

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0368p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICHARD COOEY, II,

Plaintiff-Appellant,

v.

TED STRICKLAND,

Defendant-Appellee.

No. 08-4252

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 08-00747—Gregory L. Frost, District Judge.

Submitted: October 7, 2008

Decided and Filed: October 9, 2008

Before: SUHRHEINRICH, SILER, and GILMAN, Circuit Judges.

COUNSEL

ON BRIEF: Kelly L. Schneider, Gregory William Meyers, Kimberly S. Rigby, OHIO PUBLIC DEFENDER'S OFFICE, Columbus, Ohio, for Appellant. Matthew A. Kanai, Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

SUHRHEINRICH, J., delivered the opinion of the court, in which SILER, J., joined. GILMAN, J. (p. 4), delivered a separate concurring opinion.

OPINION

The state of Ohio has scheduled the execution of Richard Cooley for 10:00 a.m. on Tuesday, October 14, 2008. On August 1, 2008, Cooley filed a § 1983 action in the district court, challenging Ohio's lethal-injection protocol. On September 30, 2008, the district court, Frost, J., issued an order granting the State's motion to dismiss Cooley's § 1983 action as time barred under this Court's decision in *Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007). See *Cooley v. Strickland*, No. 2:08-cv-747, 2008 U.S. Dist. LEXIS 75630 (S.D. Ohio Sept. 30, 2008). Cooley timely appeals from that decision. We affirm the decision of the district court.

In 1986, Cooley was convicted of two counts of aggravated murder and sentenced to death. See *State v. Cooley*, 544 N.E.2d 895 (Ohio 1989). Cooley sought state post-conviction relief without success. See *State v. Cooley*, 1994 WL 201009 (Ohio Ct. App. May 25, 1994); *State v. Cooley*, 653 N.E.2d 252 (Ohio 1995); and *State v. Cooley*, 655 N.E.2d 742 (1995).

In October 1996, Cooley filed a § 2254 habeas petition. The district court denied the petition on September 4, 1997. *See Cooley v. Anderson*, 988 F. Supp. 1066 (N.D. Ohio 1997). This Court granted a COA on two issues and denied relief for both. *Cooley v. Coyle*, 289 F.3d 882 (6th Cir.), *cert. denied*, 123 S.Ct. 1620 (2003) (“*Cooley I*”).

On June 10, 2004, Cooley filed a § 1983 challenge, alleging that the lethal-injection protocol constituted cruel and unusual punishment. The district court dismissed Cooley’s claims for failure to exhaust his administrative remedies. After exhausting them, Cooley re-filed his complaint on December 8, 2004. On March 28, 2005, the district court granted the State permission to pursue an interlocutory appeal on the issue of the district court’s denial of the State’s motion to dismiss Cooley’s § 1983 claims.

On March 2, 2007, we issued *Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007) (“*Cooley II*”) holding that Cooley’s claim was cognizable under § 1983, that the statute of limitations for such a claim began to run upon conclusion of direct review of the death sentence, and that the limitations period in Cooley’s case began no later than the date when the challenged protocol became the state’s exclusive execution method. A petition for rehearing *en banc* was denied. 489 F.3d 775 (6th Cir. 2007). The Supreme Court denied certiorari. *See Biros v. Strickland*, 128 S. Ct. 2047 (Apr. 21, 2008).

On August 1, 2008, Cooley filed another § 1983 action in district court, alleging that executing him under the established execution protocol, without deviating from it out of consideration of his particular medical conditions, will violate his Eighth and Fourteenth Amendment rights. Specifically, he claims that: (1) Ohio’s lethal-injection protocol will violate his right to be free from cruel and unusual punishment by failing to adequately address the asserted difficulty in accessing his veins, (2) the Ohio protocol will violate his Eighth Amendment rights by failing to account for potential dosage insufficiency, and (3) the protocol will violate his right to due process by unconstitutionally depriving him of a property interest in a quick and painless death.

On the first issue, Cooley claims he had previously faced an execution date in July 2003, and that in preparation for that execution, medical staff at the correctional facility noted that “Cooley’s veins are ‘sparce’ [sic]” but that he “has good vein to right hand.” (Compl. 6.) Cooley further asserts that his medical expert noted that Cooley is morbidly obese and that if he has gained weight since the 2003 execution date, “‘the single “good” vein on his right hand [] may now be obscured.’” *Id.* On the second issue, Cooley explains that he is taking Topamax, a treatment for cluster headaches, which decreases his sensitivity to sodium thiopental (the anesthetic component of Ohio’s injection protocol) and increases the risk that Cooley will be aware during the execution process. (Compl. 7.) Cooley concedes in his complaint that if “a ‘full dose of thiopental [was] successfully delivered into his circulation’ Plaintiff would be deeply anesthetized regardless of his treatment with Topamax,” but “it is also likely that his use of Topamax decreases the margin of safety and therefore makes him more vulnerable to the consequences of a partially failed thiopental administration.” *Id.* Cooley also asserts that the dosage of sodium thiopental administered per the injection protocol may be insufficient to adequately anesthetize him in light of his significant weight. *Id.*

The state moved for dismissal under Fed. R. Civ. P. 12(b)(6), alleging that Cooley’s challenge was time barred under the Sixth Circuit’s construction of the statute of limitations for such § 1983 claims established in *Cooley II*, 479 F.3d 412. In *Cooley II*, 479 F.3d 412, this Court held that a two-year statute of limitations applies to § 1983 claims in Ohio, and that such § 1983 claims began to accrue upon conclusion of direct review in the state courts and when the plaintiff knew or had reason to know about the act providing the basis of his or her injury. *Id.* at 422. As for when the plaintiff knew or should have known about the act providing the basis for injury, this Court offered possible dates: 1993, when Ohio adopted lethal injection as a method of execution, or 2001, when Ohio made lethal injection the exclusive method of execution. *Id.* This Court did not definitively resolve that

question “because even under the later date, 2001, Cooley’s claim exceeds the two-year statute of limitations deadline because his claim was not filed until December 8, 2004.” *Id.*

The district court ruled that Cooley’s first claim respecting vein access was time barred under *Cooley II*. *Cooley*, 2008 U.S. Dist. LEXIS 75630, at *4. The district court noted that in July 2003, Cooley had advised prison personnel that he had an issue accessing his veins. Thus, the district court concluded that Cooley knew or should have known of the vein issue in July 2003, and the two year statute of limitations on the vein issue correspondingly expired by July 2005. Cooley argued that the vein issue was not time barred because he has gained weight since 2003, and that weight gain has made accessing his veins more difficult. The district court concluded, however, that the core of Cooley’s claim was still vein access, “and the fact that there may be less access today does not mitigate the fact that Cooley still knew of and could have filed suit over vein access prior to July 2005.” *Id.*

As to Cooley’s second claim, that his use of Topamax may decrease his sensitivity to sodium thiopental and cause him to be aware during the execution, the district court ruled that it was also time-barred because the claim was contingent on his previously asserted claim of faulty administration, which *Cooley II* found untimely. *Id.* at *7.¹ The district court reasoned that Cooley is not claiming that the presence of Topamax itself creates a violation, but rather pleaded that “the presence of Topamax in the inquiry . . . as an aggravating factor to faulty administration or insufficient dosing.” *Id.* at *8. As such, Cooley’s claim was a challenge to the injection protocol “that at its core is simply a reassertion of his 2004 challenge to the procedures and drug amount the state employs.” *Id.*; see also *Cooley II*, 479 F.3d at 424 (explaining that among the “core complaints” of Cooley’s 2004 case was “the use and dosage of sodium thiopental”). Thus, Cooley’s claims simply added to the time-barred precursor claims that failed previously. Consequently, the district court dismissed Cooley’s claims without reaching the merits, though the court expressed doubt whether Cooley could demonstrate a likelihood of success on the claims. *Cooley*, 2008 U.S. Dist. LEXIS 75630, at *9.

Finally, the district court determined that Cooley’s statutory claim that he is entitled to a “quick and painless death” under Ohio Rev. Code § 2949.22(A) was time-barred, because § 2949.22 contained the “quick and painless death” component since 1993, and therefore the time to challenge it expired at least at the same time his Eighth Amendment § 1983 claim did. *Id.* at *6 n.1.

Having reviewed the parties’ briefs, the record, and the applicable precedent, most notably our decision in *Cooley II*, we conclude that the district court correctly held that each of Cooley’s “new” claims is time barred for the reasons stated in its opinion dated September 30, 2008. See *Cooley*, 2008 U.S. Dist. LEXIS 75630. We therefore AFFIRM the decision of the district court granting Defendant’s motion to dismiss and denying Cooley’s motion for a preliminary injunction as moot.

¹The district court noted that the record did not disclose when Cooley began to take Topamax, but that the claim was time-barred irrespective of when he started taking the drug.

CONCURRENCE

RONALD LEE GILMAN, Circuit Judge, concurring. I join in the conclusion that the district court correctly applied the rule announced by a majority of this panel in *Cooley v. Strickland*, 479 F.3d 412, 422 (6th Cir. 2007) (*Cooley II*). That rule compels the conclusion that the statute of limitations has expired on Cooley's current as-applied challenges under 42 U.S.C. § 1983, as the district court carefully explained in its opinion. I write separately, however, to reiterate my belief that *Cooley II* was wrongly decided for the reasons articulated in my dissent to that opinion.

Borrowing statute-of-limitations principles from the law of habeas corpus and applying them to the wholly distinct body of law surrounding § 1983 challenges creates anomalous results. Section 1983 claims may well expire before they have properly ripened for careful review on the merits. Cooley's case provides a perfect example of why this is so. The Supreme Court has made clear that details matter in assessing the constitutionality of a state's lethal-injection method. *See Baze v. Rees*, 128 S. Ct. 1520, 1533-34 (2008) (plurality opinion) (discussing various safeguards employed by the state of Kentucky to ensure that adequate anesthesia is administered in advance of the lethal drugs that would otherwise cause extreme pain, including the professional qualifications of the IV team, extensive practice sessions, and the insertion of back-up IV lines). Because details in the procedure might interact with the medical condition of the specific condemned prisoner in constitutionally significant ways, and because the nature of these details may not be known when the prisoner's state appeals are exhausted, I continue to believe that the *Cooley II* rule is erroneous and unjust. Cooley's § 1983 challenges deserve a hearing on their merits. But because I am constrained by the precedential law of the case, I nonetheless concur.