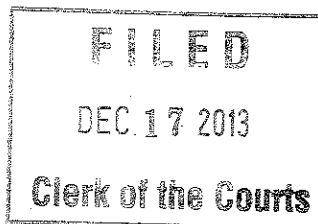


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. DONNIE EDWARD JOHNSON

Criminal Court for Shelby County
No. 85-01202

No. M1987-00072-SC-DPE-DD



ORDER

On October 3, 2013, the State filed a Motion to Reset Execution Date for Donnie Johnson. The motion stated that Mr. Johnson had completed the standard three-tier appeals process and this Court previously set an execution date for November 16, 2004, but the federal courts stayed execution pending proceedings in those courts. The motion stated that the United States Supreme Court denied a writ of certiorari on May 23, 2011, thus concluding the federal proceedings and therefore, under federal law, there is no longer pending a stay of execution, and the case is ripe for a new execution date to be set under Tennessee Supreme Court Rule 12.4(E).

On November 22, 2013, Mr. Johnson filed a Response to Motion to Set Execution Date. The response alleged that: (1) imposing the death penalty on Mr. Johnson is unconstitutionally arbitrary and indecent and violates contemporary standards of decency because accomplice Ronnie McCoy, who Mr. Johnson maintains is more culpable for the killing, received no punishment; (2) there is an ongoing challenge in state court to the Department of Correction's newly adopted one-drug lethal injection protocol; and (3) there is a Federal Rule of Civil Procedure 60(b) motion pending in the federal courts. Mr. Johnson also requested that this Court issue a certificate of commutation to the Governor.

On December 3, 2013, Mr. Johnson filed a Supplement to Response to Motion to Set Execution Date. Mr. Johnson represented that he is a plaintiff in West et al. v. Schofield et al., No. 13-1627-I (Davidson Chancery, filed Nov. 20, 2013), a declaratory judgment action challenging the constitutionality of the State's new one-drug lethal injection protocol. He attached a copy of the Complaint for Declaratory Judgment in that case, and the chancery court's scheduling order dated December 3, 2013, which reflects that a trial date has been set for July 7, 2014. Mr. Johnson requested that the Court reset his execution date for a date following the resolution of the declaratory judgment action.

In the past, this Court has found little merit in arguments that an execution date should not be set because of ongoing federal litigation. Instead, the Court has consistently held that a request for a stay of execution pending litigation of claims in federal court is more appropriately addressed to the federal courts. See Coe v. State, 17 S.W.3d 251, 251 (Tenn. 2000).

Insofar as the pending declaratory judgment action, the Court notes the complaint alleges that (1) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it creates a risk of unnecessary pain when carried out in the manner prescribed; (2) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it requires the use of compounded Pentobarbital from non-FDA-approved sources, and compounded Pentobarbital has the potential to be contaminated or sub-potent, presenting a substantial risk of pain and suffering when administered according to the protocol; (3) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it fails to provide for the adequate qualification and training of personnel, presenting the substantial risk of unnecessary pain and suffering during the execution process; (4) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it fails to conform to those accepted medical practices necessary to minimize the known risks involved in execution by lethal injection, presenting a substantial risk of unnecessary pain and suffering; (5) the new lethal injection protocol violates Article VI, section 2 of the United States Constitution and Article 1, section 8 of the Tennessee Constitution (the federal and state supremacy clauses) because its provisions violate various federal and state drug laws; and (6) the secrecy provisions of Tennessee Code Annotated section 10-7-504(h)(1), which shield from disclosure the identity of persons or entities involved in the process of executing a sentence of death, violate Article VI of the United States Constitution, the First and Fourteenth Amendments to the United States Constitution, Article 1, sections 8 and 17 of the Tennessee Constitution, and Article 2, section 2 of the Tennessee Constitution, because they deny death-sentenced inmates access to the courts, deny death-sentenced inmates due process, violate the federal and state supremacy clauses, and violate the constitutional provisions for separation of powers.

Previously, this Court has recognized that

The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge. The requirement of a fully developed record envisions a trial on the merits during which both sides have

an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision.

State v. Stephen Michael West, No. M1987-000130-SC-DPE-DD (Tenn. Nov. 29, 2010) (Order). Mr. Johnson is correct that currently, there is no controlling law in Tennessee on the constitutionality of the use of the single drug, Pentobarbital, to execute a death row inmate, or on the legality of using compounded drugs from a non-FDA approved source to do so.

Having considered the Motion to Reset Execution Date, the Response and the Supplement to Response, this Court finds that while Mr. Johnson has presented no legal basis for denying the State's Motion to Reset Execution Date, a short delay to allow the resolution of the declaratory judgment action challenging the constitutionality of the new lethal injection protocol is appropriate. Therefore, the State's Motion is GRANTED. Mr. Johnson has failed to allege sufficient extenuating circumstances that would merit a certificate of commutation. Accordingly, Mr. Johnson's request for a certificate of commutation is DENIED. It is hereby ORDERED, ADJUDGED and DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the twenty-fourth day of March, 2015, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Mr. Johnson 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.

PER CURIAM