

IN THE TENNESSEE SUPREME COURT

FILED

April 18, 2000

**Cecil Crowson, Jr.
Appellate Court Clerk**

ROBERT GLEN COE,)
)
 Petitioner-Appellee,)
)
 v.)

No. M2000-00897-SC-R9-CV

_____)
DON SUNDQUIST, Governor of the State)
of Tennessee; DONAL CAMPBELL,)
Commissioner, Tennessee Department of)
Corrections; RICKY BELL, Warden,)
Riverbend Maximum Security Institution;)
VIRGINIA LEWIS, Warden, Special Needs)
Facility; JOHN DOES 1-100, in their official)
capacity only,)
)
Defendants-Appellants)

**PLAINTIFF-APPELLEE’S MEMORANDUM OF LAW IN SUPPORT OF
THE CIRCUIT COURT’S ORDER GRANTING ROBERT GLEN COE
A TEMPORARY RESTRAINING ORDER**

This Court has no appellate jurisdiction over this appeal. Tenn. Code Ann. §16-3-201(d)(3) provides this Court with authority to assume jurisdiction only over an appeal that is pending in an intermediate appellate court. As of now, there simply is no appeal pending in the Tennessee Court of Appeals. While the State has filed a Rule 9 motion requesting that the Tennessee Court of Appeals allow an interlocutory appeal, unless and until that court acts on the State’s request there is no appeal before it. Because there is no pending appeal, there is no authority for this Court to assume jurisdiction over this case.

Further, even if this court had jurisdiction, the temporary restraining order entered by the

Circuit Court of Tennessee's 20th Judicial District is unquestionably proper. As held by the Circuit Court - which heard the evidence and assessed the credibility of the witnesses - the Department of Corrections clearly violated the Tennessee Uniform Administrative Procedures Act in the purported establishment of rules governing lethal injection. Further, as properly held by the Circuit Court, the use of medical personnel to carry out an execution by lethal injection violates applicable provisions of Tennessee law. Given the limited standard of review that this Court employs to review the entry of a temporary restraining order, this Court can do nothing other than uphold the restraining order.

This Court reviews the lower court's ruling for abuse of discretion. As the Tennessee Supreme Court stated in King v. Elrod, 268 S.W.2d 103, 106 (Tenn. 1953):

Whether or not such injunction should be granted is a question that the court must use its judgment on with reference to the special circumstances of each case, and the court's action thereunder will not be disturbed on appeal unless it clearly appears from the record that there has been an abuse of such discretion.

See International Brotherhood of Electrical Workers v. O'Brien, 302 S.W.2d 60, 63 (Tenn. 1957); Foster v. Harle, 57 S.W.2d 452 (1933); Association of Owners v. Thomasson, 878 S.W.2d 560, 566 (Tenn.App. 1994) ("The Chancellor did not abuse his discretion in granting a mandatory injunction.")

_____Based upon the facts and circumstances before the Circuit Court, it plainly appears that the injunction entered by the Circuit Court was not an abuse of discretion. The Circuit Court's findings in entering the restraining order are clear and precise and demonstrate a clear and proper application of Tennessee law. As to the clear violation of the Tennessee Uniform Administrative Procedures Act, the Circuit Court's findings provide:

2. The Uniform Administrative Procedures Act applies to the rulemaking concerning the utilization of lethal injection as a means of execution. Section 40-23-114 authorized the department of correction to promulgate rules controlling lethal injection. The Department of Corrections is an 'agency' as

considered by the Act, Section 4-5-102(2), T.C.A., and pursuant to Section 4-5-202 T.C.A., rulemaking of the agency was required to be preceded by public hearings. Such hearings were not held. The only procedure followed by the agency in promulgating these rules were visits by Warden Bell and other non-medical personnel to other states that used lethal injection. The 'team' then determined that similar drugs would be used in Tennessee. It appears that there was no attempt to comply with the provisions of the Uniform Administrative Procedures Act.

3. The rules established by the Department of Corrections therefore appear to be illegal.

Circuit Court Order, pp. 1-2.

As to the violation of Tennessee law arising from the use of licensed medical personnel in the preparation for, and conducting, of a lethal injection, the Circuit Court has found:

4. It further appears that no licensed medical doctor may participate in any way in connection with an execution by lethal injection because of ethical rules of the AMA and TMA.

Circuit Court Order, p. 2. The Circuit Court has reached this conclusion based upon evidence presented at the hearing in this matter.

Based upon these conclusions, the Circuit Court has properly concluded that it is appropriate and necessary to enter a restraining order precluding the lethal injection, as any such lethal injection is in violation of the laws of the State of Tennessee, and Robert Coe faces imminent irreparable harm if the unlawful lethal injection is carried out:

5. It therefore appears that Plaintiff is likely to succeed on the merits of his complaint and that he will suffer irreparable harm, death, unless a restraining order is issued and further hearings are held.

Under the applicable standard of review, the Circuit Court's order was unquestionably proper.

Under the facts and circumstances presented at the hearing on the application for the restraining order, it is not an abuse of discretion for the Circuit Court to conclude that the actions of the

Tennessee Department of Corrections and its agents violate applicable Tennessee law.

Nothing Precludes The Circuit Court From Issuing A Temporary Restraining Order

While the state relies upon Barger v. Brock, 535 S.W.2d 337 (Tenn. 1976) for the proposition that the circuit court had no authority to enter the restraining order, nothing in Barger precludes the trial court from entering the restraining order. Barger stands only for the unremarkable proposition that adjudications of the Supreme Court “are final and conclusive upon all questions determined by it. . . .” Id. at 340. The Tennessee Supreme Court recognizes that when, as here, the questions before the lower court are *different* from questions resolved by the Tennessee Supreme Court, the lower court is not bound by any superior court precedent and may act as it sees fit to enforce the provisions of Tennessee law. See Fletcher v. State, 951 S.W.2d 378, 381 (Tenn. 1997). That is precisely the case here.

In fact, the Circuit Court has clearly held that the issues presented have *never* been addressed by this Court:

These issues have not been previously addressed by any court nor were they considered by the Supreme Court of Tennessee. Therefore this is a question of law that is not affected by the doctrine of *stare decisis* and this court is the proper tribunal with original jurisdiction.

Circuit Court Order, p. 1. The Circuit Court’s finding is clearly correct. The state can point to no determination of the issues presented by *any* court, let alone a court in this case.

Any argument that the Circuit Court’s restraining order impermissibly interferes with this Court’s execution order misapprehends the nature of these proceedings. In fact, the state misrepresent the Circuit Court’s order as a “stay” of an order entered by this Court. Rather, it is a

restraining order entered pursuant to Tenn.R.Civ.P. 65 to preserve jurisdiction over a lawsuit which no court has ever considered. Even this court's execution order made clear that in such circumstances a court of competent jurisdiction could properly enter an order enjoining the execution if the facts and law warranted. That is exactly what the Circuit Court has done. It is no different from a post-conviction court entering a stay of a lawful execution order entered by this court when necessary to preserve jurisdiction over an inmate's legal claims.

The Uniform Administrative Procedures Act Does Apply Here

The state's claim that the Uniform Administrative Procedures Act does not apply here is patently incorrect. A "rule" is an "agency statement of general applicability that *implements* or prescribes *law* or policy or describes the procedures or practice requirement of any agency." Tenn.Code Ann. §4-5-102(10). The statute governing lethal injection (Tenn.Code Ann. §40-23-114) *specifically requires that the Department of Corrections establish rules to implement the law* of 40-23-114. The Tennessee statute provides in no uncertain language:

The department of correction is authorized to promulgate necessary *rules* to facilitate the *implementation* of this section.

The Tennessee Legislature has made it eminently clear that, before a lethal injection may occur, the department of corrections *must* establish *rules* specifically to *implement* 40-23-114. This tracks the exact language of the Uniform Administrative Procedures Act. Rules to implement the law – and directed to be established by law – must comply with the UAPA. The Circuit Court was unquestionably correct in so concluding and entering the restraining order.

In fact, this Court has previously made manifest that the department of corrections is an agency which is exempted from the UAPA only in limited circumstances involving prisoner

disciplinary or job termination proceedings: “The legislature did not exempt the Department from the provisions of the uniform act, except for situations involving prisoner disciplinary or job termination proceedings.” Slagle v. Reynolds, 845 S.W.2d 167169 (Tenn. 1992).

The State’s citation to *Mandela* is clearly inapposite, as what was at issue there was a question of internal disciplinary policies of the department of corrections, and does not take into account this Court’s pronouncements in Slagle. There was no implementation of law, as has been mandated here. There, the department of corrections was dealing only with “internal operating procedures,” 978 S.W.2d at 534, and thus only affected internal management of prisons, therefore falling outside the scope of the UAPA. There was no implementation of any law (as exists here) nor was there any specific legislative directive to establish rules, as there is here. Accordingly, *Mandela* is not controlling. And, in fact, *Mandela* specifically cites Tenn. Code Ann. §4-5-102(10) which requires compliance with the UAPA for the implementation of law. *Mandela*, 978 S.W.2d at 533. This is what is required here by the lethal injection statute itself. The Circuit Court was unquestionably correct in reaching this conclusion.

The State Misstates This Court’s Decision In Swafford v. Harris

Remarkably, the state cites Swafford v. Harris, 967 S.W.2d 319 (Tenn. 1998) for the proposition that participation of a physician-pharmacist or licensed health-care professional in the execution of Robert Coe does not violate public policy. Swafford, however, unambiguously states:

A violation of the AMA Code constitutes unprofessional conduct and violates public policy established by the Tennessee Board of Medical Examiners.

Id. at 321 (emphasis supplied). Either the state has misread *Swafford* or has intentionally misrepresented the holding in *Swafford*. In citing *Swafford*, therefore, the state has conceded the

merit of Robert Coe's claims.

In fact, the proof at the hearing established that the Warden essentially provided a list of drugs to the state-licensed pharmacist at the special needs facility who then ordered the drugs and has dispensed the drugs for the purpose of killing Robert Coe. The AMA and the TMA prohibit non-pharmacists (the Warden) from ordering drugs, and the pharmacist from dispensing such drugs to kill a human being. This is the public policy of Tennessee. In Tennessee, health care providers sustain life – they cannot and do not take it.

The state's reliance on a California Court of Appeals case does not support their position. Not only is California not governed by the applicable provisions of the laws of the State of Tennessee, but the California Legislature specifically provided for physician involvement in executions. Clearly, if the Tennessee Legislature sought to allow such physician involvement, it would have done so when it amended the lethal injection law just weeks ago. The Legislature did not.

The Public Has No Interest In Lethally Injecting Anyone In Violation Of Law

The state's argument that Robert Coe's interest in his life is of little weight is specious. Our Nation was founded on the self-evident Truth that all have the inalienable right to life. The state mocks this Declaration by its argument that the public interest would somehow be served in the implementation of a death sentence which is in clear violation of Tennessee law. We are Nation and a State of laws. To flout the law – as the state requests – makes a mockery of this institution and who we are as a *People* -- a *People* dedicated to the principles on which this Nation was founded. Robert Coe's concern is not, as the state contends, a mere trifle about "ethics." Not only are those ethics *the solemn law of this State*, but his entire complaint is that he may not be lethally injected in

violation of law.

CONCLUSION

This Court has no appellate jurisdiction over the appeal. Even if it did, this Court can take no action other than to uphold the trial court's decision. The trial court's decision granting Coe a restraining order is not an abuse of discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been provided to Office of the Attorney General and Reporter, 450 James Robertson Parkway, Nashville, TN 37243 via hand delivery, on this the 18th day of April, 2000.
