

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-24

DARICK DEMORRIS WALKER,

Plaintiff - Appellant,

v.

GENE M. JOHNSON, Director, Commonwealth of Virginia
Department of Corrections, Richmond, Virginia; GEORGE M.
HINKLE, Warden, Greensville Correctional Center, Jarratt,
Virginia; LORETTA K. KELLY, Warden, Sussex I State Prison,
Waverly, Virginia,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern
District of Virginia, at Alexandria. Claude M. Hilton, Senior
District Judge. (1:05-cv-00934-CMH-TR)

Submitted: February 10, 2009

Decided: May 13, 2009

Before WILLIAMS, Chief Judge, and TRAXLER and GREGORY, Circuit
Judges.

Affirmed by unpublished per curiam opinion. Judge Gregory wrote
a separate concurring opinion.

Danielle Spinelli, Eric R. Columbus, Will L. Crossley, Jr.,
WILMER CUTLER PICKERING HALE & DORR, LLP, Washington, D.C., for
Appellant. Robert F. McDonnell, Attorney General, Richard C.
Vorhis, Senior Assistant Attorney General, OFFICE OF THE
ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

On August 10, 2005, Darick Demorris Walker, a death row inmate, filed this 42 U.S.C.A. § 1983 (West 2003) action in the Eastern District of Virginia, challenging the constitutionality of the lethal injection protocol that the State of Virginia will use to execute him. On September 11, 2006, the district court granted the Defendants' motion for summary judgment and dismissed the case. We held Walker's appeal of the district court's ruling in abeyance pending resolution of the district court proceedings on remand from our decision in Walker v. Kelly, 195 F. App'x 169 (4th Cir. 2006), a case involving Walker's petition for a writ of habeas corpus.

While we held this appeal in abeyance, the United States Supreme Court decided Baze v. Rees, 128 S. Ct. 1520 (2008), rejecting a challenge to the State of Kentucky's lethal injection protocol, and in Emmett v. Johnson, 532 F.3d 291 (4th Cir. 2008), we upheld Virginia's lethal injection protocol—the same protocol at issue in this case—as constitutional within the guidelines set forth in Baze. See Emmett, 532 F.3d at 308 (granting summary judgment in favor of the defendants and concluding that "Virginia's protocol for lethal injection is substantially similar to that approved by the Supreme Court in Kentucky").

Both parties agree that we are bound by our decision in Emmett,* and we therefore affirm the district court's grant of summary judgment in favor of the Defendants. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

* Indeed, Walker admits that he submitted his appellate brief only to preserve for further appellate review his argument that Emmett v. Johnson, 532 F.3d 291 (4th Cir. 2008), was wrongly decided.

GREGORY, Circuit Judge, concurring:

For the reasons set forth in my dissent in Emmett v. Johnson, 532 F.3d 291, 308-12 (4th Cir. 2008) (Gregory, J., dissenting), I believe that the Emmett majority erred in summarily concluding that the Virginia legal injection protocol is substantially similar to the Kentucky legal injection protocol upheld in Baze v. Rees, 128 S. Ct. 1520 (2008). However, I am constrained by our precedent in Emmett, and thus I must concur in the judgment in this case.