

File Name: 10a0109p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRYL M DURR,

Plaintiff-Appellant,

v.

TED STRICKLAND, et al.,

Defendants-Appellees.

No. 10-3464

Filed: April 18, 2010

Before: BATCHELDER, Chief Judge; SUHRHEINRICH and COLE, Circuit Judges.

ORDER

Darryl Durr, an Ohio inmate scheduled to be executed on April 20, 2010, pursuant to Ohio's lethal injection protocol, appeals from the district court's order granting the Defendants' motion to dismiss his complaint.¹ The complaint alleged that the use of sodium thiopental, or in the alternative midazolam and hydromorphone, as a means of execution violate the Federal Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*, the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.*, and various federal regulations associated with these Acts. The complaint sought a declaration that an execution using these drugs without a prescription from a licensed medical practitioner and distributed without proper authorization violates these acts. On April 15, 2010, Judge Frost ruled held that declaratory relief was unavailable to Durr because no private right of action exists under either act. Further, even assuming that Durr could pursue such a cause of action, he failed to allege any facts to support his claim that Defendants'

¹Durr also seeks to exceed the twenty-page limitations set forth in Fed. R. App. 27(d)(2). This request is granted, and we have considered this material.

failure to adhere to federal law subjects him to a risk of inhumane execution or to suggest that the declaratory judgment that he seeks would deter the State from proceeding with his execution.

Having reviewed the parties' submissions, the record, and the applicable law, we agree with Judge Frost that this action for declaratory relief is not the proper mechanism for seeking injunctive relief from execution. We therefore **AFFIRM** the order of Judge Frost, for the reasons stated in his April 15, 2010 opinion and order. **SO ORDERED.**

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk