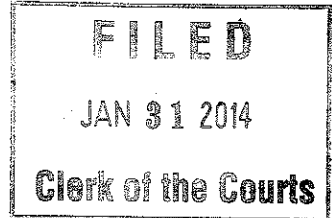


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. EDMUND ZAGORSKI

Circuit Court for Robertson County
No. 6052



No. M1996-00110-SC-DPE-DD

ORDER

On October 3, 2013, the State filed a Motion to Reset Execution Date for Edmund Zagorski. The motion stated that Mr. Zagorski had completed the standard three-tier appeals process. The State pointed out that this Court previously set an execution date for January 11, 2011. Subsequent to setting that date, however, in light of a pending declaratory judgment action filed by another death-sentenced inmate challenging the constitutionality of Tennessee's three-drug lethal injection protocol, this Court stayed Mr. Zagorski's execution pending the resolution of that case in the trial and appellate courts and "until the State files a motion to reset the execution date pursuant to Tennessee Supreme Court Rule 12.4." Ultimately, the state courts upheld the three-drug protocol and the United States Supreme Court denied a writ of certiorari on April 15, 2013. The State asserts that this Court's stay of execution dissolved with the conclusion of the declaratory judgment action related to Tennessee's three-drug lethal injection protocol. It asserts 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. Zagorski filed a Response to the State's Motion to Reset Execution Date. The response alleged that: (1) a death sentence for drug-related killings violates evolving standards of decency; (2) his death sentence is arbitrary because tainted by constitutional error in the giving of jury instructions; (3) he was denied "constitutional proportionality review" because the three cases cited by the Court on direct appeal were subsequently reversed and the defendants therein were sentenced to life imprisonment; (4) there is an ongoing challenge in state courts to the Department of Correction's newly adopted one-drug lethal injection protocol, (5) there is a Federal Rule of Civil Procedure 60(b) motion pending in the federal courts, and (6) the death penalty violates the fundamental right to life. Mr. Zagorski also requests that this Court issue a certificate of commutation to the Governor.

On December 3, 2013, Mr. Zagorski filed a Supplement to Response to Motion to Set Execution Date. Mr. Zagorski 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. Zagorski requested that the Court reset his execution date for a date following the resolution of the declaratory judgment action.

While Mr. Zagorski asserts that evolving standards of decency preclude capital punishment for drug-related killings, we note that, to the contrary, under aggravated circumstances such as in this case, where more than one victim is involved, prosecutors have sought, and juries have imposed, sentences of death. *See State v. David Lee Smith*, No. E2002-01232-CCA-R3-DD (Bradley Circuit No. 99-054, dismissed upon notice of defendant's death, Mar. 26, 2003); *State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000); *State v. Jones*, 789 S.W.2d 545, 552-53 (Tenn. 1990); *State v. Wright*, 756 S.W.2d 669 (Tenn. 1988). The fact that a killing is drug related does not preclude capital punishment.

Likewise, the Court finds no legal merit to Mr. Zagorski's claims that his sentence is disproportionate because the three cases relied upon to uphold proportionality on direct appeal have since been overturned and sentences of life imposed. *See State v. Zagorski*, 701 S.W.2d 808, 814 (Tenn. 1986) (citing *State v. Campbell*, 664 S.W.2d 281 (Tenn. 1984) (reversed in *Kenneth Wayne Campbell v. State*, No. 03C01-9012-CR-00283, 1993 WL 122057 (Tenn. Crim. App. at Knoxville, Apr. 21, 1993), for ineffective assistance of counsel—failure to present mitigating evidence during the sentencing phase, and for a *Middlebrooks* error); *State v. Laney*, 654 S.W.2d 383 (Tenn. 1983) (reversed in *Laney v. State*, No. 25322, Sullivan County Crim. Ct. order filed Nov. 15, 1994, for a *Middlebrooks* error); *State v. Morris*, 641 S.W.2d 883 (Tenn. 1982) (reversed in *Morris v. Bell*, No. 2:99-CV-00424 (E.D. Tenn. May 16, 2002), for ineffective assistance of counsel—failure to present mitigating evidence)). This Court has held repeatedly that “[w]hile important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required.” *State v. Sexton*, 368 S.W.3d 371, 428 (Tenn. 2012) (quoting *State v. Bland*, 958 S.W.2d 651, 663 (Tenn. 1997)). A proportionality analysis necessarily relies on the case law that is current at the time of the review. We note that none of the cases cited to support proportionality in the direct appeal were reversed on proportionality grounds. Furthermore, as noted above, Mr. Zagorski's case is comparable to several other cases in which the death penalty was imposed.

Neither do we find that Mr. Zagorski's sentence is arbitrary because of tainted jury instructions. This argument was expressly rejected in a prior order of this Court setting an

execution date. *State v. Edmund Zagorski*, No. M1996-00110-SC-DPE-DD (Order) (Tenn. Sept. 7, 2010). Likewise, the argument that the death penalty violates the right to life has been rejected by this Court on multiple occasions. See *State v. Holton*, 126 S.W.3d 845, 871-72 (Tenn. 2004), and cases cited therein.

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. Zagorski 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. Zagorski 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. Zagorski has failed to allege sufficient extenuating circumstances that would merit a certificate of commutation. Accordingly, Mr. Zagorski'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 ninth day of December, 2014, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Mr. Zagorski 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