

No. 10-6196

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN MICHAEL WEST,)	
)	
Plaintiff/Appellant,)	
)	
v.)	DEATH PENALTY CASE
)	
GAYLE RAY, in her official capacity)		
As Tennessee's Commissioner of)		<u>EXECUTION DATE:</u>
Correction, et al.,)		November 9, 2010
)	
Defendants/Appellees.)		

DEFENDANTS/APPELLEES' RESPONSE TO
PLAINTIFF/APPELLANT'S MOTION TO VACATE DISTRICT
COURT ORDER AND REMAND TO DISTRICT COURT FOR
ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

On August 19, 2010, West filed a complaint under 42 U.S.C. § 1983 against defendants Ray, Bell, Mills and Hodge alleging that the lethal injection protocol to be used in his execution and its manner of administration is unconstitutional. (Docket Entry No. 1, Complaint). The defendants moved to dismiss and filed a copy of an "Affidavit to Elect Method of Execution" executed by West in support of their argument that West's challenge to Tennessee's lethal injection protocol did not present a justiciable case or controversy because West elected electrocution as his method of execution. (Docket Entry No. 24, Memorandum, p. 3). West argued that the proper interpretation of the Affidavit was

in dispute, asserting that it was only effective for the execution date pending at the time the Affidavit was signed. (Docket Entry No. 27, Plaintiff's Response to Order for Briefing on the Applicability of Rule 12(d), Fed. R. Civ. P., p. 4). Because considering the "Affidavit to Elect Method of Execution" would require the court to convert the motion to dismiss into a motion for summary judgment, the district court chose not to do so. It found that the case was not in the right procedural posture for conversion. (Docket Entry No. 28).

On September 24, 2010, the district court entered an Order (Docket Entry No. 34) granting the motion to dismiss on behalf of the defendants. The court ruled that plaintiff's complaint was barred by the statute of limitations. (Docket Entry No. 33, Memorandum, pp. 2-5). West appealed to this Court.

On October 18, 2010, West filed a complaint under 42 U.S.C. § 1983 in state court alleging that execution of his sentence under the current electrocution protocol violated his rights and that his February 13, 2001, Affidavit to Elect Method of Execution, in which he chose electrocution, was of no force and effect. West also moved for a temporary injunction that he not be executed by electrocution and that the defendants be required to present him with another opportunity to elect his method of execution at least thirty days prior to his execution.¹ West also filed a motion to stay proceedings in this Court pending resolution of the State Court proceedings. The defendants responded in state court that, while they considered the

¹ On October 12, 2010, West presented the defendants with a letter in which he purported to rescind his previous election of electrocution; he did not, however, elect lethal injection as his method of execution. Instead, he informed the defendants that he was making no election of the method of execution

February 13, 2001, Election Affidavit to be valid and still effective, they would accept West's October 12, 2010, rescission of his previous election of electrocution in the interest of avoiding litigation on the issue. With West having rescinded his previous election and waiver, his sentence will now be executed by means of lethal injection, by operation of law. Based on the defendants' response, West withdrew his motion for temporary injunction on October 25, 2010.

On October 25, 2010, West filed an Amended Complaint in state court challenging the constitutionality of the Tennessee lethal injection protocol. He filed a new motion for temporary injunction, which was denied on October 28.

On October 26, West withdrew his motion to stay proceedings in this Court and filed a motion to vacate the district court judgment and remand for dismissal without prejudice, asserting that the district court lacked subject matter jurisdiction over the lethal injection challenge because there had been no case or controversy. Two days later, without waiting on a ruling from this Court on his Motion to Vacate the District Court Order, West filed a second section 1983 challenge to the lethal injection protocol in the district court virtually identical to the complaint in the case presently on appeal. *See West v. Bell*, M.D. Tenn. No. 3:10-cv-01016.

West's motion to vacate and remand should be denied. His current assertion that the district court lacked subject matter jurisdiction is contrary to the position he maintained in the district court, where he asserted that his 2001 election of

electrocution had “expired after his March 1, 2001, execution date passed” and that “it is not [binding].” (Docket Entry No. 27, Response of Plaintiff, p. 6). Because West took this position, the district court ruled on the basis of the statute of limitations. Plaintiff cannot have it both ways; he may not now change his position in the hope of achieving some advantage.

West’s action in reversing his position on subject matter jurisdiction and then refileing in the district court smacks of the “abus[e] of the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment” deplored by this Court in *Longaberger Co. v. Kolt*, 586 F.3d 459, 470 (6th Cir. 2009). *See also Sperle v. Michigan Dept. of Corrections*, 297 F.3d 483, 494 (6th Cir. 2002)(“[t]he theory upon which the case was submitted and argued in the district court cannot, when an adverse judgment results, be discarded and a new, contradictory theory be substituted and successfully invoked on appeal). As the defendants have previously argued, the judgment of the district court dismissing plaintiff’s action as barred by the statute of limitations should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2010, 2010, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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