

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL - 8 2015

MICHAEL S. RICHIE
CLERK

BENJAMIN ROBERT COLE,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. D-2004-1260

ORDER SETTING EXECUTION DATE

On June 29, 2015, the Attorney General of the State of Oklahoma, E. Scott Pruitt, filed his notice suggesting the appropriateness of setting a new execution date in this matter and listing potential dates as submitted by the Oklahoma Department of Corrections. Pursuant to 22 O.S.2011, § 1001.1, this Court now finds that an execution date should be set for Benjamin Robert Cole.

On October 24, 2014, this Court set the execution of Benjamin Robert Cole on March 5, 2015. Cole, along with four other Oklahoma prisoners under a sentence of death, filed an action in federal district court under 42 U.S.C. § 1983 contending that Oklahoma's method of execution violated the Eight Amendment. Cole and the other petitioners moved for a preliminary injunction against Oklahoma's lethal injection protocol. The federal district court denied the motion and the Tenth Circuit Court of Appeals affirmed. *Glossip v. Gross*, 576 U.S. ___, 2015 WL 2473454, 3, 8 (2015); *Glossip v. Gross*, 776 F.3d 721 (10th Cir. 2015). The United States Supreme Court granted certiorari and on January 28, 2015, stayed Cole's execution pending final disposition of his request for a preliminary injunction. *Id.*, 2015 WL 2473454, 9; *Glossip v. Gross*, 574 U.S. ___, 135 S.Ct.

1197, 1197, 191 L.Ed. 148 (2015). On June 29, 2015, the Supreme Court affirmed the judgment of the Court of Appeals for the Tenth Circuit, thus, dissolving the stay. *Id.*, 2015 WL 2473454, 18.

On July 2, 2015, Cole filed his objection to the setting of an execution date. He, first, argues that two of the other prisoners with sentences of death have objected to the setting of execution dates at this time. Cole has not set forth the basis for those objections. Although Cole joined these other prisoners in the federal court proceedings his State court cases have not been joined or cross-referenced with any other individual's cases. See Rule 3.3, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). Because Cole has not provided any argument or authority to support this objection, we find that it is waived. See *Malone v. State*, 2013 OK CR 1, ¶ 59, 293 P.3d 198, 215.

Second, Cole asserts that he is a party to a pending federal habeas corpus action in *Benjamin Cole v. Anita Trammell*, United States District Court for the Northern District of Oklahoma Case No. 15-CV-49-GFK-PJC. He informs that the case is at issue and requests "ample time" for resolution of the action. Cole does not identify the nature of the litigation. In its notice, the State asserts that Cole has challenged his competency to be executed. The proper procedure for the determination of a death row inmate's competency to be executed is set forth in 22 O.S.2011, § 1005. *Allen v. State*, 2011 OK CR 31, ¶¶ 9-12, 265 P.3d 754, 156-57. This Court has no information suggesting that proceedings to determine Cole's sanity have been properly instituted in the district court of the county in which he is situated.

In the Order Setting Execution Date issued on October 24, 2014, we found that certiorari had been denied and Cole had exhausted his appeals. Because “[t]he filing of a second or subsequent petition or appeal in any court does not prevent the setting of an execution date,” we find that the pending federal habeas corpus action does not prevent the setting of a new execution date in the present case. 22 O.S.2011, § 1001.1(B); *see also Fisher v. State*, 1992 OK CR 79, ¶¶ 14-17, 845 P.2d 1272, 1276-77.

As no stay of execution is in place, this Court is required to set an execution date. 22 O.S.2011, § 1001.1(E) (“After an execution date has been set pursuant to the provisions of this section, should a stay of execution be issued by any state or federal court, a new execution date shall be set . . . after the dissolution of the stay of execution.”). Therefore, pursuant to § 1001.1(E), we hereby order the execution of the judgment and sentence of death be carried out. The execution of Benjamin Robert Cole shall be set for October 7, 2015.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this July
day of July, 2015.

Clancy Smith
CLANCY SMITH, Presiding Judge

Gary L. Lumpkin
GARY L. LUMPKIN, Vice Presiding Judge

Arlene Johnson
ARLENE JOHNSON, Judge



DAVID LEWIS, Judge



ROBERT HUDSON, Judge

ATTEST:



Clerk