IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Wade Painter,
Petitioner

v.

Supreme Court Case No.: 14-1266

David Ballard, Warden
Mount Olive Correctional Complex
Respondent

Petitioner's Reply to Respondent's Summary Response

Prepared by Petitioner, *pro se*:

Wade Painter, DOC # 46300
Mt. Olive Correctional Complex
One Mountainside Way
Mt. Olive, WV 25185

ARGUMENT FOR REPLY BRIEF

Comes now the petitioner to briefly reply to the State's Summary Response.

1. Petitioner seeks a Writ of Mandamus to direct the Division of Corrections to obey the law, and is not directly challenging Petitioner's sentencing order. Jurisdiction and venue therefore lies with the Kanawha County Circuit Court.

Petitioner submitted a petition for a Writ of Mandamus to the Kanawha County Circuit Court, asking that the Division of Corrections obey the law as embodied in West Virginia Code § 25-1-3c and Policy Directive 111.06 and stop deductions from funds provided Petitioner by family and friends. Since a state agency was named in the suit, West Virginia Code § 14-2-2 mandates that the suit be prosecuted in the Kanawha County Circuit Court. Since the suit seeks a Writ of Mandamus, Petitioner is asking the lower court for a general legal ruling or declaration that the Division of Corrections must follow its own legislative rule. Respondent agrees that this is sufficient reason for the venue to lie in the Kanawha County Circuit Court, but then keeps on insisting that Petitioner's legal claims relate to his sentencing. This is false. Petitioner's legal claim is that the Division must follow its own legislative rule.

2. West Virginia Code § 25-1-3c, together with Policy Directive 111.06, legally define earnings to exclude funds from family and friends, and thereby limits the authority of a Circuit Court to have lawfully ordered restitution collected from such funds.

Petitioner agrees that West Virginia Code § 25-1-3c does not specifically define earnings. Subsection (c)(1) does direct the Commissioner to develop a policy directive (Policy Directive 111.06) to outline a formula for distribution of an inmate's income to pay court-ordered debts such as restitution. Petitioner showed in his brief that the policy directives manual is a legislative rule, and has the force and effect of law. Respondent admits that Policy Directive 111.06 defines earnings to exclude funds provided Petitioner by his family and friends. Since a statute directed the development of Policy Directive 111.06, and it is a legislative rule with the force and effect of law, then that exclusion is statutory.

Respondent tries to duck this truth by an **unsupported** conclusion that Policy Directive 111.06 is not legally controlling when it comes to defining "earnings," but is merely a directive from the Division of Corrections to itself absent "more specific direction from the sentencing court regarding restitution." This is certainly a novel twist on the concept of a legislative rule. This Court has said that a legislative rule has the force and effect of law. Moreover, this legislative rule was created in response to statute. Is it not the province of the Legislature to create law and approve legislative rules developed by the Executive? Why, then, would any Circuit Court breach the division of powers mandated by Article V, Section 1, of the West Virginia Constitution and arrogate upon itself the title of "superlegislature" by defying a legislative rule? Petitioner humbly submits that it cannot do so, and prays that this Court so rule.

Respondent makes much of West Virginia Code § 61-4A-11, "Restitution; when ordered," the relevant section of the 1984 Victim Protection Act. Subsection (f) states that if "not otherwise provided by the court under this subsection, restitution shall be made immediately." Petitioner avers that a significant number of inmates fall into this category; i.e., they owe immediate restitution and are unable to pay. Petitioner admits he is such an inmate. He admits his restitution is due immediately, and that he is delinquent; i.e., unable to pay. Respondent argues that delinquent restitution under subsection (f) authorizes a judge to unilaterally seize any inmate funds in any amount to satisfy the debt. **Petitioner disputes this**.

Respondent overlooks subsection (h):

> "An order of restitution may be enforced by the state or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action."

That is, enforcement of Petitioner's immediate restitution must be done in the same fashion as a judgment in a civil action. Thus, pursuant to Rule 69, "Executions and other final process; proceedings in aid thereof," subsection (a), "For payment of money," of the West Virginia Rules of Civil Procedure, the process "to enforce a

judgment for the payment of money shall be a writ of execution, a writ of suggestee execution and such other writs as are provided by law." The rule goes on to say that:

> "(1) A writ of execution shall be made returnable not less than 30 days nor more than 90 days after issuance, as directed by the person procuring issuance of the writ; and (2) an answer to a summons issued in a suggestion proceeding shall be served upon the plaintiff within 20 days after service of the summons; and (3) a return on a writ of suggestee execution shall be made forthwith on the expiration of one year after issuance of the writ."

If Respondent wishes to follow West Virginia Code § 61-4A-11(h), therefore, he must secure a writ as suggested above and serve it upon Petitioner. Since this has not been done, Respondent is clearly **NOT** following West Virginia Code § 61-4A-11(h), and his arguments relying on this statute are without merit.

In addition, Petitioner cited case law in his brief that as an incarcerated person he cannot be directly subjected to civil action unless he waives his right to a committee. Petitioner has not waived his right to a committee, and cannot therefore be directly subjected to an enforcement action, such as a writ of execution, while he is incarcerated.

Petitioner submits that it is precisely for the above-stated reasons that the Legislature created West Virginia Code § 25-1-3c and that the Commissioner developed Policy Directive 111.06. These laws provide a specific and direct way to collect delinquent restitution from incarcerated inmates without the necessity of writs of execution that cannot be served on them. If this is so, then the Division of Corrections is bound to follow these laws, and Circuit Courts, with divided power, cannot direct the Division to disobey them.

3. Petitioner did, indeed, timely file his brief.

Respondent admits Petitioner mailed his brief to this Court on March 26, 2015. It is true that the Scheduling Order originally required the brief be due on March 2, 2015. However, Petitioner moved for an extension of time and was granted said motion by order from this Court dated February 10, 2015. That order extended the deadline for perfecting the appeal to March 27, 2015. Petitioner's brief was therefore timely filed.

It is worth noting that the original Scheduling Order required the Respondent's brief be due on April 16, 2015. Respondent filed his brief eight days later on April 24, 2015. Would Respondent agree that his summary response should be ignored because it was late? Petitioner suspects that Respondent wishes to enjoy a convenient double standard - timeliness for Petitioner and tardiness for Respondent.

Respectfully submitted,

Wade Painter, *pro se*