

IN THE SUPREME COURT OF TENNESSEE

STATE OF TENNESSEE,

VS.

FILED

February 24, 2000

(Certified Mail 2/22/00)

**Cecil Crowson, Jr.
Appellate Court Clerk**

No. M1999-01313-SC-DPE-PD

ROBERT GLEN COE

MOTION TO DISMISS FOR LACK OF JURISDICTION

COMES NOW your Appellant, Robert Coe, through his undersigned counsel of record, and moves this Honorable Court to dismiss this appeal for lack of jurisdiction, until such time as the appeal is acted upon by the Tennessee Court of Criminal Appeals. In support of this motion, Mr. Coe would show unto the Court as follows:

1. The jurisdiction of the Courts of Tennessee is established by the legislature. All appeals instituted with reference to a criminal case lie by statute to the Tennessee Court of Criminal Appeals.
2. Specifically, TCA 16-5-108 (a)(2) provides:
 - (a) The jurisdiction of the Court of Criminal Appeals shall be appellate only, and shall extend to review of the final judgements of trial courts in:
 - (2) Habeas corpus and Post Conviction Procedure Act proceedings attacking the validity of a final judgment of conviction or the sentence in a criminal case, and other cases or proceedings instituted with reference to or arising out of a criminal case.

3. Because this competency to be executed proceeding arises out of a criminal case, appellate jurisdiction lies by statute to the Tennessee Court of Criminal Appeals.
4. The Tennessee Supreme Court on November 23, 1999 decided the case of Heck Van Tran v. State of Tennessee, No. W1998-00175-SC-R11-PD. The holding in Van Tran was that a “competency to be executed” claim could not be raised in a state post conviction proceeding because the claim was not yet ripe.
5. In the Van Tran opinion, the Supreme Court discussed in elaborate Dicta what it believed should be the proceedings used in Tennessee to raise a competency to be executed claim. Part of that Van Tran Dicta provided that the decision of the trial court would be automatically reviewed by the Supreme Court; that the record must be filed with the Supreme Court within 10 days of the conclusion of the trial court proceedings; and that the appellants brief is due 5 days after filing of the record.
6. “Obiter Dictum” or “dicta” is not binding under the doctrine of stare decisis. See Shepherd Fleets, Inc v. Opryland, 759 S.W.2d 914, 921 (Tenn. App. 1988); Metro Gov’t of Nashville v. Reynolds, 512 SW 2d 6 (Tenn 1974). Court decisions must be read with special reference to the questions involved and necessary to be decided, and language used which is not decisive of the case or decided therein is not binding as precedent. See

Shepherd Fleets v. Opryland, Supra; Rush v. Chattanooga Dupont Emp. Credit Union, 210 Tenn 344, 358 SW 2d 333 (1962)

7. It is clear that since the holding in Van Tran was Heck Van Tran could not raise a competency to be executed claim in state post conviction proceeding, since the claim was not yet ripe. Everything else in the Van Tran opinion is DICTA; and thus not binding.
8. Though the Supreme Court does have the power to promulgate procedural rules (see T.C.A. 16-3-402); the Rules are not allowed to abridge, enlarge, or modify any substantive right. (see TCA 16-3-403). Most importantly, procedural Rules do not take effect until they have been approved by the General Assembly (see T.C.A. 16-3-404)
9. Because there has been no approval of the procedural rules elaborated by Van Tran by the legislature; and because the Supreme Court is without authority to modify the statute confirming jurisdiction of Appeals to the Court of Criminal Appeals, this Court is wholly without jurisdiction to consider this appeal.

WHEREFORE, premises considered, your appellant prays this Court remand this appeal to the Court of Appeals for consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via U.S. regular mail, postage prepaid, this the ____ day of _____, 2000, to the following:

Glen Pruden
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