

Mr. Miller demonstrated antisocial personality disorder, as well as drug and alcohol abuse and dependence.

Mr. Miller was subsequently committed under the Act. He appealed to the Kansas Court of Appeals, alleging an abuse of discretion by the trial court and undue prejudice as well as cumulative error. The court of appeals affirmed the commitment as properly conducted. Mr. Miller appealed to the Kansas Supreme Court.

Ruling and Reasoning

In rejecting Mr. Miller’s motion to stipulate, the district judge had relied on two Texas cases: *In re Adams*, 122 S.W.3d 451 (Tex. App. 2003), which asserted that a court may admit a sex offender’s prison disciplinary records and copies of previous conviction records despite an offender’s stipulation, and *In re Commitment of Petersimes*, 122 S.W.3d 370 (Tex. App. 2003), which asserted that a court may admit copies of a sex offender’s indictments and judgments of prior offenses, despite the offender’s stipulation. Mr. Miller’s appeal of the district court’s decision was based on the U.S. Supreme Court’s decision in *Old Chief v. United States*, 519 U.S. 172 (1997). In *Old Chief*, the defendant’s proffered stipulation to his prior conviction (criminal possession of a firearm) was rejected by the lower court. The Court reversed the conviction and held it was an abuse of the lower court’s discretion to spurn an offer of stipulation, thus raising “the risk of a verdict tainted by improper considerations” (*Old Chief*, p 174). The Kansas Supreme Court rejected Miller’s *Old Chief* rationale, relying on their own precedents in *State v. Lee*, 977 P.2d 263 (Kan. 1999), and *In re Care and Treatment of Crane*, 7 P.3d 285 (Kan. 2000). In *Lee*, the court held that although the *Old Chief* rationale was valid for most instances, the court’s “views should not be read as limiting the State in presenting a full in-depth story of a prior crime when the prior crime has relevance independent of merely proving prior felony status” (*Lee*, p 271). In *Crane*, the court asserted that *Lee* (and implicitly *Old Chief*) did not apply to sexually violent predator commitment hearings, holding that “. . . evidence of prior conduct was material to the question of likelihood that the respondent would engage in repeat conduct as well as to the element of conviction of prior conduct” (*Crane*, p 293).

Discussion

The Kansas Supreme Court considered multiple allegations made by Miller’s counsel alleging error in the process used to civilly commit him under the Kansas SVP Act. In rejecting each claim, the court confirmed that a wide range of evidence is admissible in such hearings. The trial court admitted live, in-court testimony from former victims and prison personnel, evidence concerning prior nonsexual offenses, and charges dismissed due to lack of evidence. The court relied on *State v. Franklin*, 677 N.W.2d 276, 282, n. 9 (Wis. 2004):

The nature of the [sexually violent] predator inquiry virtually guarantees the wide-ranging admissibility of evidence concerning the defendant’s past crimes and transgressions.

In *Miller*, as in other SVP cases, the court separated those convicted of sexual offenses from typical criminal offenders. Normally, the inquiry in criminal cases looks backward to determine guilt. In sex offender determinations, the inquiry looks backward to determine propensity. The criminal offender is presumed to be rationally autonomous—that is, able to choose to obey the law, or not. The SVP inquiry focuses on whether the subject has, to some extent, lost free will. This loss of autonomy (and by extension, behavioral control) shifts the focus from prior wrong to future menace. Per the Kansas SVP Act, the inquiry “looks to the future, to the probability of a respondent’s continuing ‘menace to the health and safety of others’” (Kan. Stat. Ann. § 59-29a02(c) (2006)).

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Competence for Execution

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The Sixth Circuit Reversed the District Court’s Dismissal of an Inmate’s Petition as to Incompetency to Be Executed and Remanded for Further Proceedings

In *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2009), Gregory Thompson appealed a Tennessee

district court's dismissal of the *habeas* petition in which he sought to stay his execution by an assertion that he was incompetent to be executed. The Sixth Circuit Court of Appeals reviewed the case.

Facts of the Case

In 1985, a Coffee County Circuit Court jury in Tennessee found Gregory Thompson guilty of the first-degree murder of Brenda Lane and sentenced him to death. The Tennessee courts upheld his conviction on direct and collateral review. In 1998, he filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 (1998). The district court denied the petition in February 2000. In January 2003, the Sixth Circuit upheld the district court's dismissal of his petition (*Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003)). In December 2003, the United States Supreme Court denied a *certiorari* petition, and in January 2004, denied a petition for rehearing. Tennessee's Attorney General then filed a motion with the Tennessee Supreme Court to set a date for Mr. Thompson's execution. In February 2004, Mr. Thompson filed a response that opposed the state's motion and a petition serving notice of his incompetency to be executed. The Tennessee Supreme Court set an execution date and remanded the question of his competency to the trial court.

Under Tennessee law, established in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), a prisoner is not competent for execution if he "lacks the mental capacity to understand the fact of the impending execution and the reason for it." Under this standard, a prisoner claiming to be incompetent for execution in Tennessee has the initial evidentiary burden to make a threshold showing that his present incompetency is genuinely at issue to warrant an evidentiary hearing. In his petition to the trial court, Mr. Thompson requested an evidentiary hearing to determine his competency and submitted, with his motion, his prison medical records, along with the reports of three mental health experts. These experts, two psychiatrists and a psychologist, all concluded that he "currently lacks the capacity to understand the fact of his scheduled execution or the reason for it." Mr. Thompson told one of the experts that he (Thompson) "cannot die, and there will be a two-year period in which he will stay alive, even if he were executed" (*Thompson*, p 430).

In March 2004, the trial court denied Mr. Thompson's incompetency petition without holding

an evidentiary hearing, finding that he had not made the requisite threshold showing of incompetency to warrant such a hearing. The trial court found that "all three of the expert reports . . . demonstrate clearly that Thompson is presently aware that he is under a death sentence for the murder of Brenda Lane under the 'cognitive' standard established by the Supreme Court" (*Thompson*, p 431).

The Tennessee Supreme Court affirmed the trial court in May 2004. The court found that although the expert reports indicated that Mr. Thompson was then suffering from "schizophrenia, chronic undifferentiated type, the reports do not present facts indicating that Thompson is unaware of his impending execution and the reason for it" (*Thompson*, p 431). The court dismissed his documented history of mental illness as "stale" and "not relevant to the issue of *present* competency" (emphasis in the original). The court relied on Mr. Thompson's ability to recount certain details of his crime and his statements showing that he knows about his death sentence for the murder as evidence that he was aware of his execution and the reason for it. The court even asserted that his statement that it was impossible for him to be executed, as further evidence that he understood that an execution was going to take place. The court acknowledged his delusions, but stated, "[t]his Court previously rejected a prisoner's reliance on such delusional or unorthodox beliefs as irrelevant to the question of competency for execution" (*Thompson*, p 431).

In June 2004, Mr. Thompson filed a federal *habeas* petition challenging the state court's competency ruling, and the district court responded by staying his execution. However, his *habeas* proceeding concerning his incompetency was then stayed when the Sixth Circuit Court amended and reversed its January 2003 ruling affirming the denial of his original *habeas* petition. Tennessee appealed the Sixth Circuit's amended decision, and, in June 2005, the U.S. Supreme Court held that the Sixth Circuit had abused its discretion by withholding the mandate of its original judgment for more than five months after the Supreme Court denied rehearing on Mr. Thompson's petition for writ of *certiorari*.

Following the Supreme Court's denial of rehearing in August 2005, the district court resumed review of Mr. Thompson's *habeas* petition based on incompetency. He then argued that because so much time had passed, he should have the opportunity to update

the state courts concerning his present mental condition. In September 2005, the district court lifted the stay of execution, allowing the Tennessee Supreme Court to set a new date. Mr. Thompson re-petitioned the court asserting that a substantial change in his condition had occurred since the court's previous ruling.

He also resumed his *habeas* petition based on incompetency in the federal district court. In May 2006, the court dismissed his petition, finding that the state court's decisions on his present competency to be executed were neither contrary to, nor an unreasonable application of, clearly established federal law. The court then issued a certificate of appealability with respect to his original claim of incompetency. In June 2007, the Sixth Circuit Court expanded the certificate of appealability to include his second incompetency claim.

Ruling and Reasoning

The Sixth Circuit reversed the district court's denial of Mr. Thompson's *habeas* petition based on incompetency and remanded for further proceedings. The court ruled that the Tennessee Supreme Court unreasonably applied *Ford v. Wainwright* (477 U.S. 399 (1986)) when it determined that Mr. Thompson's "severe delusions" were "irrelevant" to a *Ford* competency analysis. "It is therefore error to derive from *Ford* . . . a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted" (*Thompson*, p 435). The Sixth Circuit noted that Mr. Thompson's delusions related to precisely the two concepts that *Ford* required a prisoner to understand to be deemed competent: his impending execution and the reason for it.

The Sixth Circuit also held that the Tennessee Supreme Court's determination that Mr. Thompson's documented history of mental illness was "irrelevant" to the question of his present incompetency was unreasonable. The court cited his "extensive evidence of mental dysfunction" as part of the basis for his "threshold showing" and reasoned that, regardless of whether his incompetency petition should be granted, his evidence had at least created a genuine question of his competency, and therefore warranted an evidentiary hearing. The ruling noted that he included extensive evidence of his incompetency in his petition, including: reports of three medical experts,

two of whom had examined the inmate on multiple occasions; a long, documented history of delusions and psychosis; and the state's previous effort to appoint a conservator to make medical decisions on his behalf. The Sixth Circuit reasoned that the evidence Mr. Thompson submitted was undoubtedly a "substantial threshold showing," and therefore an evidentiary hearing should have been held. The court noted that his medical records were relevant to that question, particularly to the extent that they demonstrate a chronic mental condition or a condition that may have only worsened over time. It further opined that his medical history demonstrated a "long history of bipolar disorder" and that he had been psychotic and delusional since at least 1989. The court held that, although this history was not definitive proof of his current incompetency for execution, it was at least strongly suggestive of the seriousness of his illness and whether it was chronic.

Discussion

The Tennessee Supreme Court appears to have taken an unreasonably restrictive interpretation of the Eighth Amendment prohibition against executing a prisoner who is insane. In *Ford*, Justice Powell held that prisoners are insane for the purposes of execution if they are "unaware of the punishment they are about to suffer and why they are to suffer it" (*Ford*, p 422). Powell also opined that a state might, consistent with due process, presume that a prisoner who is competent to stand trial is sane at the time of execution and "may require a substantial threshold showing of insanity merely to trigger the hearing process" (*Ford*, p 426).

The Tennessee Supreme Court's dismissal of Mr. Thompson's delusional beliefs as irrelevant once he was aware the state had identified the link between his crime and the punishment to be inflicted, appears to be a critical error. The justices dismissed the reports of the mental health experts, as well as his long, well-documented history of delusions and psychosis. The court also appears to have dismissed the degree to which his delusional beliefs affected his ability to comprehend the potential punishment or the reasons for it. Ironically, if the court had elected to hold an evidentiary hearing for him, its strict test vis-à-vis competency to be executed may have positioned his case beyond the ambit of appeal or review.

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