

FILED
STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE 2007 JAN 25 AM 11:25 SUPERIOR COURT DIVISION

WAKE COUNTY, O.S.C. 07 CVS 001109

MARCUS ROBINSON and JAMES EDWARD
THOMAS,
Plaintiffs

Vs.

THEODIS BECK, Secretary of the NC
Department of Corrections; MARVIN POLK,
Warden; et al., in their individual and official
Capacities,
Defendants

ORDER ALLOWING
PRELIMINARY INJUNCTION

This matter came on for hearing before the undersigned judge upon motion by plaintiffs for injunctive relief to stay their scheduled executions. Plaintiffs contend that a January 17, 2007 decision of the North Carolina Medical Board prohibits physicians from participating in their execution. Plaintiffs acknowledge that the presence and participation by physicians in past executions have provided guarantees of medical intervention to insure humane treatment of condemned prisoners. Under these past executions in which physicians participated, federal courts have approved executions so long as there existed sufficient medical protocol protections to minimize the potential for pain and suffering of the prisoner.

Plaintiffs contend that the absence of a physician's participation in the monitoring and supervision of a condemned prisoner's medical condition during an execution creates a potential risk of pain and suffering to the prisoner in violation of the Constitutional prohibition against cruel and unusual punishment.

The defendants at this hearing do not challenge the legal authority of the Medical Board to prohibit physician participation in an execution. Defendants' Counsel has announced that defendants have elected to comply with the Medical Board's decision and that physicians will no longer participate in the protocol to be followed in executions. Although a physician will be present during an execution, that physician will not supervise or participate in the injection of any drugs or the monitoring of the prisoner's medical condition. Defendants contend that the Warden has the responsibility to insure that an execution is carried out in a constitutional and lawful manner and that the Warden may do so through the use of trained medical personnel that does not include a physician.

Defendants contend that their current execution procedures and protocol can be lawfully carried out without the participation of a physician.

The defendants' current position is different from that which they have taken in past executions. This current procedure and protocol eliminates the physician's participation in an execution. This is a new execution protocol approved by the Secretary of Corrections and the Warden. In view of this significant change in the execution protocol, the court rules that G.S. 15-188 [Manner and place of execution.] is controlling.

G.S. 15-188 provides in part the following: "The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of this Article."

The court is of the opinion that the Secretary of Corrections and the Warden may not significantly alter the existing protocol for the manner and method of executions, which protocol has previously received court approval as constitutional, without first submitting such substantial changes to the Governor and Council of State for review and approval. In the absence of a protocol approved by the Governor and the Council of State which authorizes an execution to be carried out under procedures that do not require the participation of a physician, the requirements of G.S. 15-188 and Article 19 of Chapter 15 of the General Statutes have not been met.

WHEREFORE, the court having determined that the Governor and the Council of State have not reviewed and approved a new execution protocol which eliminates the requirement of participation by a physician, it is hereby ordered that the Plaintiffs' motions for preliminary injunction are allowed. The State of North Carolina is restrained and enjoined from carrying out the scheduled executions of Plaintiffs until there has been compliance with the requirements of law as heretofore set forth in this order.

However, if the Governor and Council of State or the Warden determines that the decision of the North Carolina Medical Board is invalid and is contrary to existing state law and prevents the Warden from conducting an execution in a lawful and constitutional manner, this order is entered without prejudice to the right of the defendants to file a third party action against the North Carolina Medical Board and to join that Board as a third party defendant to litigate that issue in this proceeding.

The undersigned judge retains jurisdiction over all matters in this case.

THE SHERIFF OF WAKE COUNTY IS ORDERED TO IMMEDIATELY NOTIFY THE WARDEN OF CENTRAL PRISON THAT THE EXECUTIONS OF THE PLAINTIFFS HAVE BEEN STAYED UNTIL FURTHER ORDER OF THIS COURT. THE SHERIFF SHALL ALSO CAUSE A COPY OF THIS ORDER TO BE SERVED UPON THE WARDEN.

MARCUS ROBINSON & JAMES EDWARD THOMAS VS. THEODIS BECK,
01 CVS 1109 et al.

It is so ordered this the 25th day of January, 2007.



Donald W. Stephens
Senior Resident Superior Court Judge