

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

PHILIP RAY WORKMAN)
)
v.) NO. 3:01-0296
) Consolidated With Case No. 3:07-0499
) JUDGE CAMPBELL
DR. BRUCE LEVY, et al.)

ORDER

Pending before the Court are Plaintiffs' Motion For Preliminary Injunction (Docket No. 3 in Case No. 3:07-0499) and Defendants' Motion For Permission To Retain Body Of Philip Workman Pending Appeal (Docket No. 13 in Case No. 3:07-0499). The Court held an evidentiary hearing in this case on Plaintiffs' request for a preliminary injunction on May 14, 2007. For the reasons set forth below, the Motion For Preliminary Injunction is DENIED.

Over six years ago and prior to a previously-scheduled execution date, condemned inmate Philip Ray Workman filed suit in this Court seeking to prevent an autopsy on his body after death (Case No. 3:01-0296). In that case, the Court issued a preliminary injunction preventing the autopsy upon finding that the Plaintiff's First Amendment religious rights outweighed the interest of the medical examiner for the State of Tennessee and the Davidson County Metropolitan Government, Dr. Bruce Levy, in performing an autopsy (Docket No. 8). After the order was issued, the Tennessee Supreme Court stayed the execution, and this Court closed the file administratively (Docket No. 9). At this time, Philip Workman was not contesting the constitutionality of the lethal injection protocol.

On April 11, 2007, the Defendants filed a motion to reopen the case and vacate the Court's order (Docket No. 10). By Order entered on May 3, 2007, the Court reopened the case,

but denied Defendants' request to vacate the preliminary injunction order (Docket No. 22). The Plaintiff subsequently sought an amendment to the injunction order to prohibit certain specific invasive procedures (Docket No. 23). The Court denied the Motion because the Plaintiff had not originally requested that relief (Docket No. 30).

Plaintiffs Philip Ray Workman, and his brother, Terry Workman, subsequently filed a separate case the day before the scheduled execution seeking to prevent any forensic, pathological or other action or procedure on the body of Philip Workman, whether or not considered to be part of an autopsy or pathological investigation (Docket Nos. 1, 3 in Case No. 3:07-00499). The Court issued a Temporary Restraining Order in the case prohibiting "any forensic, pathological, or other action, testing or procedure on Philip Workman's body or any part of his body (whether or not considered part of an autopsy or pathological investigation) that involves puncturing, cutting, sampling or testing the body." (Docket No. 5). The Court did not prohibit an external examination of the body. (*Id.*) The Court set a hearing for May 14, 2007 on Plaintiffs' request for a preliminary injunction.

After the hearing, the Court consolidated the two cases (3:01-0296 and 3:07-0499), and extended the Temporary Restraining Order for ten days or until an order was entered on the preliminary injunction (Docket No. 33).

In determining whether to issue a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court is to consider: (1) whether the movant has shown a strong or substantial likelihood of success on the merits; (2) whether irreparable harm will result without an injunction; (3) whether issuance of a preliminary injunction will result in substantial harm to others; and (4) whether the public interest is advanced by the injunction. Michigan State

AFL-CIO v. Miller, 103 F.3d 1240, 1249 (6th Cir. 1997).

At the hearing, the Plaintiffs called Plaintiff Terry Workman and Warden Ricky Bell as witnesses. The Defendants called Dr. Bruce Levy. Plaintiffs also introduced into evidence the Last Will of Philip R. Workman and his Durable Power of Attorney For Health Care And Living Will. Both documents charge Terry Workman with the authority to dispose of Philip Workman's remains and express his religious objections to an autopsy or the drawing of bodily fluid.

First, in assessing whether the Plaintiffs have a strong or substantial likelihood of success on the merits, the Court rejects Defendants' argument that Plaintiffs lack standing to bring this action.

The Sixth Circuit Court of Appeals has recognized a constitutionally protected property interest in the body of a deceased next-of-kin. Whaley v. County of Tuscola, 58 F.3d 1111, 1115-16 (6th Cir. 1995) (Michigan law provided next-of-kin with constitutionally protected property interest in the dead body of a relative); Brotherton v. Cleveland, 923 F.2d 477, 480 (6th Cir. 1991) (Ohio law created property interest in a dead relative's body); Collins v. Crabbe, 1999 WL 55279 (6th Cir. Jan. 12, 1999) (assumed *arguendo* that Tennessee has created the same sort of property right as the ones in Michigan and Ohio). Tennessee courts have recognized that a surviving spouse has sole legal authority over the disposition of her husband's remains. Foley v. St. Thomas Hospital, 906 S.W.2d 448, 453 (Tenn. Ct. App. 1995) (citing Tenn. Code Ann. § 68-4-111)). In Tennessee, next-of-kin have the right to custody and burial of a deceased's body, absent an express desire of the deceased. Estes v. Woodlawn Memorial Park, Inc., 780 S.W.2d 759, 762 (Tenn. Ct. App. 1989); see also Tinsley v. Dudley, 915 S.W.2d 806, 807 (Tenn. Ct.

App. 1995) (although there was no property right in the body of a deceased at common law, a quasi-property right in dead bodies vests in the nearest relative). The Court finds that Plaintiffs have demonstrated a likelihood of success on the merits as to whether Plaintiff Terry Workman has a constitutional property right in the body of his deceased brother.

Plaintiff Philip Workman undisputedly had standing to assert his claims when he filed this action before his execution. Although a Section 1983 action is personal to the direct victim of the alleged constitutional tort, when a victim is deceased, the victim's estate's representative may prosecute the Section 1983 claim. Claybrook v. Birchwell, 199 F.3d 350, 357 (6th Cir. 2000). Only the purported victim, *or his estate's representative*, may prosecute a Section 1983 claim. Id.; Kinzer v. Metropolitan Gov't of Nashville and Davidson Co., 451 F.Supp. 2d 931, 941-42 (M.D. Tenn. 2006); Rogers v. White, 2006 WL 903727 (W.D. Tenn. April 7, 2006).

In light of these holdings, the Court finds that, even if Philip Workman is no longer a proper Plaintiff in this action, Plaintiffs have demonstrated a likelihood of success on the merits as to whether Plaintiff Terry Workman has standing to assert the claims herein.

As to the Plaintiffs' First Amendment free exercise of religion claim, Defendants contend that the Court should apply the standard set forth in Employment Div., Dept. Of Human Resources of Ore. v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In Smith, the Court held that laws that are content neutral and of general applicability normally do not raise free exercise of religion concerns even if they incidentally burden a particular religious practice or belief. If a law that burdens a religious practice is not neutral or generally applicable, however, the law violates the Free Exercise Clause unless the government shows that it is the least restrictive means of achieving a compelling governmental interest. 110 S.Ct. at 1611.

The laws at issue here, Tennessee Code Annotated Sections 38-7-101 to 119, govern the post-mortem examinations of deceased individuals. The parties appear to agree Section 38-7-109 *requires* that the county medical examiner perform an investigation of the circumstances of a death reported to him under certain circumstances, and that Section 38-7-106 gives the medical examiner *discretion* in determining whether to perform an autopsy.

Because the medical examiner is vested with discretion in determining whether to perform an autopsy, it is arguable that the statute is not “generally applicable.” See Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649-55 (10th Cir. 2006)(Discussing case law relevant to the issue of whether a regulation is “generally applicable.”) Thus, the exercise of discretion would permit the decision-maker to make decisions based on their own religious animus. Id.; Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1990) (Government employees were given considerable discretion in assessing applications for unemployment benefits and denied application of plaintiff who refused to work on Saturdays due to her religious beliefs). As such, the government action would be subject to a strict scrutiny analysis in which the government must show a compelling interest for taking the action, and that the action is the least restrictive means of furthering that interest. Sherbert, 83 S.Ct. at 1795.

Several circuit courts have held, however, that the exercise of discretion alone does not automatically require the application of strict scrutiny. Grace United Methodist Church, 451 F.3d at 650-55. These courts have looked to whether there is evidence that the exercise of discretion in the application of a system of individualized exceptions has been based on religious animus. Id.

At the hearing in this case, Dr. Levy testified about the reason he seeks to perform an

autopsy on the body of Philip Workman:

An autopsy is the only method by which we can actually confirm the cause of death of Mr. Workman or many other persons who fall under our jurisdiction. You know, while there is a process for the lethal injection procedure, you know we heard how it is spelled out and is documented, we don't know what the levels of medications in Mr. Workman's body was at the time of his death. We don't know if all of them were administered in a way to obtain the intended effect, specifically the Sodium Thiopental to render Mr. Workman unconscious, the Pancuronium Bromide to paralyze him, and the Potassium to stop his heart.

Further, we do not know whether any other intervening means may have participated in his death, without an autopsy. I mean, with all due respect to Warden Bell and the work that he and his staff does, it is imperative that an independent agency confirm that what the prison system is telling us is indeed the truth.

(Transcript of May 14, 2007 Hearing, at 47-48 (Docket No. 38)).

Based on this testimony that the basis for the exercise of discretion is for a reason or reasons other than the religious beliefs or practices of Mr. Workman, and in the absence of any evidence to the contrary, the Court concludes that application of this discretionary autopsy statute does not implicate free exercise of religion concerns in this case, and is not subject to strict scrutiny.

Even if the Court applies strict scrutiny, however, Dr. Levy's testimony indicates that the State and Metropolitan governments have a compelling interest in assessing the effects of the lethal injection protocol that has been the subject of widespread constitutional challenge in recent years. While Mr. Workman's religious beliefs are sincere and worthy of consideration, they do not outweigh the medical examiner's interest in confirming that the manner of death complied with the requirements of the law. Philip Workman, moreover, put the issue of the efficacy of the lethal injection protocol in question (Philip Workman v. Governor Phil Bredesen, et al., 3:07-0490). At this time, the least restrictive means of assessing the effects of the lethal

injection protocol is an invasive post-mortem examination by Dr. Levy. Accordingly, the Court concludes that the Plaintiffs do not have a strong or substantial likelihood of success on the merits regarding their First Amendment claim.

The Court also is not persuaded that the Plaintiffs have a strong or substantial likelihood of success on the merits regarding their Ninth and Fourteenth Amendment claims. The parties have not cited any persuasive authority in support of these novel claims.

As to the second factor, Plaintiffs have demonstrated that they will suffer immediate and irreparable harm if injunctive relief is not granted pending appeal. Therefore, in order to maintain the status quo while the Plaintiffs seek an appeal to the Sixth Circuit, the Court maintains the Temporary Restraining Order in effect until midnight on May 24, 2007, pursuant to Federal Rule of Civil Procedure 65(b). Accordingly, Defendants' Motion For Permission To Retain Body Of Philip Workman Pending Appeal (Docket No. 13 in Case No. 3:07-00499) is DENIED, as moot.

In light of the extension of the Temporary Restraining Order, the Court finds that the balance of relative harms among the parties does not weigh in favor of either party.

The public interest will not be harmed by permitting the autopsy after the period permitted by the Court for the Plaintiffs to seek appellate review.

Prior orders of this Court on this issue are vacated.

It is so ORDERED.


TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE