Supreme Court of Ohio Clerk of Court - Filed June 29, 2020 - Case No. 2020-0676

In the

Supreme Court of Ohio

CLEVELAND JACKSON,	:	Case No. 2020-0676
	:	
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

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INTRODUCTION

This case does not warrant the Court's review, and it does not implicate the broad interests that Appellant Cleveland Jackson alleges. Instead, it involves the application of settled law to untenable claims. Equally important, the claimed need for review fails because of an undeniable mismatch between the cause that Jackson now seeks to champion – a substantive challenge to the drugs used in DRC's execution protocol, 01-COM-11 (the "protocol") – and the actual claim he filed – a *procedural* attack on the protocol and whether it should have been promulgated as an administrative rule. But Jackson's attempt to mount a substantive attack fails because, while he and others have long pursued litigation about the protocol drugs in federal court, there is no independent legal avenue to pursue such claims under Ohio law. *Scott v. Houk,* 127 Ohio St.3d 317, 319, 2010-Ohio-5805 ¶4 ("There is no state postconviction relief or other state-law mode of action to litigate the issue of whether a specific lethal-injection protocol is constitutional under [federal] or Ohio law").

As with the appeal by James Derrick O'Neal, docketed as Case No. 2020-0683, only two legal questions are properly before the Court. 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

Appellant Cleveland Jackson was sentenced to death for the 2002 murders of two girls, ages 3 and 17, during a drug robbery. Jackson's execution is scheduled to take place on January 13, 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 DRC "shall ensure that the death sentence is executed." The statute further requires 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 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 an execution by lethal injection as legislatively mandated by R.C. 2949.22.

On January 24, 2018, another Death Row inmate, James Derrick 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 the protocol 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 protocol 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.

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

There is a fundamental disconnect between the propositions of law proposed by Jackson and his explanation of why this case is a matter of public or great general interest. He confuses the actual issues in the case he joined in the courts below and the case he wishes he could have brought.

This case is a challenge to what is essentially an internal procedural checklist followed by DRC employees in the months, days and hours leading up to a scheduled execution. The protocol is an order promulgated by the Director of DRC which sets forth the duties of particular employees under very specific circumstances. It does not affect 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.

Throughout this litigation, in his motion for summary judgment, and his appeal to the Tenth District, Jackson made three arguments: (1) the protocol should have been filed as a rule under R.C. 111.15; (2) in adopting the protocol DRC exceeded its statutory authority under R.C. 2949.22(A); and/or (3) the General Assembly improperly delegated the responsibility to DRC to establish the procedures set forth in the checklist. Those are the issues argued by Jackson in the courts below, and those are the issues reflected in his propositions of law.

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[1] O'Neal's appeal is docketed as Case No. 2020-0683.

In other words, this case is a *procedural* attack on the protocol – whether it was promulgated properly in the first place, and whether DRC had the authority to promulgate it at all. But in his explanation of why this Court should accept jurisdiction of the case, Jackson instead discusses the case he wishes he could have brought, that is, a *substantive* challenge to the particular drugs enumerated in the protocol and his belief that the use of the drugs set forth in the protocol would not cause a "quick and painless death" as directed by R.C. 2949.22(A). So, in his jurisdictional statement Jackson avers that the drug protocol included in the protocol would not result in a quick and painless death, relying on findings made by a federal magistrate in a preliminary injunction proceeding that the first drug in the three-drug protocol, midazolam, would not prevent the pain allegedly inflicted by the second and third drugs.

The first problem with Jackson's argument is that those findings have since been overruled by the U.S. Court of Appeals for the Sixth Circuit. *Adams v. Henness (In re Ohio Execution Protocol Litigation)*, 946 F.3d. 287 (6th Cir. 2019), held that "the district court erred in finding that Henness met his burden of proving that midazolam is incapable of suppressing his consciousness enough to prevent him from experiencing – at a constitutionally problematic level – the pain caused by the combination of the paralytic agent and the potassium chloride." *Id.* at 290.

The second and even more critical problem is that under this Court's precedents Jackson cannot bring a substantive challenge under Ohio law to the protocol set forth in the protocol. In *Scott v. Houk*, 127 Ohio St.3d 317, 319, 2010-Ohio-5805, this Court held there is no independent Ohio-law cause of action for an Ohio court to consider whether a specific lethal-injection protocol is constitutional under either federal or Ohio law. *Id.* ¶4. Further, concurring opinions written by Justice Stratton and Justice O'Connor both rejected the position espoused by Jackson

here – that the phrase "quick and painless death" included in R.C. 2949.22(A) provides greater protection against pain and suffering than the Eighth Amendment prohibition against cruel and unusual punishment. *Id.* at ¶12 (Stratton, J., concurring); *Id.* at ¶ 20 (O'Connor, J. concurring).

Despite Jackson's protestations to the contrary, this case is *not* about the death penalty, and it is *not* about whether the protocol causes unconstitutional levels of pain, or what R.C. 2949.22(A) means when it directs that an execution by lethal injection result in a "quick and painless death." Rather, this case is about whether the protocol is a rule as defined by R.C. 111.15 even though it does not have general application in the prisons nor does it affect the day-to-day operations of the prisons. And the case is about whether the General Assembly properly delegated to DRC the formulation of the specific procedures to be followed by DRC employees in carrying out an execution by lethal injection. The Tenth District Court of Appeals carefully analyzed each of these issues, rejected each of Jackson's arguments, and concluded that the protocol is valid.

Therefore, this appeal does not present any questions of public or great general interest, and it does not involve any substantial constitutional questions.

ARGUMENT

Appellee's Proposition of Law I:

> *The protocol is an internal procedural checklist used by employees to carry out executions, and so 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.

Jackson argues that the protocol set forth in 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 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.

Jackson argues that the protocol is a "rule" because DRC intends to apply the procedure set forth therein "to everyone who is affected by it." That statement begs the question. Of course, everyone to whom the procedure applies will be "affected" by it. But that fact does not make the

protocol a uniform, day-to-day impact on the operations of the prisons. Executions are not day-to-day events, 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 file it in accordance with 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.*

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

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.

B. There is no independent state law cause of action by which an inmate can litigate the issue of whether a specific lethal-injection protocol is constitutional under Ohio law. *Scott v. Houk*, 127 Ohio St.3d 317, 2010-Ohio-5805, ¶4.

In support of his second proposition of law, Jackson argues that the drug protocol and manner of administration set forth in the protocol exceed the authority of R.C. 2949.22 because the protocol will not result in a quick and painless death. However, as explained above, in *Scott*

v. Houk, supra, this Court concluded that there is no independent mechanism under Ohio law for such a challenge:

> The Ohio General Assembly has not yet provided an Ohio-law cause of action for Ohio courts to process challenges to a lethal-injection protocol, and given the review available on this issue through Section 1983, Title 42, U.S. Code, for injunctive relief against appropriate officers or federal habeas corpus petitions, we need not judicially craft a separate method of review under Ohio law. Accordingly, until the General Assembly explicitly expands state review of death-penalty cases by creating a methodology for reviewing Ohio's lethal-injection protocol, we must answer the certified question as follows: There is no state postconviction relief or other state-law mode of action to litigate the issue of whether a specific lethal-injection protocol is constitutional under *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420, or under Ohio law.

Id. at ¶4. The dissenting opinion argued, much as Jackson does here, that the "quick and painless" language in R.C. 2949.22 imposed a higher standard than the Eighth Amendment's prohibition against cruel and unusual punishment. This argument was expressly rejected in the concurring opinions written by Justice Stratton, *id.* at ¶¶12-13, and by Justice O'Connor, *id.* at ¶20. As Justice O'Connor explained:

> The flaw in the dissent's position, however, is that R.C. 2949.22(A) does not create a cause of action to enforce any supposed right to a quick and painless death. *Cooey v. Strickland* (C.A.6, 2009), 589 F.3d 210, 234. Rather, the statute directs that the death sentence be carried out by lethal injection of a drug, or combination of drugs, of sufficient dosage to quickly and painlessly cause death to the person upon whom the death penalty was imposed. R.C. 2949.22(A). The statute, therefore, imposes a duty upon the individual administering the lethal-injection protocol, but it does not plainly create any right to a quick and painless death as the dissent mistakenly presumes.

Id. Jackson has given this Court no good reason to revisit that conclusion.

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 Jackson'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."

Jackson 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,

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CERTIFICATE OF SERVICE

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

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