

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

**CLAYTON LOCKETT and
CHARLES WARNER,**

Appellants,

v.

STATE OF OKLAHOMA,

Appellee.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 18 2014

MICHAEL S. RICHIE
CLERK

**No. D-2000-1330 and
D-2003-829**

Cross Reference with
Oklahoma Supreme Court
Case No. 112,639

**ORDER VACATING AND RESETTING
EXECUTION DATES**

Appellants filed a civil declaratory judgment action in the District Court of Oklahoma County on February 26, 2014, arguing that Oklahoma's execution-secrecy law, 22 O.S.2011, § 1015(B), is unconstitutional, and that Oklahoma's current execution protocol has been adopted in violation of the Oklahoma Administrative Procedures Act.¹ Appellants moved to stay their upcoming executions—scheduled for March 20 and 27 respectively—to allow them an opportunity to vindicate their rights and obtain a ruling on the merits of their claims. The district court denied a stay of execution pending final disposition of their declaratory judgment action, but did not otherwise rule on

¹Lockett's and Warner's execution dates were set by this Court on January 22 and 23, 2014, respectively. As noted in the main text, Lockett and Warner filed their civil action in the Oklahoma County District Court on February 26, 2014. On the State's motion, the cause was removed to federal district court on March 4, 2014. After conducting a hearing on the matter, the federal district court remanded the cause back to the Oklahoma County District Court on March 7, 2014. Judge Parrish of the Oklahoma County District Court denied the application for a stay of execution on March 10, 2014.

the merits of the declaratory judgment claims. The appellants appealed the district court's ruling to the Oklahoma Supreme Court.

On March 13, 2014, the Oklahoma Supreme Court held that the district court has jurisdiction over the merits of Appellants' declaratory judgment claims, but only the Oklahoma Court of Criminal Appeals could enter stays of execution. Based on the Oklahoma Supreme Court's determination that stays of execution are a criminal rather than a civil matter, that Court transferred to the Oklahoma Court of Criminal Appeals the Plaintiffs' Emergency Application for Stay of Execution Pending Outcome of Appeal. The Oklahoma Supreme Court remanded Appellants' civil declaratory judgment action to the district court for ruling on the merits. That ruling in effect left the issue of a stay of execution to this Court. This Court in turn directed briefing from the parties addressing the applicability of *Malicoat v. State*, 2006 OK CR 25, 137 P.3d 1234, and 22 O.S.2011, § 1001.1 to the application for stay.

In its brief, the State of Oklahoma revealed that as of Monday, March 17, 2014, the Oklahoma Department of Corrections remained without the drugs (pentobarbital, vecuronium bromide and potassium chloride) needed to carry out the lawful sentence of death for Appellants. *See Appellee's Brief* at 8. According to the Oklahoma Attorney General, "pentobarbital remains in short supply" and "vecuronium bromide is now difficult, if not impossible, even for hospitals and medical professionals to obtain." *Id.* The State declared that it had pursued "every feasible option to obtain the necessary execution drugs" but its "Herculean" efforts so far had been unsuccessful. *Id.* at 8-9. The State

acknowledged that the current shortage of drugs may prompt a revision of the execution protocol to incorporate drugs that are currently available, and obtainable, on the open market. *Id.* at 9. Absent the State obtaining the necessary execution drugs, a revised protocol will be necessary to fulfill the Court's orders of execution. *Id.* It is a near certainty that any change in protocol would lead to a lawsuit and request for stays of execution. *Id.*

The Attorney General's attestations give this Court no confidence that the State will be able to procure the necessary drugs before the scheduled executions are to be carried out. Based on this new information, we find the execution dates for Appellants Lockett and Warner must be vacated and reset in order to allow the State of Oklahoma time to procure the necessary execution drugs or to adopt a new execution protocol.

Appellant Lockett's execution date of March 20, 2014 is hereby **VACATED** and reset for Tuesday, April 22, 2014. Appellant Warner's execution date of March 27, 2014 is hereby **VACATED** and reset for Tuesday, April 29, 2014. Plaintiffs' Emergency Application for Stay of Execution Pending Outcome of Appeal is **DENIED** as moot.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 18th day
of March, 2014.



DAVID LEWIS, Presiding Judge

Clancy Smith

CLANCY SMITH, Vice Presiding Judge

Gary L. Lumpkin - Concur in Part / Dissent
in Part (writing attached)

GARY L. LUMPKIN, Judge

Charles A. Johnson

CHARLES A. JOHNSON, Judge

Arlene Johnson

ARLENE JOHNSON, Judge

ATTEST:

Michael D. Richie

Clerk

LUMPKIN, J.: CONCURRING IN PART/DISSENTING IN PART

While I agree the Appellants have failed to meet their burden for an emergency stay, I dissent to the Court, *sua sponte*, taking action based on assumption and speculation. The State has been candid with the Court as to its efforts but has not requested a stay for inability to comply with the statute. Rather than finding the Appellant's Motion for Emergency Stay is moot based on a *sua sponte* decision issued by this Court we should be determining the merits of Appellant's Motion.

On March 13, 2014, the Oklahoma Supreme Court transferred to this Court part of the matter pending in Oklahoma Supreme Court Case No. 112,639 which addressed the issue of whether a stay should be issued prior to the District Court of Oklahoma County considering the pleadings that have been filed in the above cited civil matter. This Court ordered the Appellants and the State to provide this Court with supplemental briefs addressing the statutory provisions of 22 O.S.2011, § 1001.1 regarding the requirements for a stay of execution in a death penalty case and the impact of this Court's decision in *Malicoat v. State*, 2006 OK CR 25, 137 P.3d 1234 in determining whether a stay is warranted in each case. The briefs for both Appellants and the State have been timely filed with the Clerk of this Court.

In *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), the United States Supreme Court acknowledged "that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel

and unusual punishment.” *Id.*, at 49, 128 S.Ct. at 1529. “However, to establish that such exposure violates the Eighth Amendment, . . . the conditions presenting the risk must be ‘sure or very likely to cause serious illness and needless suffering,’ and give rise to ‘sufficiently imminent dangers.’” *Id.* at 49-50, 128 S.Ct. at 1529-31 *quoting Helling v. McKinney*, 509 U.S. 25, 33, 34-35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). The United States Supreme Court explained that “[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.” *Id.* at 50, 128 S.Ct. at 1531. The Court held that “[a] stay of execution may not be granted . . . unless the condemned prisoner establishes that the State’s lethal injection protocol creates a demonstrated risk of severe pain. . . . [and] the risk is substantial when compared to the known and available alternatives.” *Id.* at 61, 128 S.Ct. at 1537. *See also Pavatt v. Jones*, 637 F.3d 1336, 1339 (10th Cir. 2010) (applying *Baze* principles to find District Court did not abuse its discretion in denying defendant’s motion for preliminary injunction to stay execution).

In *Malicoat v. State*, 2006 OK CR 25, ¶¶ 6 & 10, 137 P.3d 1234, 1237, 1239, this Court upheld Oklahoma’s execution protocol as constitutional. In so doing, we determined that a stay of execution may not be granted based upon mere speculation that mistakes or problems may occur in the lethal injection process. *Id.* Further, pursuant to 22 O.S.2011, § 1001.1(C):

When an action challenging the conviction or sentence of death is pending before it, the Court of Criminal Appeals may stay an execution date, or issue any order which effectively stays an execution date **only upon a showing by the defendant that there exists a significant possibility of reversal of the defendant's conviction, or vacation of the defendant's sentence, and that irreparable harm will result if no stay is issued.** (emphasis added).

In the present case, the Appellants have not made the requisite showing for an emergency stay of execution because they have raised only speculation that problems may occur in the carrying out of their legal sentence.

Under 22 O.S.2011, § 1080, all common law and statutory methods of challenging a conviction or sentence shall be brought under the Post Conviction Procedure Act. Pursuant to 22 O.S.2011, § 1089(C), the Capital Post-Conviction Procedure Act, the only issues which may be raised in an application for post-conviction relief are those that: 1) were not and could not have been raised in a direct appeal; and 2) support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent. Appellants have each had original post-conviction review but have not filed second applications for state post-conviction relief pursuant to 22 O.S. 2011, § 1089(D)(8). Instead, they have chosen to pursue their constitutional claims in a civil declaratory judgment action. Appellants' claims implicate the execution of their legal sentences, the Oklahoma Department of Correction's (ODOC) lethal injection protocol and the state constitutional ban on "cruel and unusual punishments." Okla. Const. art. 11, § 9. Until Appellants file a second application for post-conviction relief challenging their death sentences in this Court, § 1001.1(C) forecloses a stay of

execution. In effect, Appellants have sought to side-step the established legal method of addressing the issue presented in an attempt to find a friendlier forum to raise issues otherwise foreclosed under precedent.

Due process is defined by statutes and procedures developed by precedent. See *Cooper v. State*, 1995 OK CR 2, ¶ 16, 889 P.2d 293, 300, *overruled on other grounds*, *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct.1373, 134 L.Ed.2d 498 (1996). Appellants have not sought to utilize the process that is due them as established by the Oklahoma Legislature. As Appellants have failed to meet the criteria for an emergency stay as set out in *Baze v. Rees*, and failed to present any authority supporting their challenge to the constitutionality of the state statute,¹ the Appellant's request for emergency stay should be denied.

Further, the Order granting the stay mischaracterizes the nature of 22 O.S.2011, § 1015. It is not an "execution-secrecy law"; it only provides that "[t]he identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential." 22 O.S.2011, § 1015(B). Nothing precludes the disclosure of drugs used in the protocol.

Although, the State informs the Court, in its supplemental brief, that it faces a shortage of the drugs needed to carry out Appellants' sentences, the Court should restrain independent action and allow the parties to present any request for action they deem necessary under the circumstances to the Court

¹ See *Murphy v. State*, 2012 OK CR 8, ¶ 32, 281 P.3d 1283, 1292 (statutes are presumed to be constitutional and the person alleging their unconstitutionality has the burden of proof).

when they believe the Court's action is required. We should permit both the Appellants and the State the freedom to choose to litigate their case as they see fit. "It is not this Court's role to reach out and reshape the world in the Court's perceived better image." *Cohee v. State*, 1997 OK CR 30, ¶ 5, 942 P.2d 211, 218 (Lumpkin, J., concurring in part/dissenting in part). "This Court should rule on the issues as presented by the Appellant[s]. It should not reformat those issues into questions it would like to answer, but was not asked." *Bumpus*, 1996 OK CR 52, ¶ 5, 925 P.2d 1208, 1213 (Lumpkin, J., dissenting). Until this Court receives a request to stay the execution dates based upon the Attorney General's attestations, this Court should not be determining that matter.