IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STEPHEN MICHAEL WEST v. GAYLE RAY, ET AL.

Chancery Court for Davidson County
No. 10-1675-I

No. M2010-02275-SC-R11-CV

ORDER

On July 15, 2010, this Court set the execution of the applicant, Stephen Michael West, for November 9, 2010. On October 25, 2010, Mr. West filed in the Chancery Court for Davidson County, Tennessee, an Amended Complaint for Declaratory Judgment and Injunctive Relief, and a Motion for Temporary Injunction.

Mr. West contended that injunctive relief was appropriate because the method of lethal injection by which the defendants intend to execute him would constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution. Mr. West maintained that under Tennessee's existing three-drug lethal injection protocol, the dosage of the first drug administered, sodium thiopental, is insufficient to render the prisoner unconscious. Therefore, he maintained, inmates are likely awake and conscious when the second and third drugs, which paralyze the muscles and cause cardiac arrest, are administered.

Mr. West supported this claim with two affidavits from Dr. David Lubarsky. In the April 22, 2010 affidavit, Dr. Lubarsky attested that he had reviewed the autopsy reports from three other condemned inmates who were executed under Tennessee's current three-drug lethal injection protocol. According to Dr. Lubarsky, these autopsy reports show that the postmortem levels of the initial anesthetic drug used, sodium thiopental, were not sufficient to produce unconsciousness or anesthesia. Dr. Lubarsky opined that as a result, all three of these inmates would have suffocated and suffered pain during the execution process. The State did not introduce any proof on this issue.

On October 28, 2010, the Chancery Court found that the injunctive relief sought by Mr. West would necessarily require issuance of a stay of execution and held that it did not have jurisdiction to supersede a valid order of the Supreme Court. Accordingly, the court denied the Motion for Injunction and immediately granted Mr. West's motion for permission

to take an interlocutory appeal under Tenn. R. App. P. 9. Mr. West promptly filed an application for an interlocutory appeal in the Court of Appeals. On November 3, 2010, the Court of Appeals denied permission to appeal. The matter is now before this Court on Mr. West's application for permission to appeal pursuant to Tenn. R. App. P. 11 or, in the alternative, a motion to vacate or modify the order setting execution.

We agree with both the Chancery Court and the Court of Appeals that the Chancery Court does not have the authority to stay this Court's execution order. See Robert Glen Coe v. Sundquist, No. M2000-00897-SC-R9-CV (Tenn. Apr. 19, 2000) (Order). However, we do not agree that the time constraints created by the pending execution necessarily prevented the Chancery Court from taking proof and issuing a declaratory judgment on the issue of whether Tennessee's three-drug protocol constitutes cruel and unusual punishment because the manner in which the sodium thiopental is prepared and administered fails to produce unconsciousness or anesthesia prior to the administration of the other two drugs.

Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, tested, and weighed in an adversarial hearing such as the one that was held by the United States District Court for the Middle District of Tennessee in Harbison v. Little, No. 3:06-cv-01206, 2010 WL 2736077 (M.D. Tenn. July 12, 2010). The current record in this case contains no such evidence. Accordingly, we have determined that both Mr. West and the State of Tennessee should be afforded an opportunity to present evidence supporting their respective positions to the Chancery Court and that the Chancery Court should be afforded an opportunity to make findings of fact and conclusions of law with regard to the issues presented by the parties.

Accordingly, we grant Mr. West's application for permission to appeal and, dispensing with further briefing and argument in accordance with Tenn. R. App. P. 2, we vacate the Chancery Court's October 28, 2010 order and remand the case to the Chancery Court for further proceedings consistent with this order. Because of the shortness of the time between the entry of this order and the current date of Mr. West's execution, we also grant Mr. West's motion to modify our July 15, 2010 execution order and reset the date of Mr. West's execution for November 30, 2010.

In order to assist the parties and the Chancery Court in identifying and focusing on the issues to be addressed following the remand of this case, we note that the United States Supreme Court addressed Kentucky's three-drug lethal injection protocol in Baze v. Rees, 553 U.S. 35 (2008). The Court issued several opinions in that case, including Chief Justice Roberts' plurality opinion (writing for two other justices), one concurring opinion, four other opinions concurring in the judgment, and one dissenting opinion. Under these circumstances,

Chief Justice Roberts' plurality opinion is controlling. See Harbison v. Little, 571 F.3d 531, 535 (6th Cir. 2009); Emmett v. Johnson, 532 F.3d 291, 298 n. 4 (4th Cir. 2008); see also Walker v. Epps, 287 Fed. App'x 371, 375 (5th Cir.2008) (relying on plurality opinion for controlling legal standard). In Baze, the United States Supreme stated that to prevail on an Eighth Amendment claim there must be proof of a "substantial risk of serious harm," an "objectively intolerable risk of harm" qualifying as cruel and unusual punishment. Baze, 553 U.S. at 50 (plurality opinion). "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." Id. Rather, to prevail on an Eighth Amendment claim, there must be "a demonstrated risk of severe pain . . . [that] is substantial when compared to the known and available alternatives." Id. at 61. The same standard applies under Article 1, section 16 of the Tennessee Constitution. Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 314 (Tenn. 2005). Therefore, to prevail on a claim of cruel and unusual punishment under Article 1, section 16 of the Tennessee Constitution, the inmate must also introduce proof that there is an objectively intolerable risk of harm or suffering that would qualify as cruel and unusual punishment. The heavy burden of proving this risk is on the party challenging the protocol. Baze v. Rees, 553 U.S. at 53.

The plurality opinion in Baze, in addressing the constitutionality of Kentucky's similar three-drug lethal injection protocol, noted that the intent behind administration of the first drug, sodium thiopental, is to ensure that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs. Id. at 44. Even viewing the uncontroverted affidavit of Dr. Lubarsky as true,[1] we note that there is no objective proof in the record regarding what level of sodium thiopental is necessary to ensure that a prisoner is at a level of unconsciousness where he or she will be unable to feel severe pain at the time the second and third drugs are administered. Furthermore, although Dr. Lubarsky opined that the sodium thiopental serum levels present in the three executed inmates were not high enough to ensure unconsciousness, there is no evidence in the record as to what serum level (and concomitant dosage) would induce a level of unconsciousness to assure that the inmate does not suffer severe pain. Accordingly, there is currently no evidence upon which to base a decision of what procedures are required to ensure an execution by lethal injection is free of risk of suffering. Furthermore, the State has not yet

[1]In reaching the conclusion that Tennessee's lethal injection procedures do not render those being executed in Tennessee unconscious before the pancuronium bromide and potassium chloride are administered, Dr. Lubarsky relied upon the findings set forth in an article titled Inadequate Anaesthesia in Lethal Injection for Execution that he co-authored with Drs. Leonidas G. Koniaris, Teresa A. Zimmers, and Jonathan P. Sheldon and which was published in the British medical journal The Lancet in April 2005 ("Lancet study"). In State v. Hester, ___ S.W.3d ___, 2010 WL 3893760, at *63 (Tenn. 2010), this Court joined the United States Supreme Court and other jurisdictions in declining to afford constitutional weight to the Lancet Study as a basis for rejecting the three-drug lethal injection protocol.

been afforded an opportunity to present evidence countering the currently uncontested opinion testimony of Dr. Lubarsky. At present, there is no evidence in the record in defense of the adequacy of existing procedures to ensure that inmates are unconscious before the pancuronium bromide and potassium chloride are administered. Without such evidence, we cannot determine whether lethal injection under the current protocol, specifically the portion of the protocol that sets out the proper amount and concentration for sodium thiopental, constitutes cruel and unusual punishment.

Accordingly, on remand, the parties and the Chancery Court should, in addition to any of the other matters properly raised by the parties, particularly address:

> (1) The scientific basis for and reliability of Dr. Lubarsky's or any other expert's opinion under the standards of Tennessee Rules of Evidence 702 and 703 and McDaniel v. CSX Transp., Inc., 95 S.W.2d 257 (Tenn. 1997);
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> (2) Whether the current amount and concentration of sodium thiopental mandated by Tennessee's current lethal injection protocol are insufficient to ensure unconsciousness so as to create an objectively intolerable risk of severe suffering or pain during the execution process; and if so
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> (3) At what level sodium thiopental is sufficient to ensure unconsciousness so as to negate the objectively intolerable risk of severe suffering or pain during the execution process.

It is further ordered that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law at 10:00 p.m. on the 30th day of November, 2010, or as soon as possible thereafter within the following twenty-four hours, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Mr. West shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

The costs of these proceedings are taxed to the State of Tennessee.

IT IS SO ORDERED.

PER CURIAM