

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. DAVID EARL MILLER

Criminal Court for Knox County
No. 12080

No. E1982-00075-SC-DDT-DD

FILED

DEC. 17 2013

Clerk of the Courts

ORDER

On October 3, 2013, the State filed a Motion to Set Execution Date for David Earl Miller. The motion stated that Mr. Miller had completed the standard three-tier appeals process and that an execution date should therefore be set under Tennessee Supreme Court Rule 12.4(A).

On November 22, 2013, Mr. Miller filed a Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation. The response requested this Court to issue a certificate of commutation on the grounds that the death sentence is not the proper penalty in this case because Mr. Miller was mentally ill at the time he committed this crime. Mr. Miller also requested that the Court delay setting an execution date to allow adequate time to pursue the clemency process and pending resolution of a legal challenge to the State's one-drug lethal injection protocol.

On December 5, 2013, Mr. Miller filed a Supplement to Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation. Mr. Miller 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. Miller requested that should this Court grant the State's motion to set an execution date, the Court set his execution date for a date following the resolution of the declaratory judgment action, and then only if the Chancery Court finds the new execution protocol to be constitutional.

The Court notes that the pending declaratory judgment action 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. Miller 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 Set Execution Date, the Response and the Supplement to Response, this Court finds that while Mr. Miller has presented no legal basis for denying the State's Motion to Set Execution Date, a short delay to allow the resolution of the declaratory judgment action challenging the legality of the new lethal injection protocol is appropriate. Therefore, the State's Motion is GRANTED. As for Mr. Miller's request for a certificate of commutation, this Court notes that a defense of insanity was presented to the jury during the guilt phase of Mr. Miller's trial. See State v. Miller, 674 S.W.2d 279 (Tenn. 1984) (direct appeal). Evidence of Mr. Miller's deprived and abused childhood, his alcoholism and other factors were presented to the jury during the sentencing phase of his trial. See State v. Miller, 771 S.W.2d 401 (1989) (direct appeal of re-sentencing). The jury failed to find sufficient merit in such claims to warrant acquittal or a sentence less than death. The Court finds that these issues, which have been addressed by the state and federal courts both on direct appeal and collateral review, do not constitute extenuating circumstances that merit the issuance of a certificate of commutation pursuant to Tennessee Code Annotated section 40-27-106. Accordingly, Mr. Miller'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 eighteenth day of August, 2015, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Mr. Miller 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