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5-22-1996

Duffey v. Lehman

Precedential or Non-Precedential:

Docket 94-9003

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-9003

STEVEN DUFFEY,

Appellant

v.

JOSEPH D. LEHMAN, Commissioner of the
PA Department of Corrections;
WILLIAM J. LOVE, Superintendent of the
State Correctional Institution at Huntingdon;
JOSEPH P. MAZURKIEWICZ, Superintendent of
the State Correctional Institution at Rockview

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 94-cv-01947)

Argued

October 26, 1995

Before: MANSMANN, COWEN and LEWIS, Circuit Judges.

(Opinion Filed: January 16, 1996; Vacated: February 12, 1996)

Reargued In Banc

May 14, 1996

Before: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE and SAROKIN,
Circuit Judges.

(Filed: 5-22-96)

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COUNSEL FOR APPELLEE

ORDER

On December 23, 1994, Steven Duffey, a Pennsylvania state prisoner incarcerated under a sentence of death, appealed the district court's denial of his motion for stay of execution, alleging entitlement under the standard announced by the U.S. Supreme Court in *McFarland v. Scott*, 114 S. Ct. 2568 (1994). Agreeing, a panel of this court remanded the case for entry of an order granting Duffey a stay pending the presentation of a first petition for writ of habeas corpus after the state courts ruled on his post-conviction petition. By order dated February 12, 1996, we granted the Commonwealth's petition for rehearing in banc, thus vacating the panel's judgment and withdrawing the panel opinion.

Prior to the in banc argument, Duffey filed a motion to dismiss the appeal as moot, claiming that because the district court has now appointed counsel under 21 U.S.C. § 848(q)(4)(B) to assist him in the investigation, preparation, and filing of a federal habeas petition, his entitlement to a stay is no longer governed by *McFarland*. Moreover, the death warrant issued for the week of December 4, 1994, has expired.

At oral argument before the court in banc, counsel for Duffey advised that a first federal habeas petition has not yet been filed. Court-appointed counsel instead elected to pursue Duffey's unexhausted state claims under the Pennsylvania Post-Conviction Relief Act, 42 Pa. Cons. Stat. § 9543, et. seq., and a petition is currently pending before the Court of Common Pleas of Lackawanna County, Pennsylvania. Should a new death warrant issue, counsel assured us that Duffey was prepared to append to any motion for stay of execution, if not granted by the state courts, his first federal habeas petition. Thus, counsel contended that this appeal, which challenged the denial of a stay under *McFarland*, is factually moot and could not arise again.

Because we agree that this appeal is now factually in a different posture and accepting the representations of Duffey's counsel that Duffey would not return to the federal courts under the same circumstances, we decline to consider the issue originally presented in this appeal. In accordance with *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), we, therefore, dismiss this appeal and vacate the judgment of the district court on the motion for stay.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Attest:

P. Douglas Sisk, Clerk