

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

2010 NOV 24 PM 5:45

APPELLATE COURT CLERK
NASHVILLE

STATE OF TENNESSEE V. STEPHEN MICHAEL WEST

No. M1987-000130-SC-DPE-DD¹

ORDER

On November 6, 2010, this Court reset the execution date for Stephen Michael West to November 30, 2010, pending an evidentiary hearing and ruling in a declaratory judgment action filed by Mr. West challenging the constitutionality of Tennessee's three-drug protocol for lethal injection. 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 this order incorporated by reference the trial court's November 19, 2010 bench ruling. On that same date, November 22, 2010, Mr. West filed in this Court a "Motion to Vacate or Further Modify Court's Order Scheduling Mr. West's Execution."

As grounds for the motion, Mr. West relies upon the trial court's bench ruling and order of November 22, 2010, finding that Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment in Article I, section 16 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution. Mr. West asserts that as a result of this ruling the State of Tennessee is unable to execute the sentence of death as provided by law and that if the defendants change the protocol in the days remaining before his execution date, he will not have an opportunity to present evidence to the trial court challenging the constitutionality of the revised protocol. Mr. West therefore requests that this Court vacate its order of November 6, 2010, setting his execution for November 30, 2010, and decline to reset his execution until the defendants have demonstrated that any new method of carrying out lethal injections comports with the state and federal constitutions.

On November 24, 2010, the defendants filed a response in opposition to Mr. West's Motion. The defendants assert that vacating or modifying the order setting Mr. West's execution date is not necessary because the lethal injection protocol has been revised to

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

respond to the trial court's ruling that the failure to assess consciousness creates an objectively intolerable risk of severe suffering or pain.² 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. West 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. West's Motion and the State's response, Mr. West's Motion is DENIED. The denial of Mr. West's motion is without prejudice to Mr. West's ability seek further relief in this or any other court.

It is so ORDERED.

PER CURIAM

²The 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.