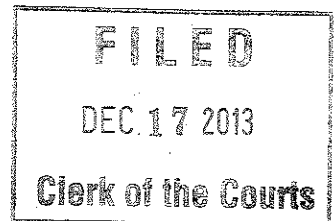


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

NICHOLAS TODD SUTTON v. STATE OF TENNESSEE

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

No. E2000-00712-SC-DDT-DD



ORDER

On October 3, 2013, the State filed a Motion to Set Execution Date for Nicholas Todd Sutton. The motion stated that Mr. Sutton 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. Sutton filed a Response Opposing Motion to Set Execution Date and Request for Certificate of Commutation. The response alleged that the State's motion was premature because Mr. Sutton has a Federal Rule of Civil Procedure 60(b) motion pending in the federal courts. Mr. Sutton also alleged that extenuating circumstances in his case warrant clemency, and asked the Court to issue a certificate of commutation.

On December 5, 2013, Mr. Sutton filed a Supplement to Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation. Mr. Sutton 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. Sutton 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.

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 that 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. Sutton 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. Sutton 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. The Court finds that Mr. Sutton has failed to allege sufficient extenuating circumstances that would merit a certificate of commutation. Accordingly, Mr. Sutton's Request for 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 seventeenth day of November, 2015, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Mr. Sutton 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