14-1266

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2014 OCT 29 PM 3: 16

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
dHM

WADE PAINTER,
Petitioner,

v.

Civil Action No. 14-P-520
Judge Tod Kaufman

DAVID BALLARD, Warden,
Mt. Olive Correctional Complex,
Respondent.

FINAL ORDER

Before the Court is Respondent's motion to dismiss the present civil action pursuant to West Virginia Rules of Civil Procedure, Rules 12(b)(1), (3) and (6). The Respondent's Motion to Dismiss is based on the following grounds:

1. The Circuit Court of Berkeley County, West Virginia, has ordered that restitution in *State v. Painter*, 06-F-24, be paid from monies contained within any prison account or any assets of the Defendant/Petitioner. In as much as the Petitioner seeks that this Court to set aside or to interpret the intent of another Circuit Court's Sentencing Order regarding restitution, venue and jurisdiction is improper and dismissal is required pursuant to West Virginia Rules of Civil Procedure, 12(b)(1) and (3).
2. West Virginia Code, § 25-1-3c does not limit the authority of a Circuit Court to order restitution and have such restitution collected from an inmate by the West Virginia Division of Corrections. A Circuit Court's order of restitution may include all sources of the Defendant/Petitioner's assets and is not limited to those sources of a prisoner's "earnings" as defined by the West Virginia Division of Corrections in Policy Directive

111.06. Dismissal is required pursuant to West Virginia Rules of Civil Procedure, 12(b)(6).

DISCUSSION

I. The Petitioner is challenging his Sentencing Order and obligation to pay restitution by the Circuit Court of Berkeley County, West Virginia. Venue lies with the sentencing court, and not the court of the place of incarceration.

Where the Petitioner's legal questions are related to his sentencing, venue and jurisdiction is in the Circuit Court that issued the sentencing order. *See* W.Va. Code, § 53-1-2 ("Jurisdiction of writs of mandamus and prohibition ... shall be in the circuit court of the county in which the record or proceeding is to which the writ relates").

In the present case, the Petitioner's challenge is related to his conviction and sentencing in *State v. Painter*, 06-F-24. The Petitioner claims that the Mt. Olive Correctional Complex ("Mt. Olive") cannot take certain funds from his inmate accounts to pay restitution, as ordered by the Berkeley County Circuit Court. As acknowledged by the Petitioner, and in Mt. Olive's response to his grievance number 14-MOCC-ST-126, Mt. Olive has been acting, and will act, pursuant to his Sentencing Order. The Petitioner's claim, thus, presents the possible legal theories that:

1. The Berkeley County Circuit Court's sentencing order does not take precedence over a Policy Directive issued by the Commissioner of Corrections.
2. The Berkeley County Circuit Court's sentencing order is in violation of West Virginia Code, § 25-1-3c, and the Circuit Court has no statutory authority to order that

restitution be taken from other sources of assets, other than what the Petitioner "earns" as defined by Policy Directive 111.06.

3. Mt. Olive is erroneously carrying out the terms of the Berkeley County Circuit Court's sentencing order regarding restitution.

The Petitioner, here, necessarily and specifically seeks to place a limit on his obligations to pay restitution to the Berkeley County Circuit Court, as set forth by that Court's Sentencing Order. Venue and jurisdiction are with the Berkeley County Circuit Court, which is in the best position to address the legality of its Order and the interpretation of its Order. In the event the Petitioner would seek a general legal ruling on whether Corrections and its facilities are permitted follow restitution orders which impose additional restitution requirements beyond "earnings," as defined in its Policy Directive, the claim would fall under the venue and jurisdiction of the Kanawha County Circuit Court pursuant to West Virginia Code, § 14-2-2.[1] However, this case does not seek a general ruling, but instead asks the Kanawha County Circuit Court to necessarily pass on the legality and or interpretation of another Circuit Court's order, an act over which it lacks jurisdiction. Dismissal is warranted pursuant to West Virginia Rules of Civil Procedure, Rule 12(b)(1) and (3).

II. West Virginia Code, § 25-1-3c does not limit the authority of a Circuit Court to have lawfully ordered restitution collected from an inmate to the terms set forth by the West Virginia Division of Corrections in Policy Directive 111.06.

The Petitioner is serving an overall sentence of life without mercy – any restitution he pays pursuant to his sentence will be made while he is in prison. The Berkeley County Circuit

[1] The venue provisions of W.Va. Code § 14-2-2 prevent the possibility of having multiple contradictory rulings from the 31 Circuit Courts in West Virginia on the same issue.

Court, in full knowledge of the effect of its sentence, has ordered that restitution shall be paid not only from the Petitioner's future "work income" while in prison, but also from any prison account or any asset of the Petitioner's.[2] The intent of the Sentencing Order is for the Petitioner to pay restitution from any asset, including monies sent to him from friends and family while he is in prison, and not just from monetary assets/earnings as defined in Corrections' Policy Directive 111.06.

A Circuit Court may include money sent to an inmate from friends and family as part of inmate assets subject to the forty percent deduction under West Virginia Code, § 25-1-3c.

West Virginia Code, § 25-1-3c(c)(1) does not define the term "earnings" subject to having restitution deducted by the prison facility, and does not cite any particular inmate monetary asset which cannot, as a matter of law, be considered to be "earnings." Earnings, in its common sense definition, can mean any type of monetary asset which has been acquired as a result of a person's effort, actions or behavior. Earnings may legitimately include monetary assets sent from a friend or family. Such transfers of money, while not part of a binding contract, are the result of the recipient's effort, actions or behavior – they are not the product of some random act of kindness to a stranger, but have been earned in some manner. Under West Virginia Code, § 25-1-3c, it is well within a Court's authority to find that the term "earnings" includes more than income earned at a prison job assignment.

While Corrections' Policy Directive 111.06 provides a definition of "earnings," it is not controlling in the event the sentencing court provides a narrower or broader definition of what assets or earnings are subject to its restitution order. For example, if the Berkeley County Circuit Court's Sentencing Order limited restitution to only "work income" of an inmate, neither West

[2] While in prison, the Petitioner's basic needs, including medical care, food, shelter and security, will be provided to him at taxpayer expense. A Circuit Court may reasonably find that an inmate should devote a portion of monies sent

Virginia Code, §25-1-3c nor Policy Directive 111.06 would give Mt. Olive authority to take restitution from other non "work income" monetary assets, such as inheritance or civil judgments, which Corrections has defined as "earnings" in Policy Directive 111.06. West Virginia Code, § 25-1-3c, does not authorize the Commissioner of Corrections to develop, on behalf of West Virginia's Circuit Courts, a legally controlling definition of "earnings" for purposes of the statute or to restrict a circuit court's authority to order restitution. Corrections' Policy Directive 111.06 represents Corrections' directives to itself as an agency as to how it will define "earnings" and how it will apply West Virginia Code, § 25-1-3c *absent* more specific direction from the sentencing court regarding restitution.

West Virginia Code, § 61-11A-4 provides a Circuit Court with the authority to order restitution from any of source and to require the Defendant to pay restitution immediately.

Even assuming West Virginia Code, § 25-1-3c does not authorize a Court to have Corrections handle an inmate's restitution obligations using the money sent to an inmate by friends and relatives, the general provisions of West Virginia Code, § 61-11A-4 ("Restitution; when ordered") still govern restitution and give a Circuit Court wide power in the ordering of restitution. West Virginia Code, § 61-11A-4 does not limit restitution to only those sources and assets set forth in Corrections' Policy Directive 111.06 or in West Virginia Code, § 25-1-3c, and would permit restitution to be paid from any asset of the Defendant, including any inmate account or any gift to the inmate from friends and family. Moreover, pursuant to the provisions for payment of court ordered restitution under West Virginia Code, § 61-11A-4(f), if the Circuit Court does not require that the Defendant make restitution within a specified period or in specified installments, "restitution shall be made immediately." Under West Virginia Code, § 61-11A-4, the Berkeley County Circuit Court has the inherent authority to require an inmate

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to him by friends and family to restitution as opposed to his personal expenditures.

through his inmate trustee account to pay forty percent or more of any assets, whether "earnings" or not, as these assets come to be acquired by the inmate.

In the present case, Mt. Olive and Corrections has been presented with two possible interpretations of the Berkeley County Circuit Court's Order:

1. That the Sentencing Order intended all of the money in the Petitioner's inmate accounts be part of his "earnings," of which forty percent will be deducted to pay restitution; or
2. That the Sentencing Order does not refer to West Virginia Code, § 25-1-3c, and that the Order is silent on the rate of payment and that all monies, which do not qualify as "earnings" under Policy Directive 111.06, are to be paid immediately pursuant to West Virginia Code, § 61-11A-4(f). One hundred percent of those assets are to be paid out of the Petitioner's trustee account as they are received at Mt. Olive, until restitution is satisfied.

Here, Mt. Olive has interpreted the Sentencing Order in the manner which is most beneficial to the Petitioner, as well as, most likely to encourage repayment of the restitution.[3] Moreover, given that West Virginia Code, § 25-1-3c applies to inmate restitution, the Respondent's interpretation that the Sentencing Order seeks repayment for all inmate assets in a manner consistent with the statute, as opposed to having several different rates of repayment depending upon the source of the money in the Petitioner's inmate account, is reasonable and gives full effect to the intent of the Berkeley County Circuit Court.

[3] Immediate payment or a one hundred percent deduction would most likely cause friends and relatives to send in no money to the petitioner as long as the restitution obligation remains to be paid.

RULING

WHEREFORE, for the above-stated reasons the Court grants Respondent's Motion in the above-titled action pursuant to West Virginia Rules of Civil Procedure, Rules 12(b)(1), (3) and (6). This case is hereby DISMISSED and STRICKEN from the docket of this Court.

The Circuit Clerk shall send a certified copy of this Order to all counsel of record:

Wade Painter, #46300, *pro se*
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Entered this Order the 29th day of October, 2014.

Tod J. Kaufman, Circuit Court Judge for

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT. GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 31st DAY OF October 2014
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
UHm