FILED
United States Court of Appeals
Tenth Circuit

December 6, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BIGLER JOBE STOUFFER,

Plaintiff - Appellant,

v.

SCOTT CROW; RANDY CHANDLER; BETTY R. GESELL; JOSEPH A. GRIFFIN; F. LYNN HAUETER; KATHERYN A. LAFORTUNE; STEPHAN MOORE; CALVIN PRINCE; T. HASTINGS SIEGFRIED; DARYL WOODARD; JIM FARRIS; JUSTIN FARRIS; MICHAEL CARPENTER; JUSTIN GIUDICE; PARAMEDIC Y; EXECUTIONER #1; EXECUTIONER #2; EXECUTIONER #3,

Defendants - Appellees.

No. 21-6153
(D.C. No. 5:21-CV-01000-F)
(W.D. Okla.)

ORDER

Before **TYMKOVICH**, Chief Judge, **MURPHY**, and **MORITZ**, Circuit Judges.

Bigler Jobe Stouffer is an Oklahoma inmate sentenced to death whose execution has been scheduled for December 9, 2021. He has appealed to this court from the district court's order denying his motion for a preliminary injunction. In connection with his appeal, he filed an emergency motion for stay of execution.

Our rule concerning stays pending appeal is that

> [n]o application for a stay . . . pending appeal will be considered unless the applicant addresses all of the following:
>
> (A) the basis for the district court's or agency's subject matter jurisdiction and the basis for the court of appeals' jurisdiction, including citation to statutes and a statement of facts establishing jurisdiction;
>
> (B) the likelihood of success on appeal;
>
> (C) the threat of irreparable harm if the stay or injunction is not granted;
>
> (D) the absence of harm to opposing parties if the stay or injunction is granted; and
>
> (E) any risk of harm to the public interest.

10th Cir. R. 8.1.

In exercising our discretion whether to issue a stay, we consider these factors as they apply to the circumstances of the case before us. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009). Mr. Stouffer "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 434.

In his motion, Mr. Stouffer has not addressed the last three stay factors. In particular, he has not identified the threat of irreparable harm he may suffer if the stay or injunction is not granted. The defendants discern his alleged irreparable harm as the potential that "the *method* of execution will cause irreparable harm, for example, by showing he will suffer a constitutionally impermissible level of pain as compared to another available and constitutional method he proposes." Resp. at 20. In his reply, Mr. Stouffer does not challenge this articulation of his alleged irreparable harm. Nor does he specify any other irreparable harm he may suffer if the stay is not granted. Accordingly, we will limit our discussion to whether, absent a stay, Mr. Stouffer has

shown he will be irreparably harmed by being subjected to an unconstitutionally painful method of execution in violation of the Eighth Amendment.

To establish such a harm, Mr. Stouffer must show both that the State's chosen method of execution presents "a substantial risk of severe pain" and that the risk is substantial in comparison to other known and available alternatives. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (citing *Glossip v. Gross*, 576 U.S. 863 (2015), and *Baze v. Rees*, 553 U.S. 35 (2008)). These two factors are commonly known as "*Glossip* prongs one and two." Mr. Stouffer's entire argument on his Eighth Amendment claim is that "[t]he additional evidence regarding the [John] Grant execution satisfies the first hurdle and Stouffer's Affidavit wherein he has made the same choices [of alternative methods of execution], without reservation, as [the] *Glossip* plaintiffs, satisfies the second." Mot. at 19-20.

The district court found Mr. Stouffer had failed to establish a likelihood of success on either prong of the *Glossip* test. Concerning the first prong (substantial risk of severe pain) it cited the testimony of Dr. Ervin Yen, an anesthesiologist who witnessed John Grant's execution on October 28, 2021, that "Mr. Grant was unconscious and insensate to pain very soon after the midazolam was pushed and was dead before the second drug was pushed," and that his regurgitation and respiratory distress occurred while he was unconscious. R., Vol. 2 at 42. The district court further concluded that even if Mr. Grant had been conscious during the episode of coughing and regurgitation, "this brief episode did not subject him to a level of pain and suffering necessary to amount to severe, cruelly

superadded pain within the meaning of the Supreme Court's lethal injection cases." *Id.* at 43.

Based on our review of the cited portions of the record, including Dr. Yen's testimony and the entire transcript of the preliminary injunction hearing, Mr. Stouffer has failed to establish a threat that he will be irreparably harmed by a violation of his Eighth Amendment rights if he is executed using Oklahoma's three-drug protocol, including midazolam. As we stated in a previous appeal, the fact that the district court declined to grant summary judgment on the first element of an identical *Glossip* claim asserted in another case does not equate to a showing of a likelihood of success on the merits for purposes of appeal. *See Jones v. Crow*, No. 21-6139, 2021 WL 5277462, at *6 (10th Cir. Nov. 12, 2021) (citing *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). Nor does the favorable summary-judgment decision, even when supplemented with the additional evidence Mr. Stouffer has supplied concerning the Grant execution, equate to a showing in his case of the likelihood of irreparable harm resulting from an unconstitutionally painful execution. Because Mr. Stouffer has failed to establish the first prong of the *Glossip* test by showing a substantial risk of unconstitutionally severe pain, we need not consider whether he has made an adequate showing of the second prong of that test.

Given Mr. Stouffer's failure to establish the threat of irreparable harm if the stay he seeks is not granted, we need not discuss whether he has satisfied the other stay

factors. Mr. Stouffer has not shown that the circumstances justify an exercise of our discretion to issue a stay pending appeal. We therefore deny his motion for stay.

Entered for the Court
Per Curiam