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United States District Court, S.D. Ohio, Western Division.

Jane ROE, et al. Plaintiffs
v.
Simon L. LEIS, Jr., et al. Defendants

No. C–1–00–651. | Jan. 10, 2001.

Opinion

ORDER GRANTING PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION

DLOTT, J.

***1** This matter comes before the Court on Plaintiffs' Motion for a Preliminary Injunction. By agreement of the parties, the Court will treat this Motion as one for a Permanent Injunction.[1] Plaintiffs Jane Roe and Walter T. Bowers II, M.D., ask this Court to restrain Defendants Simon L. Leis, Jr. and Hamilton County from continuing to administer a policy in Hamilton County prisons that they claim is unconstitutional. For the reasons that follow, the Court hereby GRANTS Plaintiffs' Motion.

[1] Federal Rule of Civil Procedure 65(a)(2) so authorizes.

I. FACTUAL BACKGROUND

The parties have stipulated to all pertinent facts.[2] Defendant Simon L. Leis, Jr., in his official capacity as Sheriff of Hamilton County, administers detention facilities in that jurisdiction. Under Sheriff Leis's administration, Policy 56.00 governs pregnancy terminations and provides the following procedure:

[2] Pursuant to Federal Rule of Civil Procedure 52, the Court will set out its findings of fact in this section and its conclusions of law in subsequent sections.

> 3. If the inmate expresses the wish to receive an abortion, the healthcare staff will facilitate contact between the inmate and the appropriate counseling service.
>
> 4. If the Medical Director, in consultation with the Area Medical Director, judges that an abortion is therapeutically indicated, the medical care will be arranged following the procedure established at the institution providing specialty care.

Joint Ex. 2. Defendants and their medical contractors have interpreted "therapeutically indicated" to permit abortions only to save the life of the mother. The Defendants do not provide abortion services within any of their detention facilities.

In July 2000, while an inmate at 1617 Reading Road, Plaintiff Jane Roe advised Defendants that she was pregnant. They promptly transported her to University Hospital, where an ultrasound confirmed her pregnancy. She then requested access to abortion services, which Defendants denied. In an August 7, 2000 letter to Ms. Roe's attorney, Sheriff Leis explained this denial by stating that "the Hamilton County Sheriff's Office does not transport inmates for elective procedures without a court order. Upon receipt of a court order, the Hamilton County Sheriff's [*sic*] will transport inmate [Jane Roe] to her chosen health care provider." Joint Ex. 1. Having exhausted her administrative remedies, Ms. Roe and her physician, Plaintiff Walter T. Bowers II, M.D., sought relief in this Court under 42 U.S.C. § 1983. On August 9, 2000, this Court temporarily restrained Defendants Leis and Hamilton County from enforcing their policy requiring a court order before granting abortion services to an inmate and also enjoined them to provide Ms. Roe access to abortion services. Ms. Roe terminated her pregnancy.

II. STANDING

As an initial matter, Defendants contended at trial on this Motion that Dr. Bowers is not a proper plaintiff in this suit. They argue that there may never be another pregnant inmate in a Hamilton County detention facility and that even if there is, there is no guarantee that the inmate would seek the services of Dr. Bowers instead of another physician. Thus, if Ms. Roe has already terminated her pregnancy and Dr. Bowers is not a proper party, Plaintiffs' claim would be moot. If Defendants' contention was correct, the policy at issue here would be virtually unreviewable by a court. Unsurprisingly, therefore, the Supreme Court foreclosed such argument in 1976.

> ***2** [T]he constitutionally protected abortion decision is one in which the physician is intimately involved. Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the

> constitutionality of the State's interference with, or discrimination against, that decision.... For these reasons, we conclude that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision.

Singleton v. Wulff, 428 U.S. 106, 117–18 (1976) (internal citation omitted). Defendants have offered neither authority nor logic to explain why *Singleton* does not apply here. The Court concludes that Dr. Bowers is a proper plaintiff.

III. LEGAL STANDARD FOR A PERMANENT INJUNCTION

"Where the plaintiff establishes a constitutional violation after a trial on the merits, the plaintiff will be entitled to permanent injunctive relief upon showing 1) a continuing irreparable injury if the court fails to issue an injunction, and 2) the lack of an adequate remedy at law." *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1067 (6th Cir.1998).[3]

[3] This standard incorporates the theory behind preliminary injunctive relief, coupled with the recognition that the litigant must actually succeed on the merits, within the specific context of constitutional law. Generally, in considering a motion for a preliminary injunction, district courts consider four factors: the movant's likelihood of success on the merits, whether the movant will suffer irreparable harm absent injunctive relief, whether such relief will harm third persons, and whether it will benefit the public interest. *See Samuel v. Herrick Mem'l Hosp.,* 201 F.3d 830, 833 (6th Cir.2000). "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546 n. 12 (1987).

IV. ANALYSIS

Plaintiffs challenge Defendants' policy on three grounds. They argue, first, that it is an undue burden on a woman's abortion decision, in violation of the Fourteenth Amendment; second, that it contains no health exception, in violation of the Fourteenth Amendment; and third, that it constitutes deliberate indifference to serious medical need, in violation of the Eighth Amendment. Because the Court finds Plaintiffs' first argument easily adequate to decide this case, it will not consider the others.[4]

[4] *Cf. Ashwander v. Tennessee Valley Auth.,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (counseling courts not to rule on constitutional questions unless necessary); Christopher J. Peters, *Assessing the New Judicial Minimalism,* 100 Colum. L.Rev. 1454 (2000) (critiquing judicial minimalism, but arguing that courts should decide that which is necessary to resolve a case but no more); Cass R. Sunstein, *The Supreme Court, 1995 Term–Foreword: Leaving Things Undecided,* 110 Harv. L.Rev. 4 (1996) (advocating judicial minimalism).

The Supreme Court has instructed, "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley,* 482 U.S. 78, 89 (1987). The Court's inquiry in this case is therefore two-fold. First, does Defendants' policy impinge on inmates' constitutional rights? Second, is the regulation reasonably related to legitimate penological interests?

Defendants' policy impinges on inmates' constitutional rights. State action "which imposes an undue burden on the woman's decision [whether to terminate her pregnancy] before fetal viability" is unconstitutional. *Planned Parenthood v. Casey,* 505 U.S. 833, 877 (1992). "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* Defendants require that a woman in their custody seeking a non-therapeutically indicated abortion commence litigation and obtain a court order before they will provide abortion services. Without question, that policy places a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; therefore, it constitutes an undue burden.

***3** Ordinarily, the Court would next inquire whether this impingement of inmates' constitutional rights is reasonably related to legitimate penological interests, employing the four factors mentioned by the Supreme Court in *Turner.* Here, however, Defendants have not offered any legitimate penological interest to justify their policy. Nor can the Court infer one on this record. Accordingly, Defendants' policy with respect to abortion services is invalid. Plaintiffs have succeeded on the merits of their claim.

In addition, because this case concerns not an isolated incident but a standing procedure, Defendants' policy threatens continuing irreparable injury to inmates who seek abortion services. For a woman whom the government denies her constitutional right to abortion, there is obviously no adequate remedy at law. Plaintiffs have thus demonstrated all that is required for a permanent injunction.

What has been said is enough to dispose of the case. But the Court finds it appropriate to answer the implicit premise of the policy of the Sheriff and the County that they are not bound by the federal courts' holdings concerning abortion. The United States Constitution is the supreme law of the land. *See* U.S. Const. art. VI. Nearly two-hundred years ago, in the canonical case of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803), Chief Justice Marshall declared, "It is emphatically the province and duty of the judicial department to say what the law is." This means that the federal judiciary, not the Hamilton County Sheriff, is supreme in the exposition of the law of the land.

The application of the Constitution to the facts of this case is clear. In an eloquent and comprehensive opinion for the Third Circuit, Judge Higginbotham detailed the legal questions with which the Court is today faced and concluded, as the Court does here, that a prison policy "requiring court-ordered releases for inmates to obtain nontherapeutic, elective abortions impermissibly burdens the inmates' constitutionally protected right to choose to terminate their pregnancies." *Monmouth County Corr. Inst. Inmates v. Lanzaro,* 834 F.2d 326, 351 (3d Cir.1987). Indeed, last year this Court expressly found "the reasoning of the Third Circuit to be persuasive" in granting a temporary restraining order against the Director of the River City Correctional Facility, who was employing the same policy as the one challenged here. *Doe v. Barron,* 92 F.Supp.2d 694, 696 (S.D.Ohio 1999).

In light of this precedent, it is difficult to conceive of a justification for these Defendants' continued insistence on an unconstitutional policy. Upon entering office, the Sheriff of Hamilton County, like all state executive officials, takes a solemn oath to support the Constitution. The federal judiciary has detailed a woman's constitutional right to an abortion. The Sheriff might find such a right morally repugnant. Or he might find ignoring its existence politically expedient. Nevertheless, "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." *Cooper v. Aaron,* 358 U.S. 1, 18 (1958). Ours is a government of laws, not of men.

***4** Therefore, the Court GRANTS Plaintiffs' request for a permanent injunction and hereby ORDERS Defendants, Sheriff Simon L. Leis, Jr. and Hamilton County, to institute a policy, consistent with this opinion, for providing abortion services to inmates who request them.

IT IS SO ORDERED.