

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED 02/14/2020 Clerk of the Appellate Courts
--

STATE OF TENNESSEE v. NICHOLAS TODD SUTTON

**Circuit Court for Morgan County
No. 7555**

No. E2000-00712-SC-DDT-DD

ORDER

On January 15, 1985, while serving a life sentence for the murder of his grandmother, Mr. Sutton and other inmates stabbed inmate Carl Estep thirty-eight times. A Morgan County jury convicted Mr. Sutton of first degree murder. On March 4, 1986, the jury sentenced him to death based on three aggravating circumstances: (i)(2) (the defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person); (i)(5) (the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind); and (i)(8) (the murder was committed by the defendant while he was in . . . a place of lawful confinement). Tenn. Code Ann. § 39-2-203(i)(2), (5), and (8). Over thirty-one years ago, this Court affirmed Mr. Sutton’s conviction and sentence of death. *State v. Sutton*, 761 S.W.2d 763 (Tenn. 1988), *reh’g denied*, 1988 WL 129356 (Tenn. 1988), *cert. denied*, 497 U.S. 1031 (1990). Mr. Sutton unsuccessfully sought post-conviction relief. *Sutton v. State*, No. 03C01-9702-CR-00067, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), *perm. app. denied* (Tenn. Dec. 20, 1999), *cert. denied*, 530 U.S. 1216 (2000).

Mr. Sutton’s petition for a writ of habeas corpus was denied by the federal district court. *Sutton v. Bell*, No. 3:00-CV-00013 (E.D. Tenn. Dec. 4, 2002). The Sixth Circuit Court of Appeals affirmed. *Sutton v. Bell*, 645 F.3d 752 (6th Cir. 2011), *reh’g* and *reh’g en banc denied*, (Aug. 26, 2011), *cert. denied*, *Sutton v. Colson*, 566 U.S. 938 (Apr. 16, 2012), *reh’g denied*, 566 U.S. 1043 (2012). The federal courts subsequently denied applications for second or successive habeas corpus petitions. *See Order, In re: Nicholas T. Sutton*, No. 13-6190 (6th Cir. Nov. 25, 2013) (denying petitioner relief based on *Martinez v. Ryan*, 566 U.S. 1 (2012))

and Order, *In re: Nicholas T. Sutton*, No. 16-5945 (6th Cir. Aug. 3, 2016) (denying petitioner relief based on *Johnson v. United States*, 135 S.Ct. 2551 (2015)).

On December 17, 2013, the Court set the execution of Mr. Sutton for November 17, 2015. On April 10, 2015, the Court vacated its order pending the outcome of litigation involving the lethal injection protocol. This litigation concluded in May 2019. See *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017), *cert. denied sub nom. West v. Parker*, 138 S.Ct. 476 (Nov. 27, 2017), and *cert. denied sub nom. Abdur’Rahman v. Parker*, 138 S.Ct. 647 (Jan. 8, 2018), *reh’g denied*, 138 S.Ct. 1183 (Feb. 26, 2018); *Abdur-Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018), *cert. denied sub. nom. Zagorski v. Parker*, 139 S.Ct. 11 (Oct. 11, 2018), and *cert. denied sub. nom. Miller v. Parker*, 139 S.Ct. 626 (Dec. 6, 2018), *cert. denied*, 139 S.Ct. 1533 (Sotomayor, J., dissenting). Under the provisions of Tennessee Supreme Court Rule 12(4)(E), the Court sua sponte re-scheduled Mr. Sutton’s execution for February 20, 2020.

On June 8, 2016, Mr. Sutton filed a Motion to Reopen Post-Conviction Proceedings arguing that *Johnson v. United States*, 135 S.Ct. 2551 (2015), announced a new constitutional rule requiring retroactive application that would invalidate the application of the prior violent felony aggravating circumstance in his case. The post-conviction court initially granted the motion to reopen only as to the *Johnson* claim. Mr. Sutton subsequently filed an amended post-conviction petition raising additional claims, including a claim he was forced to appear before the jury wearing shackles and handcuffs. The post-conviction court ultimately denied relief without a hearing. The Court of Criminal Appeals affirmed the post-conviction court. *Sutton v. State*, No. E2018-00877-CCA-R3-PD, 2020 WL 525169, *11 (Tenn. Crim. App. Jan. 31, 2020). On February 7, 2020, Mr. Sutton filed an application for permission to appeal pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure. On February 13, 2020, the Court denied the application. Order, *Sutton v. State*, No. E2018-00877-SC-R11-PD (Tenn. Feb. 13, 2020).

On February 2, 2017, during the pendency of these post-conviction proceedings, Mr. Sutton filed a petition for a writ of error coram nobis alleging “newly discovered evidence” in that he was “visibly shackled and handcuffed during his capital trial and sentencing.” The coram nobis court entered an order on May 17, 2019, denying relief without a hearing. The Court of Criminal Appeals affirmed. *State v. Sutton*, No. E2019-01062-CCA-R3-ECN, 2020 WL 703607 (Tenn. Crim. App. Feb. 11, 2020). On February 13, 2020, Mr. Sutton filed a Rule 11 application for permission to appeal. On February 14, 2020, the Court denied

the application. Order, *State v. Sutton*, No. E2019-01062-SC-R11-ECN (Tenn. Feb. 14, 2020).

Mr. Sutton has filed a motion to stay his execution pending his appeals in his post-conviction and error coram nobis proceedings. Tennessee Supreme Court Rule 12(4)(E) provides that this Court “will not grant a stay or delay an execution date pending resolution of collateral litigation in state court unless the prisoner can prove a likelihood of success on the merits of that litigation.” Tenn. Sup. Ct. R. 12(4)(E). “In order to establish a likelihood of success on the merits of a claim, a plaintiff must show more than a mere possibility of success.” *State v. Irick*, 556 S.W.3d 686, 689 (Tenn. 2018) (quoting *Six Clinics Holding Corp II v. Cafcomp Sys.*, 119 F.3d 393, 402 (6th Cir. 1997)). Given the denial of the Rule 11 applications as noted above, Mr. Sutton has failed to prove a likelihood of success on the merits of the litigation in both matters. Accordingly, Mr. Sutton’s motion to stay his execution is DENIED.

PER CURIAM