United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5252 **September Term, 2019**

1:19-mc-00145-TSC

Filed On: August 25, 2020

In re: In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,

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James H. Roane, Jr., et al.,

Appellees

Keith Nelson,

Appellant

Bruce Webster, et al.,

Appellees

v.

William P. Barr, Attorney General, et al.,

Appellees

BEFORE: Pillard, Wilkins, and Rao, Circuit Judges

O R D E R

Upon consideration of the motion for stay of execution pending appeal, the opposition thereto, and the reply, it is

ORDERED that the motion for stay of execution pending appeal be denied.

Plaintiff Keith Nelson is a federal death-row inmate scheduled to be executed on Friday, August 28, 2020. On August 21, he moved this court for a stay of execution pending his appeal of the district court's dismissal of his Eighth Amendment method-of-execution claim. The parties completed accelerated briefing on the motion yesterday.

On July 25, 2019, the government adopted its first new execution protocol since 2004 to enable it to resume execution of federal death sentences (the 2019 Protocol), see A.R. 1016-70, and it announced plans to execute five inmates, not including Nelson, most of whom had been sentenced to death under the Federal Death Penalty Act, 18 U.S.C. §§ 3591-3599. Soon thereafter, a group of death-row inmates, again not including Nelson, filed complaints challenging the 2019 Protocol, and the district court consolidated those cases on August 20, 2019. ECF No. 1. On February 25, 2020, Nelson filed a complaint challenging the 2019 Protocol, and the district court consolidated Nelson's case with the lead case on April 2, 2020. Nelson v. Barr, No. 20-cv-557, ECF Nos. 1 & 17 (D.D.C.).

On November 20, 2019, the district court preliminarily enjoined the scheduled executions of four inmates on the basis that they were likely to succeed on their claims that the federal regime adopted in the 2019 Protocol violates the Federal Death Penalty Act's requirement that federal death sentences be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." In re Fed. Bureau of Prisons' Execution Protocol Cases (In re FBOP), No. 19-mc-145, 2019 WL 6691814, at *4 (D.D.C. Nov. 20, 2019) (emphasis omitted) (quoting 18 U.S.C. § 3596(a)). On April 7, 2020, we vacated that preliminary injunction. In re FBOP, 955 F.3d 106 (D.C. Cir. 2020), cert. denied sub nom. Bourgeois v. Barr, No. 19-1348, 2020 WL 3492763 (June 29, 2020).

On June 1, 2020, Nelson and his co-plaintiffs filed an amended complaint including an Eighth Amendment challenge to the method by which the government planned to execute them under the 2019 Protocol. ECF No. 92. The 2019 Protocol replaced the previous three-drug lethal injection protocol for federal executions with a single-drug protocol using pentobarbital. Plaintiffs claimed that the use of pentobarbital alone is very likely to cause extreme pain and needless suffering, and that proposed alternatives would significantly reduce that risk. Id. at 13-33, 35. On June 15, the government scheduled execution dates for four inmates, including Nelson's for August 28. ECF No. 99.

On June 19, Nelson and the three other inmates, whose executions had been scheduled for July, moved for a preliminary injunction. ECF No. 102. On the morning of July 13, the date of the first of the scheduled executions, the district court granted a preliminary injunction on the ground that the inmates were likely to succeed on their Eighth Amendment claim. In re FBOP, 19-mc-145, 2020 WL 3960928 (D.D.C. July 13, 2020). The court made findings based on evidence in the administrative record of the 2019 Protocol and additional evidence plaintiffs submitted in support of their motion. Id. at *4-6. That day, the government moved in the district court and this court for a stay pending its appeal of the preliminary injunction, which both courts denied. See In re FBOP, No. 20-5199 (D.C. Cir. July 13, 2020) (per curiam). In the early morning hours of July 14, the Supreme Court granted the government's application for vacatur of the district court's

preliminary injunction "because, among other reasons, the plaintiffs have not established that they are likely to succeed on the merits of their Eighth Amendment claim." Barr v. Lee, No. 20A8, 2020 WL 3964985, at *1 (U.S. July 14, 2020) (per curiam). The first of the executions occurred later that morning, followed by two more executions later that week.

On July 31, the government moved in the district court under Fed. R. Civ. P. 12(b)(6) to dismiss Nelson and his remaining co-plaintiffs' Eighth Amendment claim. ECF Nos. 169 & 170. That same day, Nelson moved for an expedited trial on that claim. ECF No. 174. As an attachment to his August 7 reply brief in support of his motion for an expedited trial, Nelson filed a Preliminary Findings Report on the autopsy of Wesley Ira Purkey, who had been executed under the 2019 Protocol on July 16. ECF Nos. 183 & 183-1. Accompanying the report on the autopsy, which had occurred on July 23, was a supplemental expert declaration regarding its findings. ECF No. 183-2.

On August 15, the district court granted the government's motion to dismiss the Eighth Amendment claim and denied Nelson's motion for an expedited trial on that claim. In re FBOP, 19-mc-145 (D.D.C. Aug. 15, 2020). Nelson moved on August 17 to certify that decision as a partial final judgment, and the district court granted that motion three days later. In re FBOP, 19-mc-145 (D.D.C. Aug. 20, 2020). That same day, August 20, Nelson appealed the district court's dismissal of his Eighth Amendment claim, and the next day he filed the motion now before us, which seeks a stay pending appeal. At the same time, Nelson filed an emergency motion to expedite his appeal of the district court's dismissal of his Eighth Amendment claim, but he withdrew that motion later that afternoon. Nelson did not move for a stay or other emergency relief in the district court, arguing to us that it would have been impracticable under Fed. R. Civ. P. 8(a)(2)(A)(i). Pl.'s Mot. for Stay (Br.) at 1, In re FBOP, No. 20-5252 (D.C. Cir. Aug. 21, 2020). The district court thus had no occasion to make any new findings of fact or to otherwise rule on the evidence attached to Nelson's brief supporting expedited trial.

In determining whether to grant "the exceptional remedy of a [stay] pending appeal," John Doe Co. v. CFPB, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (per curiam), we consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies," Nken v. Holder, 556 U.S. 418, 434 (2009). The government's proposed method of execution violates the Eighth Amendment if it carries "a substantial risk of severe pain" that would be "significantly reduce[d]" by adoption of "a feasible and readily implemented alternative method . . . that the [government] has refused to adopt without a legitimate penological reason." Bucklew v. Precythe, 139 S. Ct. 1112, 1125 (2019).

Nelson argues that "new evidence, not previously considered by the Supreme Court," distinguishes his Eighth Amendment claim from the claim the Court in Barr v. Lee held unlikely to succeed on its merits. Br. 9. In particular, Nelson cites to the Preliminary Findings Report from the Purkey autopsy, which he submitted in connection with his motion for an expedited trial, as well as photographic evidence regarding the labeling of the vials of pentobarbital used for two of the July executions, which he submitted in connection with a motion for summary judgment on his claims under the Federal Food, Drug, and Cosmetic Act, filed in the district court on August 4. See id. at 9-12; ECF Nos. 183 & 190. He contends that the autopsy evidence "is the best, most recent, and most reliable evidence available of the noxious aspects of execution using a high dose of pentobarbital and confirmation that the Government's protocol will cause those effects and, accordingly, exposes Mr. Nelson to unconstitutional risk of harm." Pl.'s Reply on Mot. for Stay at 3, In re FBOP, No. 20-5252 (D.C. Cir. Aug. 24, 2020) (emphasis omitted). He submitted the labeling evidence in an effort to show that the compounded pentobarbital the government plans to use is expired, so may be sub-potent, raising the risk of prolonged death and extreme pain. Br. 11-12.

Nelson's new evidence provides no ground on which we might grant equitable relief. The district court made no factual findings on that evidence, and we are in no position to do so in the first instance. In granting the government's motion to dismiss Nelson's Eighth Amendment claim under Rule 12(b)(6), the district court was limited to evaluation of the sufficiency of the allegations. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). It did not engage in any fact-finding or weighing of evidence, as it could have done had it ruled on a motion to stay or for a preliminary injunction, or had it denied the government's motion and proceeded to the expedited trial that Nelson requested. The factual findings before us are thus unchanged from those on which the district court relied in granting the preliminary injunction in Lee. The factual record is identical to what the Supreme Court considered when it vacated that preliminary injunction. And because the Court in Lee concluded that Nelson and his co-plaintiffs had not established a likelihood of success on the merits of their Eighth Amendment claim, we must, in the absence of any further fact-finding by the district court, reach the same conclusion here.

The parties disagree whether Nelson errs in moving for a stay when, the government contends, he could only halt his execution by obtaining a temporary injunction against the government carrying out his sentence. Defs.' Opp. to Mot. for Stay at 2, 11-12, In re FBOP, No. 20-5252 (D.C. Cir. Aug. 23, 2020). Whether the relief is styled as a stay or injunction, Nelson must at least make "a strong showing" of his likelihood of success on the merits of his Eighth Amendment claim to obtain emergency relief. Nken, 556 U.S. at 434. Because the facts of record here are unchanged from the factual findings before the Court in Lee, Nelson has failed to make that showing. Nelson suggests that his burden is lighter

than the burden to support the injunction in Lee because the district court here ruled only on the legal sufficiency of the complaint under Rule 12(b)(6), which requires the court to "construe the complaint in the light most favorable to the plaintiffs" and "assume the truth of all well-pleaded allegations." Br. 7 (internal quotation marks, citation, and emphasis omitted). But the merits of the ruling on the motion to dismiss are not before us. In any event, in the context of Nelson's request for equitable relief against the pending execution date, we consider not the plaintiff's chances of defeating the preliminary motion, but his showing that he could ultimately prevail on the Eighth Amendment claim. See Munaf v. Geren, 553 U.S. 674, 690-91 (2008).

Because the record before us contains no findings of fact that distinguish the request for equitable relief before us from the request the Supreme Court rejected in Lee, the emergency motion is DENIED.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk