IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

FILED

April 18, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

ROBERT GLEN COE,)
)
Plaintiff-Appellee,)
) DAVIDSON COUNTY
) CIRCUIT COURT
) NO.M2000-00898-COA-R9-CV
v.)
)
DON SUNDQUIST, Governor)
of the State of Tennessee,)
et al.,)
)
Defendants-Appellants.)

APPLICATION FOR INTERLOCUTORY APPEAL
BY PERMISSION PURSUANT TO RULE 9, T.R.A.P.

Come now the defendants-appellants and respectfully request the Court to grant an interlocutory appeal pursuant to Rule 9, T.R.A.P., from the order of the trial court staying the April 19, 2000, execution of Robert Glen Coe.

STATEMENT OF THE FACTS

By order of April 12, 2000, the Supreme Court set the execution of Robert Glen Coe for April 19, 2000. On April 18, Coe filed in Davidson County Circuit Court a complaint for declaratory and injunctive relief, alleging that Coe's execution by lethal injection would violate various state statutes and regulations. Following a brief hearing, the circuit judge issued a stay of the execution pending disposition of the case. Pursuant to Rule 9(b), T.R.A.P., the circuit judge granted the defendants-appellants permission to file a Rule 9 appeal. (Copy attached.)

REASONS SUPPORTING AN IMMEDIATE APPEAL

Because the trial court in effect has vacated an order of the Supreme Court and because the time for carrying out that Court's order will expire at 11:59 p.m. on April 19, 2000, an immediate appeal is necessary to prevent irreparable injury to the State of Tennessee. Review upon entry of final judgment will be ineffective. In addition, the following reasons also support an immediate appeal.

I. THE TRIAL COURT LACKED JURISDICTION TO GRANT A STAY.

The trial court's order in effect has stayed the Supreme Court's April 12, 2000, order. It is well-settled that an inferior court has no authority to set aside the orders of the Supreme Court. *Barger v. Brock*, 535 S.W.2D 337, 341 (Tenn. 1976). "The slightest deviation from this rigid rule would disrupt and destroy the sanctity of the judicial process." *Id.*. In fact, in *Barger*, the Supreme Court specifically relied on *Dibrell v. Eastland*, 11 Tenn. 507 (1832), a case in which a circuit judge had ordered the issuance of a supersedeas of a decree of the Supreme Court. The Court in *Dibrell* said:

> This Court is of the opinion, that a circuit judge has no power or jurisdiction to grant an order for a supersedeas to the judgments or decrees of this Court, more than a justice of the county court has power and jurisdiction to cause to be superseded the decrees and judgments of the circuit courts. The power did not exist in this case, and it will equally apply to every decree and judgment, civil and criminal, that the Supreme Court has or may render. Let the supersedeas be quashed.

11 Tenn. at 507, quoted in *Barger, supra*, at 341. The instant case is indistinguishable.

While a trial judge may be authorized to issue a stay of execution under certain circumstances upon the filing of a proper petition for post-conviction relief, see Tenn. Code Ann. § 40-30-220, or

a petition for writ of habeas corpus, see Tenn. Code Ann. § 29-21-119, this case is neither a post-conviction case nor a habeas case, but rather an action for a declaratory judgment under Tenn. Code Ann. § 29-14-101, *et seq*. No jurisdiction exists under that act to supersede a valid order of the Supreme Court.

II. THE LETHAL INJECTION POLICY WAS NOT REQUIRED TO BE PROMULGATED AS A RULE UNDER THE UNIFORM ADMINISTRATIVE PROCEDURES ACT.

Plaintiff contends that the Department of Correction policy prescribing the protocol for carrying out lethal injections in this State should have been promulgated as a "rule" under the Uniform Administrative Procedures Act (UAPA). The claim is plainly without merit.

The UAPA defines a "rule" as an "agency statement of general applicability, that implements or prescribes law or policy or describes the procedures or practice requirements of any agency." Tenn. Code Ann. § 4-5-102(10). But the definition expressly excludes "statements concerning only the internal management of state government and not affecting private rights, privileges or procedures available to the public" (Tenn. Code Ann. § 4-5-102(10)(A)), as well as "[s]tatements concerning inmates of a correctional or detention facility." (Tenn. Code Ann. § 4-5-102(10)(G)).

The lethal injection policy at issue here fits squarely within both exclusions. It does not deal with or affect any "private rights, privileges or procedures available to the public." Rather its sole subject matter is the management of correctional personnel in the carrying out of an execution of an inmate by lethal injection. *See Mandela v. Campbell*, 978 S.W.2D 531 (Tenn. 1998). The policy also obviously constitutes a "statement[] concerning the inmates of a correctional . . . facility," *i.e.*, those inmates subject to lethal injection pursuant to an order of the Supreme Court. The policy is, therefore, <u>not</u> a "rule" under the UAPA.

III. PARTICIPATION BY A PHYSICIAN IN THE LAWFUL EXECUTION OF ROBERT GLEN COE, IN ANY MANNER, DOES NOT VIOLATE PUBLIC POLICY AS IT EXISTS IN THE STATE OF TENNESSEE, AND CANNOT BE USED AS GROUNDS TO ENJOIN HIS IMMINENT EXECUTION.

Petitioner has presented this Court with an ethical opinion, apparently adopted by the American Medical Association, which instructs that a physician should not participate in a legally authorized execution.[1] Based on this ethical opinion, he argues three points: participation by a physician in a legally authorized execution violates (1) a physician's professional ethical code of conduct; (2) public policy, as it exists in the State of Tennessee under the standards set out in *Swafford, infra*; and (3) the Uniform Administrative Procedures Act. Petitioner's arguments are groundless and without merit.

First, a physician's ethical code of conduct is not a matter for this Court's enforcement and concern. That is a matter left to the physician and the governing Board of Medical Professionals. Second, there has been no "public policy" violation. Petitioner's reliance on *Swafford v. Harris,* 967 S.W.2D 319 (Tenn. 1998), is totally misplaced and erroneous. *Swafford* involved a physician who agreed to take a contingency fee as a medical/legal consultant in a personal injury case. Just like taking a contingency fee for medical treatment violates public policy, so too does a physician taking a contingency fee in a personal injury action. This is totally inapplicable to the present case. More on point is the decision in *Thornburn v. Dept. Of Corrections,* 66 Cal. App. 4th, 1284 (Cal. Ct. Of Appeals 1998), wherein the Court of Appeal of California, even in light of the American Medical Association's ethical opinion prohibiting physician participation in executions, refused to enjoin a

[1] Respondent uses the term "apparently" insomuch as petitioner presented a claim which was obviously available to him for some time just hours before his scheduled execution.

physician's participation in a lawful execution. The Court held that that physician participation violated no public policy in that it would not likely affect the trusting quality of any physician/patient relationship. The State of Tennessee has affirmatively approved legally authorized executions as a method of punishment. No public policy concern is violated by allowing physicians or anyone else to participate in the carrying out of a lawful sentence. "In fact, the employment of tested procedures used in connection with the practice of medicine (i.e. insertion of IV) is perfectly consistent with the purpose behind the imposition of death by lethal injection; that is, to impose death upon the inmate in as humane a manner as possible." *State v. Webb,* 1998 WL 405184 (Conn. Super.) (Parenthetical information added.)

Finally, the Uniform Administrative Procedures Act is totally irrelevant to the ethical codes of conduct adopted by any non-government entity that chooses to adopt them; and this Court is powerless to enforce ethical codes of conduct. *See* Tenn. Code Ann. §4-5-102(2) (definition section of Administrative Procedures Act which defines its application to "agency" meaning "**state** board, commission, committee, etc., not a private governing committee of a profession). See also argument in Section II, *supra*.

Most importantly, even accepting as true for the sake of argument petitioner's allegations that *any* involvement by a physician whatsoever is prohibited under the code of ethics adopted by the American Medical Association, the only proper remedy for a court to undertake is to enjoin any physician from actually participating further in the lawful execution of Robert Glen Coe and not to enjoin the execution order entered by the Tennessee Supreme Court authorizing Robert Glen Coe's lawful execution on April 19th, 2000. At most, and again only for the sake of argument, the most this court can do is enjoin physician participation, not stop a lawfully ordered execution.

IV. BALANCING THE EQUITIES, THE PUBLIC INTEREST WEIGHS IN FAVOR OF DENYING INJUNCTIVE RELIEF.

Coe's interest in restraining his execution on the grounds asserted in the Complaint are entitled to little weight. He makes no claim here that the order of the Court scheduling his execution is unlawful. He makes no claim here that the sentence of death imposed upon him is unlawful. He makes no claim here that his execution in accordance with the procedures outlined in this lethal injection policy will violate any right — constitutional or statutory — personal to him. His principal concern is merely that a physician may violate the code of ethics applicable to physicians. Moreover, all the grounds asserted in the Complaint for Injunctive Relief have been available to plaintiff, and could have been asserted long ago. Plaintiff has been subject to imminent execution since May 1999. He selected lethal injection as the method of execution under Tenn. Code Ann. § 40-23-116 in September 1999. All of the policies he challenges were in effect before that date.

On the other hand, the public interest weighs heavily in favor of denying any form of injunctive relief. Plaintiff has been lawfully sentenced to death for crimes he committed nearly two decades ago. The public interest in the timely execution of a lawful sentence in this criminal case should be dispositive here.

CONCLUSION

For the reasons stated, the application should be granted and the stay immediately vacated.

Respectfully submitted,

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MICHAEL E. MOORE
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by facsimile transmission and first class mail, postage prepaid, to James H. Walker, 601 Woodland Street, Nashville, Tennessee 37206, and George Edward Barrett, BARRETT, JOHNSTON & PARSLEY, 217 Second Avenue, North, Nashville, Tennessee 37201, William R. Willis, Jr., WILLIS & KNIGHT, 215 Second Avenue, North, Nashville, TN 37201, Cecil D. Branstetter, BRANSTETTER, KILGORE, STANCH & JENNINGS, 227 Second Avenue, North, Fourth Floor, Nashville, Tennessee 37201 on this the 18th day of April, 2000.

GORDON W. SMITH
Associate Solicitor General