IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED

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Cecil Crowson, Jr.
Appellate Court Clerk

FOR PUBLICATION

STATE OF TENNESSEE, Appellee,	)	
v.	)	CLAIBORNE CRIMINAL
JOSEPH BARNETT, Appellant.	)	Hon. W. Lee Asbury, Judge
	)	No. 03S01-9410-CR-00094

CONCURRING AND DISSENTING OPINION

DROWOTA, J.

The majority concludes that, pursuant to Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the due process clause of the Fourteenth Amendment to the federal constitution requires that the State provide an independent psychiatric expert to an indigent criminal defendant if that defendant is able to show a "particularized need" for the assistance of the expert. Because I agree with the majority that the principles enunciated in Ake -- a capital case -- are equally applicable to non-capital cases, I fully concur with this conclusion. However, I cannot agree with the majority's corollary holding -- that the due process clause, as construed in Ake, also requires that the defendant be afforded an ex parte hearing in which to present evidence of the need for a state-funded psychiatric expert.

The majority supports this latter conclusion by reasoning as follows:

> The logic of requiring an ex parte hearing under such circumstances is apparent. Indigent defendants who must seek state funding to hire a psychiatric expert should not be required to reveal their theory of defense when their more affluent counterparts, with funds to hire experts, are not required to reveal their theory of defense, or the indentity of experts who are consulted, but who may not, or do not, testify at trial.

___ S.W.2d at ___ .

Initially, I concede that some language in Ake could lead one to assume that an ex parte hearing is required as a matter of federal constitutional law. For example, the Ake court states that "[w]hen the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor is his defense, the need for the assistance of a psychiatrist is readily apparent." Ake, 470

U.S. at 83, 105 S.Ct. at 1097. Moreover, the Ake court alluded to the specific interest apparently protected by ex parte proceedings by stating that:

> The State's interest in prevailing at trial -- unlike that of a private litigant -- is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.

Ake, 470 U.S. at 79, 105 S.Ct. at 1095.

Therefore, certain language in Ake appears to support, at least indirectly, the rationale espoused by the majority: that all criminal defendants have a legitimate interest in maintaining a strategic advantage over the State; that keeping the theory of defense hidden from the State is an acceptable means of realizing this interest; and, finally, that requiring an ex parte hearing for an indigent defendant protects this interest by putting such a defendant on the same footing as the non-indigent defendant, who does not have to reveal his or her theory of defense.

This rationale, though plausible at first glance, is actually flawed in a basic sense. The flaw lies in the fact that any criminal defendant, whether indigent or not, is required under Tennessee law to provide notice to the State if the insanity defense is to be raised at trial. Rule 12.2 of the Tennessee Rules of Criminal Procedure provides, in part, that:

> (a) **Defense of Insanity**. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the district attorney general in

> writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.
>
> (b) **Expert Testimony of Defendant's Mental Condition**. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his or her guilt, the defendant shall, within the time provided for the filing of the pretrial motions or at such later time as the court may direct, notify the district attorney in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

Rule 12.2 clearly requires disclosure by all defendants seeking to rely upon a defense of insanity -- regardless of their financial status -- before the case goes to trial. This rule is designed to promote fairness in criminal litigation, for the Rules Committee explicitly stated in regard to subsection (b) "that lack of notice about the defendant's mental state may seriously disadvantage the district attorney in preparing rebuttal proof."[1] The rule is thus a conscious departure from one of the usual fundamentals of criminal litigation -- the defendant's entitlement to keep his or her theory of defense concealed from the State. Therefore, since under Tennessee law a non-indigent defendant does not have any greater ability to maintain the confidentiality of his or her defense of insanity than a defendant without resources, the majority's proposed justification for the ex parte requirement loses much of its force. Indeed, this very fallacy was noted by the Arizona Supreme Court in State v.

[1]See "Comment to 1984 Amendment" to Rule 12.2. Moreover, this burden of disclosure lies squarely on the defendant; it does not require a "triggering request from the State." See Committee Comment to rule 12.2.

Apelt, 861 P.2d 634, 649-50 (Ariz. 1993), a case in which the court, after citing the broad disclosure requirements placed on a criminal defendant by Arizona law, rejected the defendant's argument that he had a constitutional right to an ex parte hearing. See also Ramdas v. Commonwealth, 437 S.E.2d 566 (Va. 1993) (no state or federal constitutional right to an ex parte hearing); State v. Floody, 481 N.W.2d 242 (S.D. 1992)(due process not violated by State's presence at hearing in which defendant requested expert assistance); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987) ("trial judge under no constitutional duty to grant defendant's request for a psychiatric expert to report confidentially to his counsel").[2]

The majority, however, objects to this conclusion, stating that:

> The dissent's conclusion overlooks the significant difference in the disclosure requirements between the pre-trial notice required by Tenn. R. Crim. P. 12.2, and the threshold showing of particularized need required to establish entitlement to funds for psychiatric expert assistance. To establish particularized necessity, the defendant will, no doubt, be required to reveal specific facts and circumstances giving rise to the potential insanity defense. Such relevations are not required by pre-trial notice. In addition, the identity of the expert will be revealed before the expert evaluates the defendant and before the defense determines whether or not it will rely upon the insanity defense. Neither Tenn. R. Crim. P. 12.2, nor Tenn. R. Crim. P. 16(b), require disclosure of the identity of experts who are consulted, but who are not called to testify.
>
> Under the analysis of the dissent, indigent defendants would, in effect, be penalized for requesting psychiatric expert assistance by being required to disclose that information, and may be deterred from seeking it because of the breadth of disclosure required.

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[2]The North Carolina Supreme Court has recently concluded, however, that indigent defendants are entitled, as a matter of federal constitutional law, to an ex parte hearing for the purpose of determining their need for state-funded psychiatric assistance. State v. Ballard, 428 S.E.2d 178 (N.C. 1993).

___ S.W.2d ___(emphasis in original).

The majority thus draws a sharp distinction between the threshold hearing and Rule 12.2, arguing that the first necessarily involves a full disclosure of the details of a potential insanity defense, whereas the latter merely requires disclosure of certain basic facts -- namely, that the insanity defense will be relied upon and that expert testimony will be introduced. In my opinion, this distinction is untenable, as the majority substantially understates the nature and extent of the disclosure contemplated by Rule 12.2. In addition to the above-quoted sections, subsection (c) of that rule provides:

> **Mental Examination of Defendant**. In an appropriate case the court may, upon motion of the district attorney, order the defendant to submit to a mental examination by a psychiatrist or other expert designated for this purpose in the order of the court. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except for impeachment purposes or on an issue respecting mental condition on which the defendant has introduced testimony.

Thus, in any case in which the mental condition of the defendant reasonably appears to be an issue, the State may have the defendant examined by a mental health expert. In order to be meaningful, this examination must inevitably delve into "specific facts and circumstances giving rise to the potential insanity defense." Although it may not use the results of the examination as substantive evidence if the defendant chooses not to raise an insanity defense at trial, the State is nevertheless authorized to explore the details of a defendant's potential insanity defense before

trial -- whether the defendant is indigent or not. Because Rule 12.2 effectively requires the defendant to disclose as much information as does the threshold hearing, and because the majority does not suggest that the rule is unconstitutional, I cannot agree that indigent defendants are penalized in a constitutional sense by having to request psychiatric assistance in the presence of the State.[3]

Because I do not believe that an ex parte hearing in this context is one of the "basic tools of an adequate defense or appeal," Britt v. North Carolina, 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400 (1971),[4] I respectfully dissent from the majority on this issue.

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FRANK F. DROWOTA III
JUSTICE

Concur:

[3]The only plausible advantage to the defendant of ex parte threshold hearings in this context is that the defendant is able to keep secret the identity of experts consulted, but who do not testify at trial. While I agree that this may be an advantage in some cases, I do not think that it is so important as to be of constitutional dimension.

[4]Indeed, it is probable that the Ake court's usage of the ex parte language is nothing more than a reflection of the fact that federal law provides that hearings for the appointment of experts for indigent defendants are to be conducted ex parte. 18 U.S.C. § 3006 A(e)(1). As this precise constitutional issue was not before the Court, however, it is impossible to deduce from the court's mere invocation of the language that it intended that an ex parte hearing be part of the Ake rule.