

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 8, 2004

GREGORY THOMPSON v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Coffee County
No. 20,014 Gerald L. Ewell, Sr., Judge**

No. M1987-00067-SC-DPE-PD - Filed May 12, 2004

ADOLPHO A. BIRCH, JR., J., concurring and dissenting.

I concur in Sections I and II of the majority opinion. I dissent, however, from the majority's conclusion that the petitioner has failed to make a threshold showing sufficient to warrant a hearing on his competence for execution.

In Van Tran v. State, 7 S.W.3d 257 (Tenn. 1999), this Court adopted a "cognitive test," for determining competency for execution, and held 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." Id. at 266. Van Tran established a procedure whereby a prisoner alleging incompetency to be executed was required to make a "threshold showing" in the trial court where he was convicted "that his or her competency to be executed is genuinely in issue." Id. at 268. The Court explained what was meant by "threshold showing" as follows:

[W]e adopt a rule that places the burden on the prisoner to make a threshold showing that he or she is presently incompetent. This 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 to the prisoner's petition 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.

Id. at 269 (citations omitted). The purpose of this threshold requirement is to avoid conclusory petitions and specious claims of incompetency made solely for the purposes of delaying execution. Id. at 268-69.

In this case, counsel for the petitioner submitted voluminous evidence of mental illness dating back at least eighteen years.¹ Furthermore, three highly qualified experts—two psychiatrists and one psychologist—submitted affidavits in support of the petition for a hearing on competency. All three opined that the petitioner suffered from severe, ongoing schizophrenia, and currently “lacks the mental capacity to understand the fact of the impending execution and the reason for it.” Report of Dr. John S. Rabun, M.D., p. 14 (January 28, 2004).²

In light of the foregoing evidence in the record, I disagree with the majority’s conclusion that there is no “genuine, disputed issue” in this case to meet the threshold requirement. The majority cites to Coe v. State, 17 S.W.3d 193 (Tenn. 2000), for the proposition that mental illness alone is insufficient to meet the threshold requirement. In that case, however, prior to this Court’s conclusion that Coe was competent to be executed, Coe actually had the benefit of a full competency hearing, where the facts of his mental status were thoroughly explored. Thus, I find Coe distinguishable. In my mind, there is a difference between requiring a “threshold showing” and requiring conclusive proof, as the majority seems to require here. Accordingly, I respectfully dissent. I would remand to the trial court for a full hearing on the issue of competency to be executed.

ADOLPHO A. BIRCH, JR., JUSTICE

¹At one point, the petitioner’s condition was so severe that, *on motion of the State Attorney General*, the Chancery Court for the Twentieth Judicial District appointed a conservator to make decisions regarding the petitioner’s mental health and medical treatment.

²Likewise, Dr. Faye E. Sultan opined, “Mr. Thompson currently lacks the capacity to understand the fact of his scheduled execution or the reason for it.” Report of Dr. Faye E. Sultan, Ph.D., p. 3 (February 27, 2004). Dr. George W. Woods stated “Mr. Thompson remains so grossly psychotic that only the most superficial interrogation would not only reveal his profound psychosis, but his current incompetency [to be executed].” Report of Dr. George W. Woods, M.D., p. 2 (February 27, 2004).