IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
Appellee,	)	
	)	Montgomery County
	)	NO. 38887
v.	)	
	)	Davidson County
	)	NO. 97-C-1834
PAUL DENNIS REID,	)	
Appellant.	)	

ORDER

The Defendant has filed application for permission to appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure from orders of the Davison County Criminal Court and the Montgomery County Circuit Court. In Davidson County case # 97-C-1834, Defendant is charged with two counts of premeditated first degree murder and two alternate counts of felony murder. In Montgomery County case # 38887, Defendant is charged with two counts of first degree murder and two alternate counts of felony murder. The cases involve different victims. Additional criminal acts, not relevant to the issues presented in this appeal, were charged in both indictments. The State has given proper notice that it intends to seek the death penalty in both counties in the event Defendant is convicted of first degree murder.

In each case, the trial courts have ordered Defendant to give written notice if he intends to introduce evidence of his mental condition during a penalty phase. The trial courts, however, specified different procedures to be followed if the Defendant does in fact give that notice. Defendant presents the following issues for review in both cases:

> I. Did the trial court err in requiring the Defendant to give specific notice of his intent to introduce evidence relating to his mental condition in the penalty phase of a capital case?
>
> II. If not, did the trial court err in ruling that any such notice by the Defendant would require the Defendant to be examined by a mental health professional selected by the prosecution?

We grant Defendant's Rule 9 application, and we consolidate the two cases for purposes of this

appeal only. Because we feel the issues have been adequately briefed, we affirm the order of the Montgomery County Circuit Court and affirm as modified the order of the Davidson County Criminal Court.

Initially we note that evidence of the defendant's mental condition is relevant at a penalty phase of a capital case. Tennessee's capital sentencing scheme provides for a separate penalty phase should a defendant be found guilty of first degree murder. Tenn. Code Ann. § 39-13-204. During this proceeding, the State may present additional evidence in an attempt to prove certain aggravating circumstances, while a defendant may, but is not required to, present any type of mitigation evidence. See Lockett v. Ohio, 438 U.S. 586 (1978) (a defendant's mitigation evidence may be limited in few instances). Tennessee's death penalty statutory scheme enumerates at least three mitigating circumstances which touch upon the defendant's mental or emotional condition. Specifically, Tennessee Code Annotated section 39-13-204 provides as follows:

> (j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but are not limited to, the following:
>
> . . .
>
> (2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> . . .
>
> (8) The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment; and
>
> (9) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing.

Tenn. Code Ann. § 39-13-204(j)(2), (8) and (9). Further, imposition of the death penalty is prohibited where the defendant is mentally retarded. Tenn. Code Ann. § 39-13-203.

This statutory sentencing scheme also provides that evidence may be offered which tends to "establish or rebut any mitigating factors." Tenn. Code Ann. § 39-13-204(c). Clearly, the

defendant has a right to offer mitigation evidence during the penalty phase, and just as clearly, the State has a right to rebut any mitigating evidence, including evidence of mental or emotional conditions presented by the defendant. Based on the foregoing, the issue of the defendant's mental condition is obviously highly relevant in the sentencing or penalty phase. However, no statute, rule or other authority explicitly authorizes a court to require a defendant to give notice of his intent to use such evidence at the penalty phase of a capital case. This Court finds that it is clear that without such a notice and a court-ordered mental examination, the State's ability to rebut any mitigation evidence relating to defendant's mental condition becomes essentially meaningless. We must therefore examine the issues presented and then fashion a procedure that complies with constitutional standards. .

I.

Defendant argues in his first issue that Rule 12.2 of the Tennessee Rules of Criminal Procedure does not specifically require the defendant in a criminal case to give notice of his or her intent to introduce expert testimony at the penalty phase regarding the defendant's mental condition. The State basically concedes this point. However, the State notes that the death penalty statutory scheme requires the same jury that determined guilt to determine punishment as soon as possible after the conclusion of the guilt phase of the trial. The State argues that if it is not put on pre-trial notice of Defendant's intention to offer expert proof of mental condition at the sentencing phase, then inevitable delay of the penalty phase would occur to allow the State to have defendant examined. We agree.

As noted earlier, our statutes provide that evidence may be offered during the penalty phase which tends to "establish or rebut any mitigating factors." Tenn. Code Ann. § 39-13-204(c). It is reasonable to conclude that the desired balance struck by Rules 12.2 and 16 relating to the guilt phase, is no less crucial in the penalty phase. The obvious intent of these rules, as they relate to expert mental condition evidence offered by a defendant in a trial, is to alert the State that such evidence may be offered. The State is thereby assured the opportunity to evaluate the evidence and mount a meaningful challenge to it. Rules 12.2 and 16 strike a balance between

the competing interests of the defendant and the State. However, this balance is lost in the penalty phase where no notice is specifically required.

Tennessee Code Annotated section 39-13-204(a) mandates that the sentencing hearing "shall be conducted as soon as practicable before the same jury that determined guilt." Rule 2 of the Tennessee Rules of Criminal Procedure reads as follows:

> Rule 2. Purpose and Construction - These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. (emphasis added).

If notice is given for the first time following the guilt phase, the resulting delay would be significant. The State would likely seek a court-ordered mental evaluation of the defendant while the jury would have to idly wait during this time. The Court might be forced to choose between precluding a portion of the defendant's mitigation evidence or forcing the State to effectively forego preparation for rebuttal. In the absence of precluding authority, logic dictates that the penalty phase must be guided by the same fairness concerns and procedural safeguards that govern the guilt phase. Such notice ensures an expedient penalty phase with does not compromise fundamental fairness and does not impede judicial efficiency in a capital case.

Furthermore, we find that the requirement of a pre-trial notice is consistent with state and federal constitutional considerations, statutory laws, and applicable rules of procedure. This pre-trial notice protects the State's right of rebuttal without unduly infringing upon the defendant's right to present mitigation evidence. Accordingly, we find that a pre-trial notice of the defendant's intent to use evidence of a mental condition at the penalty phase is appropriate.

II.

Having determined that pre-trial notice of the defendant's intent to introduce evidence of a mental condition in a penalty phase is appropriate, we must now consider whether it is appropriate to order a mental examination if requested by the State.

Once a Rule 12.2 notice has been given, Tennessee Rule of Criminal Procedure 12.2(c) provides that the State may request that the defendant undergo a "mental examination by a psychiatrist or the other expert designated for this purpose in the order of the court." The rule places the following limits on the use of statements made by the defendant in the course of the examination:

> 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.

Tenn. R. Crim. P. 12.2(c).

The issue of whether a defendant, who has given a Rule 12.2 notice, may be subjected to a court-ordered examination is now well settled in Tennessee. The concerns of privilege against self-incrimination and the right to counsel have been addressed by the Tennessee Supreme Court in State v. Thomas Dee Huskey, __S.W.2d__, No. 03S01-9610-CR-00096, Knox County (Tenn. March 9, 1998) and State v. Martin, 950 S.W.2d 20 (1997).

Our supreme court recently held in Huskey that "the court-ordered examination and the disclosure of the examination material does not violate the defendant's right against self-incrimination, provided the admissibility of any statements made by the defendant during the examination, and any 'fruits' derived therefrom, is only for impeachment or rebuttal of evidence of mental condition introduced at trial by the defendant. Moreover, disclosure of the information from the examination is not limited by Rule 16 and does not depend on whether the defendant intends to use the information or witness involved in the Rule 12.2(c) examination." No. 03S01-9610-CR-00096, slip op. at 17-18.

In Martin, the defendant argued that a court-ordered mental examination violated his constitutional rights as well. The Martin court thoroughly reviewed the privilege against self-incrimination as provided in the Fifth Amendment to the United States Constitution and article I, § 9 of the Tennessee Constitution. The supreme court also analyzed the defendant's challenge to

the examination under the Sixth Amendment to the United States Constitution. The court held that "Rule 12.2(c) safeguards the defendant's right against self-incrimination under the United States and Tennessee Constitutions." 950 S.W.2d at 24.

This Court can find by analogy that a court-ordered mental examination of the defendant in a penalty phase does not violate the defendant's constitutional rights. Accordingly, upon notice by the defendant of his intent to use evidence of a mental condition, the trial court can order a mental examination if requested by the State.

We must now determine the most appropriate procedure for handling the results of such an examination in a penalty phase. The order of the Davidson County Criminal Court, issued by Judge Cheryl Blackburn, provided the following guidelines for giving notice of intent to introduce evidence of a mental condition at a penalty phase:

> 1. If the defendant intends to introduce evidence of a mental condition at a penalty phase, he must file written notice thereof no later than May 1, 1998. The notice shall include the name and professional qualifications of any mental condition professional the defense intends to call as a witness at a penalty phase and a brief, general summary of the topics to be addressed by the expert(s) sufficient to permit the State to determine if an evaluation is necessary and, if so, in what area its expert(s) must be knowledgeable.
>
> 2. If the defendant files such a notice, the defendant shall, if requested by the State, be examined by a psychiatrist or other mental health professional selected by the State. The State and defense will cooperate to provide the court-ordered professional with, subject to privilege, all necessary and relevant information. Said examination may be videotaped in accordance with the Martin guidelines. The State's examination shall take place no later than June 1, 1998.
>
> 3. The report of that examination shall be provided **only** to the Court. The Court, in turn, will deliver the report to the defendant so that he, through counsel, can make a final determination as to whether he will introduce such evidence at a penalty phase. If the defendant elects to go forward with his evidence of mental condition at a penalty phase, the State will be supplied with the evaluation and test results for the preparation for rebuttal prior to the trial. However, if, based upon the results of the court-ordered examination, the defendant elects not to proceed with such evidence, the State will not be permitted to view the report.

The order of the Montgomery County Circuit Court, authored by Judge John H. Gassaway, III, provided guidelines as follows:

> 1. If the defendant intends to introduce mental condition testimony at a penalty phase, he must file written notice thereof no later than May 1, 1998. The notice shall include the name and professional qualifications of any mental condition professional who will testify and a brief, general summary of the topics to be addressed that is sufficient to permit the State to determine the area in which its expert must be versed.
>
> 2. If the defendant files a notice that he intends to introduce mental condition testimony at the penalty phase, the defendant shall be examined by a psychiatrist or other mental health professional selected by the State, if requested. The State's examination shall take place no later than June 1, 1998. The report of that examination and the expert report of any examination initiated by the defendant (if same exist) shall be filed under seal with the Court before the commencement of jury selection. The court-appointed mental condition professional conducting the examination for the State shall not discuss his/her examination with anyone unless and until the results of the examination are released by the Court to counsel for the State and counsel for the defendant following the guilt phase of the trial.
>
> 3. The results of any examination by the [S]tate expert and the defense expert (if same exist) shall be released to the State only in the event that the jury reaches a verdict of guilty of first degree murder and only after the defendant confirms his intent to offer mental condition evidence in mitigation. After the return of such a verdict, the defendant shall file a pleading confirming or disavowing his intent to introduce mental condition testimony at a penalty phase. If the defendant withdraws his previously-tendered notice, the results of any mental condition examinations concerning the defendant will not be released to the State. The reports of any examinations (whether by the State or defense experts) concerning the defendant shall be released to the State immediately after the filing of the pleading confirming the earlier notice. At the same time, the report of the State's expert shall be released to counsel for the defendant. Even if the defendant confirms his intent to offer mental condition evidence, the defendant may withdraw his notice of intent to raise a mental condition at any time before actually introducing such evidence, and, in that event, neither the fact of notice, nor the results or reports of any mental examination, nor any facts disclosed only therein, will be admissible against the defendant.

This Court finds the procedure set forth by Judge Gassaway to be the more appropriate one to follow in consideration of the provisions found in Rules 2, 12.2 and 16 of the Tennessee Rules of Criminal Procedure. Therefore, in both Davidson County case #97-C-1834, and in Montgomery County case #38887, the trial courts are to implement the following procedure for giving notice of intent to introduce evidence of a mental condition by Defendant at a penalty phase:

> 1. If the defendant intends to introduce mental condition testimony at a penalty phase, he must file written notice thereof no later than an appropriate date set forth by the trial court. The notice shall include the name and professional qualifications of any mental condition professional who will testify and a brief, general summary of the topics to be addressed that is sufficient to permit the State to determine the area in which its expert must be versed.

2. If the defendant files a notice that he intends to introduce mental condition testimony at the penalty phase, the defendant shall be examined by a psychiatrist or other mental health professional selected by the State, if requested. The State's examination shall take place within a reasonable time frame set forth by the trial court. The report of that examination and the expert report of any examination initiated by the defendant (if same exist) shall be filed under seal with the Court before the commencement of jury selection. The court-appointed mental condition professional conducting the examination for the State shall not discuss his/her examination with anyone unless and until the results of the examination are released by the Court to counsel for the State and counsel for the defendant following the guilt phase of the trial.

3. The results of any examination by the State expert and the defense expert (if same exist) shall be released to the State only in the event that the jury reaches a verdict of guilty of first degree murder and only after the defendant confirms his intent to offer mental condition evidence in mitigation. After the return of such a verdict, the defendant shall file a pleading confirming or disavowing his intent to introduce mental condition testimony at a penalty phase. If the defendant withdraws his previously-tendered notice, the results of any mental condition examinations concerning the defendant will not be released to the State. The reports of any examinations (whether by the State or defense experts) concerning the defendant shall be released to the State immediately after the filing of the pleading confirming the earlier notice. At the same time, the report of the State's expert shall be released to counsel for the defendant. Even if the defendant confirms his intent to offer mental condition evidence, the defendant may withdraw his notice of intent to raise a mental condition at any time before actually introducing such evidence, and, in that event, neither the fact of notice, nor the results or reports of any mental examination, nor any facts disclosed only therein, will be admissible against the defendant.

Accordingly, we affirm the order of the Montgomery County Circuit Court and affirm as modified the order of the Davidson County Criminal Court.

Per Curiam

Peay, J., Welles, J., Woodall, J.