

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

2010 NOV 24 PM 5:45

APPELLATE COURT CLERK
NASHVILLE

STATE OF TENNESSEE V. BILLY RAY IRICK

No. M1987-00131-SC-DPE-DD¹

ORDER

On July 19, 2010, this Court set December 7, 2010, as the date for the execution of Billy Ray Irick. On November 19, 2010, Mr. Irick was allowed to intervene in a declaratory judgment action filed by another death-row inmate, Stephen Michael West, in which Mr. West challenged the constitutionality of Tennessee's three-drug protocol for lethal injection.² On November 19, 2010, the trial court announced its decision in a bench ruling. On November 22, 2010, the trial court entered an order granting a declaratory judgment to Mr. West and Mr. Irick, and this order incorporated by reference the trial court's November 19, 2010 bench ruling.

On November 23, 2010, Mr. Irick filed in this Court a "Motion to Vacate or Further Modify Court's Order Scheduling Irick's Execution." Mr. Irick asserts that as a result of the trial court's ruling that the three-drug protocol violates the prohibition against cruel and unusual punishment in the state and federal constitutions, the State of Tennessee is unable to carry out his execution by lethal injection in the manner provided by law. He further asserts that because only sixteen days remain between the date of this motion and the date set for his execution, should the defendants change their method of carrying out lethal injections, he will not have an opportunity to present evidence to the trial court challenging the constitutionality of the revised protocol. He therefore requests that this Court vacate its order setting his execution date for December 7, 2010, and decline to reset this date until such time as the defendants have demonstrated that any new method of carrying out lethal injections comports with Article I, section 16 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution.

¹Mr. Irick styled his Motion Stephen Michael West et al. v. Gayle Ray et al., No. M2010-02275-SC-R11-CV. Because the motion asks this Court to modify Mr. Irick's scheduled execution, it is more properly filed under the number and style of the order initially setting Mr. Irick's execution, listed above.

²The trial court orally granted Mr. Irick's motion to intervene on November 12, 2010, but did not file an order granting the motion until November 19th.

On November 24, 2010, the defendants filed a response in opposition to Mr. Irick's Motion. The defendants assert that vacating or modifying the order setting Mr. Irick's execution date is not necessary because the lethal injection protocol has been revised to respond to the trial court's ruling that the failure to assess consciousness creates an objectively intolerable risk of severe suffering or pain.³ The trial court stated:

It appears to this Court that there are feasible and readily available alternative procedures which could be supplied at execution to insure unconsciousness and negate any objectively intolerable risk of severe suffering or pain. This Court should not say or find which of those it would recommend, but I think the Court's finding of fact regarding the ways – the various ways that unconsciousness can be checked should be left to the State.

The revised protocol requires the Warden to "assess the consciousness of the condemned inmate by brushing the back of his hand over the condemned inmate's eyelashes, calling the condemned inmate's name, and gently shaking the condemned inmate." The revised protocol also provides for a contingency procedure should the condemned inmate remain conscious. The defendants maintain that by revising the lethal injection protocol to include this test to determine consciousness and to include a contingency procedure should the inmate remain conscious, they have "taken the step[s] the trial court deemed necessary to ensure that the plaintiffs' sentences are carried out in a constitutional manner."

On its face the revised protocol appears to address the basis of the trial court's conclusion that the previous protocol was unconstitutional. Mr. Irick argues that he should be afforded an opportunity to present additional evidence regarding changes in the execution protocol. However, the addition of a step to the protocol to assure that the inmate is unconscious prior to the administration of the second and third drugs has already been litigated in the trial court; and the modifications to the protocol are consistent with those found to be appropriate by the trial court. Accordingly, no further evidence regarding these revisions is necessary.

Upon due consideration of Mr. Irick's Motion and the State's response, Mr. Irick's Motion is DENIED. The denial of Mr. Irick's motion is without prejudice to Mr. Irick's ability seek further relief in this or any other court.

It is so ORDERED.

PER CURIAM

³The defendants have submitted the revised protocol as exhibit A in support of their response. The revised protocol is a matter of which this Court may take judicial notice pursuant to Tennessee Rules of Evidence 201 and 202. Additionally, the revised protocol is capable of ready demonstration pursuant to Tennessee Rule of Appellate Procedure 14.