CR85196643-ZA 68011254

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

STATE OF OHIO, ) CASE NO. CR 196643
)
Plaintiff-Respondent, ) JUDGE BRENDAN J. SHEEHAN
)
v. )
)
ROMELL BROOM, )
) **OPINION AND JUDGMENT**
Defendant-Petitioner. ) **ENTRY**
)

This matter is before the Court on Defendant-Petitioner's Petition to Vacate or Set Aside Judgment and/or Sentence in Part, or Grant Other Appropriate Relief, Pursuant to ORC §2953.21 and 2953.23, and/or for Declaratory Relief Under ORC §2721.01 *et seq.* and Civ.R. 57. The issues have been fully briefed to the Court.

Defendant Romell Broom was found guilty of aggravated murder with two capital punishment specifications, rape, kidnapping, and two counts of attempted kidnapping related to the rape, murder and kidnapping of fourteen year-old Tryna Middleton. Broom was subsequently sentenced to death on the aggravated murder, rape and kidnapping charges.

Upon exhausting his legal challenges to his convictions and sentence, Broom was scheduled to be executed on September 15, 2009. On September 14, 2009, Broom arrived at the Southern Ohio Correctional Facility and was placed in the holding cell used to house condemned inmates prior to execution. While execution proceedings usually commence at 9:00 AM, the Sixth Circuit Court of Appeals' consideration of Broom's request for a stay of execution delayed all action until Broom's request was denied at approximately 1:00 PM.

At approximately 2:00 PM, Warden Phillip Kerns read the death warrant to Broom and the medical team members began attempting to establish two viable IV sites as required by

protocol. Their attempts were unsuccessful and one of the institution's medical doctors was summoned to assist further efforts.

Approximately two hours later, after several conferences with officials and medical staff, Director Collins called the Governor's office recommending that he grant a one-week reprieve. According to Petitioner, Collins' decision was based on "(1) concern for his team members' well-being; (2) his belief, informed by discussions with the medical team members, that further attempts to gain venous access that day would be fruitless; and (3) his concern that he would be "in a whole 'nother ballpark" of legal trouble if the team somehow managed to establish two viable IV sites in the holding cell and they started injecting the lethal drugs in the Death Chamber only to suffer yet another venous failure." Defendant/Petitioner's Reply Brief, p. 12.

In addition to pursuing other claims in both state and federal courts, Broom has filed this Petition contending that the attempts to establish an IV were "a form of torture" that subjected him to "inhuman and barbarous" conditions such that any further attempts to effectuate his sentence would violate state and federal constitutional protections. He asks that his sentence be vacated pursuant to R.C. §2953.21(A)(1)(a) as violating State and Federal Constitutions and seeks a declaratory judgment pursuant to R.C. §2721.01 *et seq.* and Civ.R. 57.

Case law in this area does not support Broom's current position. The Court was unable to locate a single case in which a sentence was vacated based upon failures in execution preparation as occurred in the case at bar. While the case relied upon by the State, *Louisiana ex rel. Francis v. Resweber* (1949), 329 U.S. 459, has been called into question, its general proposition has not been overturned. In *Resweber*, the State of Louisiana attempted to execute the defendant by electrocution. A current of electricity was run through defendant's body but he survived the execution attempt. In a plurality opinion, the Court held that additional attempts to

execute the defendant did not *per se* violate Fifth, Eighth or Fourteenth Amendment guarantees. The Court specifically noted that a second execution attempt, even when the execution went beyond the preparatory steps, did not constitute double jeopardy. *Id.* at 461.

Many factors have changed since the holding in *Resweber* including the modes of execution employed by most states toward more humane methods, such as lethal injection. Still, as noted by the Supreme Court, "a hypothetical situation" involving "a series of abortive attempts" that demonstrates an "objectively intolerable risk of harm" giving rise to a "substantial risk of serious harm" could violate the Eighth Amendment. *Baze v. Rees* (2008), 553 U.S. 35, 50. However, the Court reiterated the underlying and long-standing parameters of the Eighth Amendment as set forth in *In re Kemmler* (1890), 136 U.S. 436, 449, that: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

The decision in *Baze* has been interpreted and applied by the Sixth Circuit Court of Appeals to facts relevant to the current petition. In fact, in *Cooey (Biros) v. Strickland* (2009), 589 F.3d 210, the Court reviewed Ohio's execution protocol—much of which Broom now reiterates throughout his petition—and upheld its application as constitutionally permissible. Specifically, the court in *Biros* examined whether: 1) there was an undue risk of improper implementation of Ohio's protocol, leading to severe pain; 2) sufficiently trained and competent medical personnel were required; 3) a licensed physician was required to be present; 4) the execution team should be specifically limited to a defined time to search for accessible veins for IV administration; and 5) the lack of an explicit ban on the use of cut-down procedures for accessing veins as an alternative method of IV placement rendered a protocol unconstitutional.

In rejecting each of these challenges, the court noted that it had previously approved protocols involving cut-down procedures, in which an incision is made to establish IV access, as measures intended to enable more humane execution procedures. *Id.* at 229.

Upon consideration of the arguments and evidence presented, the Court finds that the State's first attempt at effectuating Broom's sentence does not constitute cruel and unusual punishment or otherwise deprive Broom of his rights so as to give rise to constitutional violations. Although certainly a set of circumstances could lead to constitutional violations, on the continuum of possible events those in the case at bar fall far short. While the Court acknowledges that repeated needle sticks are indeed unpleasant, they are not torture when performed to establish IV lines and the procedure is not such that a substantial risk of serious harm is present, especially where, as here, the procedure is halted out of an abundance of caution prior to the administration of any substance (including saline).

Protocols involving cut-down procedures have been approved as alternate methods of gaining IV access. Broom was not subjected to a potential cut-down procedure, which clearly involves far more medical invasion and discomfort than even multiple needle sticks. Thus, Broom's constitutional claims must fail.

Broom's claims pursuant to R.C. §2949.22 must also fail because it is established that R.C. §2949.22 does not create a cause of action to enforce any right to a quick and painless death. *Cooey (Biros)*, supra at 234; *Cooey v. Strickland* (2010), 604 F.3d 939, 945.

Accordingly, **DEFENDANT-PETITIONER'S PETITION TO VACATE OR SET ASIDE JUDGMENT AND/OR SENTENCE IN PART, OR GRANT OTHER APPROPRIATE RELIEF, PURSUANT TO ORC §2953.21 AND 2953.23, AND/OR FOR**

**DECLARATORY RELIEF UNDER ORC §2721.01 *ET SEQ.* AND CIV.R. 57 IS DENIED IN ITS ENTIRETY.**

**IT IS SO ORDERED.**

JUDGE BRENDAN J. SHEEHAN

Dated: 4/6/11

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 6th day of April, 2011:

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