

In the
Supreme Court of Ohio

JAMES DERRICK O'NEAL,	:	Case No. 2020-0683
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
THE STATE OF OHIO, et al.	:	
	:	Court of Appeals
Defendants-Appellees.	:	Case Nos. 19 AP 260 and 19 AP 289

**MEMORANDUM IN OPPOSITION OF JURISDICTION OF
DEFENDANTS-APPELLEES, THE STATE OF OHIO AND
THE OHIO DEPARTMENT OF REHABILITATION AND CORRECTION**

S. ADELE SHANK (0022148)
Law Office of S. Adele Shank
3380 Tremont Road, Suite 270
Columbus, Ohio 43221
(614) 326-1217
shanklaw@att.net

LAWRENCE J. GREGER (0002592)
5335 Far Hills Avenue, Suite 219
Kettering, Ohio 45429
(937) 223-3153
larry@gregerlawoffice.com

*Counsel for Plaintiff-Appellant
James Derrick O'Neal*

DAVE YOST (0056290)
Attorney General of Ohio

CHARLES A. SCHNEIDER (0005821)*
**Counsel of Record*
Criminal Justice Section Chief

BRENDA S. LEIKALA (0072635)
Senior Assistant Attorney General
Criminal Justice Section, Capital Crimes Unit
150 E. Gay Street, 16th Floor
Columbus, OH 43215
(614) 644-7233; (866) 523-8127 (fax)
Charles.Schneider@ohioattorneygeneral.gov
Brenda.Leikala@ohioattorneygeneral.gov

*Counsel for Defendants-Appellees
The State of Ohio and the Ohio Department of
Rehabilitation and Correction*

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INTRODUCTION

This case presents two questions: First, does a procedural checklist that prison officials use when carrying out an execution constitute a “rule” which must be subject to notice-and-comment rulemaking? Second, is an intravenous injection an “injection” for purposes of Ohio’s lethal-injection statute? The answer to the first question is “no.” The answer to the second question is “yes.” Because both follow from the plain language of the controlling statutes, and neither question implicates a pressing question needing this Court’s review, it should decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellant James Derrick O’Neal was sentenced to death for the murder of his estranged wife, Carol Ann. His execution is scheduled for February 18, 2021. R.C. 2949.22(A) directs that a death sentence “shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death.” The warden of the correctional institution or another person selected by the Director of the Department of Rehabilitation and Correction (“DRC”) “shall ensure that the death sentence is executed.” The statute further requires that the execution take place within the walls of the correctional institution designated by the Director, within an enclosure that is not open to public view, and under the direction of the warden or deputy warden. R.C. 2949.22(B).

So as to implement the requirements of R.C. 2949.22 in an orderly fashion and to ensure that no mistakes are made during the process, the Director of DRC developed protocol 01-COM-11 (the “protocol”) to detail the procedures to be followed by specific institution employees in preparing for and carrying out an execution. The protocol is a detailed procedural checklist used

by designated DRC employees when they are carrying out the “lethal injection” legislatively mandated by R.C. 2949.22.

On January 24, 2018, O’Neal filed a complaint in the Franklin County Common Pleas Court, Case No 18CV-758, seeking declaratory and injunctive relief “to determine and enforce [his] right * * * not to be subjected to the execution procedures” set forth in the protocol. O’Neal sought declarations that: (1) DRC failed to comply with the filing requirements of R.C. 111.15 in promulgating the protocol, thus rendering it invalid and unenforceable; (2) in enacting the protocol, DRC exceeded the scope of the authority delegated by the General Assembly and thus unconstitutionally usurped legislative powers; and (3) to the extent the General Assembly delegated such powers to DRC, such action was an unconstitutional delegation of legislative authority. O’Neal maintained that because he believed that DRC lacked the necessary grant of authority to promulgate the protocol, DRC should be permanently enjoined from enacting it or any other such protocols in the future. In the alternative, O’Neal maintained that DRC should be enjoined from carrying out his execution because the protocol was invalidly promulgated.

Another death row inmate, Cleveland Jackson, moved to intervene in the suit, and filed a complaint nearly identical to that filed by O’Neal. The common pleas court granted Jackson’s request to intervene. On January 25, 2019, all parties filed motions for summary judgment. By opinion and judgment entry filed on April 4, 2019, the trial court denied the motions for summary judgment filed by Jackson and by O’Neal, and granted DRC’s motion for summary judgment.

Jackson and O’Neal filed separate appeals to the Tenth District Court of Appeals, Case Numbers 19-AP-260 (Jackson) and 19-AP-289 (O’Neal). In a unanimous decision authored by Judge Klatt, the court of appeals affirmed the lower court’s decision on February 13, 2020.

O’Neal v. State of Ohio, 10th Dist. Franklin App. Nos. 19AP-260 and 19AP-289, 2020-Ohio-506. In that decision, the Tenth District held DRC’s protocol was not a “rule” pursuant to R.C. 111.15(A)(1) because it establishes the methods, processes and procedures to be employed by DRC personnel in carrying out an execution, so it is specifically exempted from the statute as an “order respecting the duties of employees.” *Id.* at ¶¶21, 23. The Court further held DRC did not usurp legislative authority in establishing and implementing the protocol for the purpose of carrying out court-ordered executions. *Id.* at ¶48. Finally, the Court held the General Assembly did not unconstitutionally delegate the authority to DRC to establish and implement the protocol for the purpose of carrying out executions. *Id.* at ¶56.

Jackson and O’Neal each filed motions for reconsideration of the appellate decision. Both motions were denied by memorandum decision filed on April 16, 2020. Jackson and O’Neal filed separate appeals and jurisdictional memoranda to this Court on June 1, 2020.¹

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST, AND IT DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION

The protocol is an internal procedural checklist to be followed by DRC employees in the final period before the scheduled execution of an inmate – after all the appeals have been concluded, after the post-conviction proceedings have been finished, and after this Court has set the execution date. The protocol is not a rule; rather, it is a procedural checklist to be followed by DRC employees under very specific circumstances. The protocol has no effect whatsoever on the general prison population or overall DRC operations. Moreover, the parameters of allowable delegation of legislative authority to an administrative agency are already well settled, and the Tenth District’s decision is a straightforward application of those long-standing precedents.

¹ Jackson’s appeal is docketed as Case No. 2020-0676.

Therefore, this case does not present any issues of public or great general interest, and it does not present any new or substantial constitutional issues for decision by this Court.

O’Neal asserts two different theories in his jurisdictional statement. First, O’Neal argues that the protocol is a rule that had to be promulgated and filed under R.C. 111.15. But, the statute plainly excludes internal employee protocols from the definition of a “rule.” Second, O’Neal tries to create a constitutional issue by arguing that DRC usurped the authority granted by R.C. 2949.22, and/or the statute unconstitutionally delegated legislative authority to DRC because the protocol uses an intravenous injection of the lethal drugs, which O’Neal asserts is not an “injection” as that term is used in the statute. But the generally accepted medical definition of the term “injection” includes both intravenous and intramuscular injections, and so O’Neal’s argument is based on semantics, not the Ohio Constitution.

A. The protocol is not a rule under R.C. 111.15.

R.C. 111.15(A)(1) defines a “rule” to be “any rule, regulation, bylaw, or standard having a *general and uniform operation*” adopted by an agency. (Emphasis added). The statute specifically excludes from the definition of a rule “any order respecting the duties of employees[.]” The protocol is an internal checklist followed by DRC employees in the months, days and hours leading up to a scheduled execution. The protocol sets forth the duties of particular employees under very specific circumstances. It does not impact the day-to-day operations of DRC, and it does not have any general application to the management of the prisons. It is not a “rule” as defined by R.C. 111.15(A)(1).

O’Neal tries to create a substantial question by arguing that the lower court held rulemaking is required only if it pertains to a statute that expressly requires rulemaking. But the Tenth District said no such thing. Instead, it held that the protocol here is not a rule because, in

plain language, the statute specifically excludes any “order respecting the duties of employees.” R.C. 111.15(A)(1); *O’Neal v. State*, *supra* at ¶21.

The court did not hold, as O’Neal alleges, that there must be a specific reference in every statute in order for rule-making to be required. All the court did was read the statute and conclude that, by its own terms, R.C. 111.15 did not apply.

B. An intravenous injection is an “injection” as that term is used in R.C. 2949.22, so the protocol, which utilizes an intravenous injection as the delivery method of the drugs, complies with the legislative directive of the statute.

The heart of O’Neal’s argument that DRC usurped legislative power, and/or that the General Assembly improperly delegated the specific procedures to be followed by DRC in carrying out an execution, is simple but nonsensical. O’Neal’s basic argument is that the General Assembly did not define the term “injection” when it instructed in R.C. 2949.22 that a death sentence be executed “by causing the application * * * of a lethal injection of a drug or combination of drugs[.]” O’Neal asserts that an intravenous injection is not an “injection” as that term is used in the statute, and so by injecting the lethal drugs intravenously as set forth in the protocol DRC has improperly engaged in legislating.

The court of appeals noted that R.C. 2949.22 did not define the term “lethal injection,” but the General Assembly properly left the details, including which drugs to use and how to administer them, to DRC. “A legislative body need not define every word it uses in an enactment. Moreover, any term left undefined by statute is to be accorded its common, everyday meaning.” *State v. Dorso*, 4 Ohio St.3d 60, 62, 446 N.E.2d 449 (1983) (citation omitted); *accord Eastman v. State*, 131 Ohio St.1, 1 N.E.2d 140 (1936), paragraph five of the syllabus, *cert. denied*, 299 U.S. 505 (1936); *Hubbard v. Canton City Sch. Bd. of Educ.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, at ¶13. Indeed, it would be literally impossible for the General

Assembly to specify each and every detail. Must the statute also specify the distance (in millimeters, perhaps) between the needle's entry way and the elbow joint? Must it specify the precise latitude and longitude of each place on the prison gurney? Of course not. The nature of legislation is that it permits or requires an act, and leaves to the executive the details of carrying out that act.

Here, following the basic tenet in R.C. 1.42 that the words of a statute should be construed in accordance with their technical or particular meaning, the court of appeals referred to *Stedman's Medical Dictionary Third Unabridged Lawyers' Edition* at 635 (1972), which defines the general term "injection" to include all three of the primary methods of injecting a drug into the body of a person: subcutaneously, intramuscularly, and intravenously. O'Neal's argument that the term "injection" refers only to an *intramuscular* injection would improperly insert a word into the statute that the General Assembly did not use.

O'Neal's arguments boil down to his disagreement with the substance of the Tenth District's decision. But mere disagreement with a lower court decision is not sufficient to invoke the appellate jurisdiction of this Court.

This case does not involve any substantial constitutional questions. The court of appeals simply applied well-established precedents in determining whether R.C. 2949.22 unconstitutionally delegated legislative authority to DRC, and whether DRC usurped legislative power in specifying detailed procedures to be followed by its employees in carrying out a scheduled execution. The court of appeals likewise applied the simple definition set forth in R.C. 111.15 to determine that the protocol is not a "rule" covered by that statute.

Therefore, this Court should decline jurisdiction over O'Neal's appeal.

ARGUMENT

Appellee's Proposition of Law I:

The protocol is an internal procedural checklist used by employees to carry out executions, so it is not a rule as defined by R.C. 111.15(A).

R.C. 111.15 governs the adoption and filing of agency rules. The statute defines “rule” to include “any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency; any appendix to a rule; and any internal management rule.” R.C. 111.15(A)(1). An “internal management rule” is a rule, regulation, bylaw or standard which governs the day-to-day staff procedures and operations within an agency. R.C. 111.15(A)(3). The statute requires that any such rules adopted by an agency be filed with the Secretary of State, the Director of the Legislative Service Commission and the Joint Committee on Agency Rule Review. R.C. 111.15(B).

Not every policy or procedure adopted by an administrative agency is a rule, however. The statute specifically exempts from its requirements “any order respecting the duties of employees.” R.C. 111.15(A)(1). And that is precisely what the protocol is; it is an order of the Director of DRC setting forth the duties of specific employees when preparing for and carrying out a scheduled execution. In short, it is a detailed procedural checklist to be used only by specific employees to perform a specific task; it is not a rule that has a general and uniform operation affecting all of DRC’s employees and institutions.

O’Neal argues that the protocol is at least an “internal management rule” and so is subject to the filing requirements. However, an internal management rule is defined by R.C. 111.15(A)(3) to be a rule which governs the “day-to-day staff procedures and operations within” the agency. The protocol does not do that. Executions, while part of DRC’s statutory duties, do not happen on a day-to-day basis. The execution procedures set forth in the protocol have no

applicability to any of DRC's institutions or inmates *except* the inmates housed on death row whose execution dates have been scheduled by this Court. The execution procedures set forth in the protocol likewise have no applicability to DRC employees in general; the only employees they affect are the ones who have specific assigned duties set forth in the protocol.

Executions are not day-to-day operations, and they are not conducted on a regular or routine basis. Instead, they are infrequent occurrences conducted at one institution. The protocol therefore is not an internal management rule.

In short, the Tenth District correctly held that the protocol is not a rule, and DRC was not required to engage in formal rule-making under R.C. 111.15.

Appellee's Proposition of Law II:

DRC did not exceed its statutory authority when it adopted the protocol to provide uniform procedures in carrying out executions.

Consistent with the Ohio Constitution, in enacting R.C. 2949.22, the General Assembly directed that executions in Ohio be by lethal injection, and placed the responsibility on DRC to carry out such executions accordingly.

R.C. Chapter 5120 grants broad executive powers to the director of DRC. *See State ex rel. AFSCME v. Taft*, 156 Ohio App.3d 37, 2004-Ohio-493, ¶35. The General Assembly authorized DRC to “maintain, operate, manage, and govern all state institutions for the custody, control, training, and rehabilitation of persons convicted of crime and sentenced to correctional institutions.” R.C. 5120.05. DRC has the “power and authority necessary for the full and efficient exercise of the executive, administrative, and fiscal supervision over” prisons. R.C. 5120.36.

Under R.C. 2949.22, “a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of

drugs of sufficient dosage to quickly and painlessly cause death.” The responsibility to carry out the execution is placed on DRC: “The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.” R.C. 2949.22(A).

By prescribing that Ohio executions be carried out by lethal injection but remaining silent on the particulars, the legislature implicitly left it to DRC’s expertise to use its discretion to establish the guidelines for the execution process. “It is axiomatic that if a statute provides the authority for an administrative agency to perform a specified act, but does not provide the details by which the act should be performed, the agency is to perform the act in a reasonable manner based upon a reasonable construction of the statutory scheme.” *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 287, 2001-Ohio-190, 750 N.E.2d 130, citing *Swallow v. Indus. Comm.*, 36 Ohio St.3d 55, 57, 521 N.E.2d 778 (1988).

This Court has previously addressed DRC’s execution protocol, and agreed that having, and following, a specific protocol in carrying out an execution is vital: “[to] be clear the state must comply with the protocol as amended. Strict compliance with the protocol will ensure that executions are carried out in a constitutional manner and can also prevent or reveal an inmate’s attempt to interfere with the execution process.” *State v. Broom*, 146 Ohio St.3d 60, 73, 2016-Ohio-1028, at ¶53.

DRC did not exceed its statutory authority in drafting the protocol.

Appellee’s Proposition of Law III:

In enacting R.C. 2949.22, the General Assembly properly delegated the responsibility to DRC to determine what procedures would be used in carrying out an execution by lethal injection.

A. The legislature properly delegated authority to DRC to determine the specific procedures to use to carry out executions by lethal injection.

“A legislative act is presumed constitutional and the presumption is only overcome by showing beyond a reasonable doubt that the legislative act and constitutional provision are incompatible.” *State v. Klinck*, 44 Ohio St.3d 108, 109, 541 N.E.2d 590 (1989), citing *State, ex rel. Brockman, v. Proctor*, 35 Ohio St.2d 79, 298 N.E.2d 532 (1973). Delegation of authority to permit an agency to issue directives for the conduct of its operations is a necessary response to the increasing complexity of modern government. *In re Adoption of Uniform Rules and Regulations Relating to Valuation of Real Property*, 169 Ohio St. 445, 455, 160 N.E.2d 275 (1959). A statute does not unconstitutionally delegate legislative power by conferring discretion to an agency “when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished[.]” *Blue Cross of Northeast Ohio v. Ratchford*, 64 Ohio St.2d 256, 259, 416 N.E.2d 614 (1980), quoting *Matz v. J. L. Curtis Cartage Co.*, 132 Ohio St. 271 (1937), paragraph seven of the syllabus. As the Supreme Court recognized, due to the need for flexibility in using discretion, it is not always practical to delineate specific standards for the exercise of discretion. *Id.* at 259-60. Thus, “[o]rdinarily, the establishment of standards can be left to the administrative body or officer if it is reasonable for the General Assembly to defer to the officer’s or body’s expertise.” *Id.* at 260.

As the court of appeals properly determined, that is precisely what was done when the legislature left the specifics of the execution to DRC's discretion and expertise.

B. Despite O'Neal's protestations otherwise, DRC's use of an intravenous injection does not conflict with the requirement that an execution be carried out by lethal injection or that the execution be "quick and painless."

O'Neal makes the nonsensical argument that the protocol conflicts with the execution statute of R.C. 2949.22 because the lethal drugs are given via an intravenous injection. This flies in the face of the medical definition of "injection." In the medical sense, an injection is defined as the "introduction of a medicinal substance or nutrient material into the subcutaneous tissue (subcutaneous or hypodermic injection), the muscular tissue (intramuscular injection), *a vein (intravenous injection)*, an artery (intraarterial injection) * * * or other canals or cavities of the body." *Stedman's Medical Dictionary for the Health Professions and Nursing*, at 748 (5th Ed.2005) (emphasis added). *See also Taber's Cyclopedic Medical Dictionary*, at 996 (18th Ed.1997) (defining injection as the "forcing of a fluid into a vessel, tissue, or cavity intramuscularly or under the skin").

Further, the use of intravenous injection rather than an intramuscular injection does not alter the execution statute's "quick and painless" requirement. As this Court has previously ruled, the "quick and painless" requirement of R.C. 2949.22 applies only once the drugs flow into the inmate's body. *State v. Broom, supra* at ¶26. In *Broom*, this Court found the insertion of intravenous lines was "a necessary preliminary step" but that "the statute makes clear [that] the execution commences when the lethal drug enters the IV line." *Id.* Thus, the use of intravenous injection to carry out executions has already been endorsed by this Court.

In short, consistent with the Constitution of Ohio, the legislature has required DRC to carry out executions by lethal injection, while vesting DRC with the necessary discretion to formulate the specific manner and procedures for carrying out that statutory obligation.

CONCLUSION

For the above reasons, the State urges the Court to deny jurisdiction.

Respectfully submitted,

DAVE YOST (0056290)
Attorney General of Ohio

s/ Charles A. Schneider

CHARLES A. SCHNEIDER (0005821)*

**Counsel of Record*
Criminal Justice Section Chief

BRENDA S. LEIKALA (0072635)
Senior Assistant Attorney General
Criminal Justice Section, Capital Crimes Unit
150 E. Gay Street, 16th Floor
Columbus, OH 43215
(614) 644-7233; (866) 523-8127 (fax)
Charles.Schneider@ohioattorneygeneral.gov
Brenda.Leikala@ohioattorneygeneral.gov

Counsel for Defendants-Appellees
The State of Ohio and the Ohio Department of
Rehabilitation and Correction

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Memorandum in Opposition of Jurisdiction of Defendants-Appellees* was served via electronic mail this 29th day of June, 2020, upon the following counsel:

S. Adele Shank
shanklaw@att.net

*Counsel for Appellant
James O'Neal*

Randall L. Porter
Assistant State Public Defender
Randall.Porter@opd.ohio.gov

*Counsel for Appellant
Cleveland Jackson*

Richard Cline
Senior Assistant State Public Defender
Richard.Cline@opd.ohio.gov

*Counsel for Appellant
Cleveland Jackson*

Lawrence J. Greger
larry@gregerlawoffice.com

*Counsel for Appellant
James O'Neal*

Dale A. Baich
Assistant Federal Public Defender
Dale_Baich@fd.org

*Counsel for Appellant
Cleveland Jackson*

/s/ Charles A. Schneider
CHARLES A. SCHNEIDER (0005821)
Criminal Justice Section Chief