IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

FILED

November 23, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

HECK VAN TRAN,	)	
	)	FOR PUB LICATION
Petitioner-Appellant,	)	
	)	NO. 02-S-9909-CR-0087
v.	)	
	)	
STATE OF TENNESSEE,	)	
	)	
Respondent-Appellee.	)	

SEPARATE CONCURRING AND DISSENTING OPINION

The Fourteenth Amendment to the United States Constitution provides that no state shall:

> . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]

The majority has today promulgated an elaborate and detailed protocol for determining whether a prisoner is competent to be executed. I concur in much of it. However, this protocol does not include several components I find essential to a fair and balanced resolution of the issue. Therefore, I conclude that the protocol comports neither with the Fourteenth Amendment nor with reasonable standards of public decency and propriety.

The missing components of the protocol established by the majority are:

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[1]U.S. Const. amend. XIV, § 1; see also Tenn. Const., art. I, § 8.

> 1. The criteria for deciding competence for execution should include an inquiry into the prisoner's ability to assist counsel;
>
> 2. The ultimate issue--competence for execution-- should be decided by a jury; and
>
> 3. The burden of persuasion on the ultimate issue should be on the State once the prisoner has made the required threshold showing of incompetence.

Because of these views--indeed, these convictions--I am constrained to dissent from the protocol established by the majority to the extent and in the particulars herein enumerated.

CRITERIA FOR DETERMINING COMPETENCE

The protocol established by my colleagues provides, in pertinent part:

> . . . we adopt the "cognitive test," and hold that under Tennessee law a prisoner is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it.

Noticeably absent from this criterion is any reference to the prisoner's ability to assist counsel. Without inclusion of the

"assistance prong," it is conceivable that a prisoner could be deemed competent to be executed despite an inability to assist counsel.

In considering the criteria for determining competence for execution, the majority compares the standard discussed by Justice Powell in Ford v. Wainwright[2] with the common-law rule. According to Justice Powell, the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and the reason they are to suffer it. Ford, 477 U.S. at 422, 106 S. Ct. at 2608. As noted by the majority, however, the common-law rule would additionally require that the prisoner be able to consult with and assist his or her lawyer. This additional common-law requirement is called the "assistance prong," and it has been adopted by several states as part of the criteria to determine if a prisoner is competent to be executed.[3]

After conceding that Tennessee currently includes the "assistance prong" as a criterion for determining whether a defendant is competent to stand trial or to plead guilty,[4] the

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[2]477 U.S. 399, 422, 106 S. Ct. 2595, 2608, 91 L. Ed. 2d 335, 354 (1986)(Powell, J., concurring).

[3]Miss. Code Ann. § 99-19-57(2)(b) (1994); Singleton v. State, 437 S.E.2d 53, 57-58 (S.C. 1993); State v. Harris, 789 P.2d 60, 66 (Wash. 1990).

[4]Berndt v. State, 733 S.W.2d 119, 123 (Tenn. Crim. App. 1987) (the standard applied to determine if the defendant is competent to stand trial is whether the defendant is able to understand the nature of the proceedings, consult with counsel, and assist in the preparation of his defense); State v. Johnson, 673 S.W.2d 877, 880 (Tenn. Crim. App. 1984) ("The test for determining if a defendant is competent to stand trial is whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . ."); Jordan v. State, 124 Tenn. 81, 87-88, 135 S.W. 327, 328-29 (Tenn. 1911) (a defendant is competent to stand trial if he is capable of understanding the nature and object of the proceedings around him, if he can comprehend his own condition in reference to such proceedings, and if he can conduct a rational defense).

majority nonetheless decides that a prisoner may be deemed competent to be executed even if he or she is unable to consult with and assist counsel. I strongly disagree. By analogy to the test now applied to determine competence to stand trial or to plead guilty, I would include the "assistance prong" as part of the criteria to determine if a prisoner is competent to be executed in Tennessee. After all, of what benefit is counsel if one is unable to assist that counsel?

JURY TRIAL

The protocol established by my colleagues provides, in pertinent part:

> . . . the trial court shall hold and conclude a hearing to determine the issue of competency. No jury is involved and the trial judge alone shall determine the issue of competency.

Although the right to trial by jury has been and remains at the bedrock of our judicial system, the majority would permit the determination of competence for execution to be decided by the trial judge alone. In my view, the prisoner has a right to have "all issues of fact decided by the jury if the evidence is in conflict." Wallace v. Knoxville's Community Dev. Corp., 568 S.W.2d 107, 112 (Tenn. Ct. App. 1978). Indeed, this Court has previously found in a criminal case that the question of a defendant's sanity at a particular time was an issue of fact. State v. Sparks, 891 S.W.2d 607, 616 (Tenn. 1995).

The determination of a prisoner's competence to be executed is a fact-driven inquiry. For example, issues of fact are raised when experts differ on a prisoner's mental status and,

perhaps, when a prisoner raises factual issues through testimony. Cross-examination will undoubtedly raise additional issues of fact. Considering the gravity of the inquiry, it would appear to be consistent with standards of public decency and propriety to require a jury to resolve the ultimate issue.

Other jurisdictions recognize that the issue of competence to be executed must be decided by a jury, not a judge. For example, Oklahoma's relevant statute provides that:

> [i]f, after his delivery to the warden for execution, there is good reason to believe that a defendant under judgment of death has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty is to immediately file in the district or superior court of such county a petition stating the conviction and judgment and the fact that the defendant is believed to be insane and asking that the question of his sanity be inquired into. Thereupon, the court must at once cause to be summoned and impaneled from the regular jury list a jury of twelve persons to hear such inquiry.

Okla. Stat. tit. 22, § 1005 (1986)(emphasis added).

Interpreting this statute, the Oklahoma Court of Criminal Appeals[5] suggests a rationale for requiring that a jury determine competence for execution:

> [t]he investigation of the sanity of the prisoner is based upon the public will and sense of propriety rather than on a right of the prisoner. The latter is not entitled as a matter of law to a judicial investigation. Any

[5]The Oklahoma Court of Criminal Appeals is Oklahoma's court of last resort as to criminal issues.

> investigation of the mental condition of the prisoner is for the sole purpose of determining whether it would be consistent with public decency and propriety to take away the life of a person who was not sane enough to realize what was being done.

Bingham v. State, 82 Okla. Crim. App. 305, 312, 169 P.2d 311, 315 (1946) (citations omitted).

Like Oklahoma, California requires a jury to determine a condemned prisoner's competence. The California statute is essentially the same as Oklahoma's. It provides that if, after being sentenced to death, a prisoner is suspected to have become insane, that ". . . the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry." Cal. Penal Code § 3701 (West 1982).

Because the protocol articulated by the majority is a fact-driven inquiry, and because reasonable standards of public decency and propriety so demand, I am of the opinion that a jury should determine whether a prisoner is competent to be executed.

BURDEN OF PROOF

The protocol established by the majority provides, in pertinent part:

> [t]o prevail, the prisoner must overcome the presumption of competency by a preponderance of the evidence.

In other words, the prisoner must prove his or her own insanity by a preponderance of the evidence.

Our General Assembly has statutorily recognized insanity as a defense to prosecution. Tenn. Code Ann. § 39-11-501 (1997). In considering the insanity defense, this Court has held that sanity is presumed. State v. Jackson, 890 S.W.2d 436, 440 (Tenn. 1994) (citing Brooks v. State, 489 S.W.2d 70, 72 (Tenn. Crim. App. 1972)). If, however, there is evidence which "raises a reasonable doubt as to the defendant's sanity, the burden of proof falls upon the State to establish the defendant's sanity beyond a reasonable doubt." Id. (citations omitted).

Admittedly, there is a conceptual distinction between the insanity defense at trial and insanity after judgment. I would, nonetheless, require the State to prove, beyond a reasonable doubt, that an individual is competent for execution.

The taking of a life by execution is no ordinary sentence. Indeed, this Court has recognized that the death penalty is "'qualitatively different' from any other sentence . . . ." State v. Terry, 813 S.W.2d 420, 425 (Tenn. 1991) (quoting Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944, 961 (1976)). Additionally, the execution of the insane "provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment." Ford, 477 U.S. at 407, 106 S. Ct. at 2600 (citation omitted) (examining the common-law's prohibition of the execution of the insane). Moreover, "the community's quest for 'retribution'--the need to offset a criminal act by a punishment of equivalent 'moral quality'--is not served by execution of an insane person, which has a 'lesser value' than that of the crime for which he is to be punished." Id. at 408, 106 S. Ct. at 2601 (citation omitted). The absolute finality of the death penalty balanced

against the arguably questionable deterrent and retributive effects of executing an individual deemed incompetent, require, in my view, that the State bear the burden of proving that the prisoner is competent for execution.

SUMMARY

Though I concur with much of the protocol promulgated by the majority,[6] I dissent because I am convinced that several aspects of the majority's protocol fail to comport with the Fourteenth Amendment to the United States Constitution and with reasonable standards of public decency and propriety.

Specifically, the criteria for deciding a prisoner's competence to be executed should include an inquiry into that prisoner's ability to assist counsel--the constitutionally guaranteed right to counsel means little if a prisoner cannot assist that counsel. Additionally, because of the fact-driven nature of the inquiry, a jury should make the final determination of whether a prisoner is competent to be executed. Finally, because the death penalty is the most severe and final punishment that can be imposed, the burden of persuasion on the ultimate issue of the prisoner's competence should be on the State, once the prisoner has made the required threshold showing of incompetence.

[6]I agree with the majority that a petition for post-conviction relief is not the appropriate means by which a prisoner should litigate his competency to be executed. I further agree with the majority that the question of whether the petitioner currently before the court is competent to be executed is not ripe for determination.

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ADOLPHO A. BIRCH, JR., Justice