

File Name: 10a0110p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRYL DURR,	} No. 10-3467
<i>Plaintiff-Appellant,</i>	
v.	}>
TED STRICKLAND, et al.,	}
<i>Defendants-Appellees.</i>	

Filed: April 18, 2010

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

ORDER

Darryl Durr, an Ohio death-row inmate scheduled to be executed on April 20, 2010, appeals the district court's order denying his motion for a temporary restraining order or preliminary injunction.¹ On April 5, 2010, Durr filed a motion seeking the appointment of Dr. Mark Heath as an expert to review Durr's medical records to determine how Durr's asserted allergy to general anesthetics might affect the administration of lethal injection drugs. On April 7, 2010, Judge Frost approved the requested expenditure of funds for Heath, pursuant to the authority of General Order No. 05-1. On April 15, 2010, Durr filed a motion for injunctive relief to stay his execution. On April 16, 2010, Judge Frost declined to issue injunctive relief. Judge Frost held that Durr failed to present sufficient evidence of an allergy that is likely to affect the execution process, and therefore failed to demonstrate a likelihood of success on the merits. *See Cooley v. Strickland*, 589 F.3d 210, 218 (6th Cir. 2009) (stating four-factor test for injunctive relief; and cases cited therein). Specifically, Judge Frost found that Durr presented only

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.

“an unproven allergy that might have an unknown effect on his execution,” and that such “[s]peculation is not evidence.” By contrast, Defendants offered the medical evaluation of Dr. Mark Dershwitz, who noted that the phrase “allergy to general anesthetics” is meaningless from a medical standpoint and in any event, opined that it was extremely unlikely that even if a prisoner were to experience an allergic reaction to thiopental sodium, that reaction would cause any pain or discomfort. Because Durr could not establish a likelihood of success on the merits the first factor weighed against injunctive relief, Judge Frost denied Durr’s motion for injunctive relief.

Having reviewed the parties’ submissions and the record, we **AFFIRM** the opinion and order of Judge Frost, for the reasons stated in his opinion dated April 16, 2010. **SO ORDERED.**

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk