IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: DARYL KEITH HOLTON

No. M2000-00766-SC-DDT-DD - Filed: September 11, 2007

ORDER

On September 11, 2007, seventy-eight Tennessee attorneys filed a respectful petition asking this Court to exercise its inherent authority to *sua sponte* withdraw the order that set Daryl Keith Holton's execution for September 12, 2007. The petitioners assert that this Court should "either declare electrocution unconstitutional or order an expeditious review of the constitutionality of electrocution in Tennessee." The State of Tennessee has filed a response to the petition, arguing that the petitioners lack standing, that there is no case or controversy, and that, by choosing electrocution, Holton has waived his constitutional challenges to the manner of executing the sentence.

Notwithstanding issues of timeliness and procedural propriety, we recognize the sincere concerns expressed by the petitioners regarding the constitutionality of electrocution as a method of execution and will address the requests made in the petition. To do so, however, it is necessary to recount briefly the procedural history of this case.

On February 1, 2007, the Governor of Tennessee granted an executive reprieve to several death row inmates, including Daryl Keith Holton, until May 2, 2007, to allow the Commissioner of Correction to review the manner in which death sentences are administered in Tennessee and to provide new protocols and related written procedures for administering the sentence of death.[1] On April 30, 2007, the Commissioner completed his review and forwarded the revised execution protocols to the Governor. Having received the Report,[2] which included updated and revised protocols concerning electrocution, the Governor declined to extend the reprieve. Thus, on May 4, 2007, the State of Tennessee filed a motion to re-set Holton's execution date. On May 10, 2007, Holton filed *pro se* a response indicating that he did not oppose the State's motion. On May 22, 2007, this Court granted the State's motion and re-set the date of execution for September 12, 2007. On August, 14, 2007, pursuant to Tennessee Code Annotated section 40-23-114 (2006), Holton executed an affidavit, stating: "I waive the right to have my execution carried out by lethal injection and choose to be executed by electrocution."

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[1] Governor's Exec. Order No. 43 (Feb. 1, 2007).

[2] Tenn. Dep't of Corr., Report on Administration of Death Sentences in Tennessee (Apr. 30, 2007), available at Workman v. Bredesen, 486 F.3d 896, 913-921 (6th Cir. 2007) (Appendix A).

Against this backdrop we consider Petitioners' request that we *sua sponte* withdraw the order of execution. We decline to do so. While we recognize that there are moral concerns about the propriety of the death penalty, our analysis must be guided by legal precedent and the Constitutions of the United States and of the State of Tennessee. This Court has consistently upheld the constitutionality of the death penalty and the constitutionality of electrocution as a method of execution. See, e.g., State v. Morris, 24 S.W.3d 788, 814 (Tenn. 2000); State v. Hines, 919 S.W.2d 573, 582 (Tenn. 1995); State v. Black, 815 S.W.2d 166, 178-79 (Tenn. 1991). Additionally, the Legislature has not eliminated electrocution as a method of execution for all death-sentenced inmates in Tennessee. Cf. Van Tran v. State, 66 S.W.3d 790, 804 (Tenn. 2001) (recognizing that Tennessee's statutory prohibition against executing the mentally retarded established the evolving standard of decency in Tennessee concerning execution of the mentally retarded).

Moreover, "[c]ourts have long recognized the right of competent defendants to make decisions concerning their available legal remedies." Pike v. State, 164 S.W.3d 257, 262, 264 (Tenn. 2005) (refusing to mandate post-conviction review of death sentences and rejecting the argument that allowing a death-sentenced inmate to waive post-conviction review "denies the people of the State of Tennessee the right to ensure that only individuals who have received a death sentence through a constitutional process are executed").

Finally, the United States Supreme Court has held that a death-sentenced inmate's choice of a particular method of execution waives any objection the inmate may have to the chosen method. Stewart v. LaGrand, 526 U.S. 115, 119, 119 S. Ct. 1018, 1020 (1999) ("By declaring his method of execution, picking lethal gas over the State's default form of execution–lethal injection–Walter LaGrand has waived any objection he might have to it."). See also Cone v. Bell, 492 F.3d 743, 757 (6th Cir. 2007) ("Since Cone selected a method of execution different from [Tennessee's] default method, his objections to his chosen method of execution are waived and we do not reach the merits of his claim.")

Holton was tried by a jury of his peers and convicted of four counts of premeditated first degree murder. The jury imposed the ultimate penalty for these convictions. Holton's convictions and sentences were reviewed on direct appeal by both the Tennessee Court of Criminal Appeals and by this Court. Holton chose to forego collateral review and affirmatively selected the method of execution shortly after the execution protocols had undergone an extensive review. Considering both the circumstances of this case and the relevant legal precedent, we decline to exercise our supervisory authority to *sua sponte* withdraw the order of execution. Accordingly, the petition is, respectfully, DENIED.

It is so ORDERED.

PER CURIAM

Justice Cornelia A. Clark, Not Participating