evidence not subject to cross-examination (i.e. hearsay). Thus, it would be improper for the court to hold that the State is free to admit hearsay in a competency proceeding, because such a rule could effectively destroy the defendants Sixth Amendment Right to cross-examine witnesses which is expressly recognized in *Van Tran*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply has been served upon Mr. Mike Moore, Solicitor General, 425 Fifth Avenue North, Cordell Hull building, Nashville, TN 37243-0493 this 2nd day of March, 2000.

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