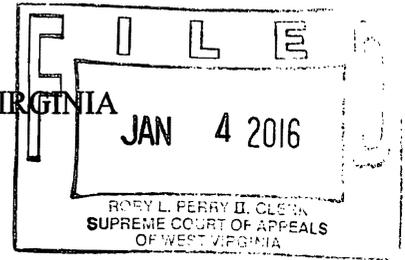


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



WADE PAINTER,  
Petitioner Below, Petitioner

v.

No. 14-1266  
(Kanawha Co. 14-P-520)

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

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SUPPLEMENTAL REPLY BRIEF OF PETITIONER

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SUPPLEMENTAL REPLY BRIEF OF PETITIONER<sup>1</sup>

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ARGUMENT

I. CONTRARY TO THE ASSERTIONS OF THE RESPONDENT WARDEN, BY DEDUCTING FUNDS FROM GIFTS TO THE PETITIONER, THE RESPONDENT WARDEN IS IN VIOLATION OF BOTH W.VA. CODE § 25-1-3c(c)(1) AND DOC POLICY DIRECTIVE 111.06.

A. The Order of the Circuit Court Order Setting Forth Restitution Did Not Interpret the Words "Earnings" and "Income," and Did Not Require the Respondent Warden to Deduct Funds From Gifts.

In his supplemental response, the Respondent Warden erroneously states, "The first issue is whether the Berkeley County Circuit Court had the legal authority to interpret 'earnings' and

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<sup>1</sup> This Supplemental Reply Brief is filed pursuant to the Court's Order of August 25, 2015, providing that any supplemental reply brief deemed necessary may be filed within 20 days of the respondent's brief.

'income' and order . . . that the West Virginia Division of Corrections deduct money from 'earnings' and income' . . . " Respondent's Response to Supplemental Brief of Petitioner, at 6.

The Respondent Warden is erroneous because the Berkeley County Circuit Court<sup>2</sup> did not enter an order interpreting the words "earnings" and "income." Instead, the Circuit Court, in its Sentencing Order, simply stated (in three separate paragraphs ordering restitution), " . . . restitution shall be paid from monies contained within any prison account or any assets of the defendant." Sentencing Order and Post Trial Motion Hearing, No. 06-F-24 (Circuit Court of Berkeley County, Nov. 16, 2007), at 4-5.

The Sentencing Order makes no mention of "earnings" or "income," let alone making any effort to interpret the meaning of those words. Instead, as set forth below, it is the Respondent Warden, not the Circuit Court, who has taken the actual words of the court order ("any prison account" and "any assets") and interpreted these words in a manner that violates the explicit terms of W.Va. Code § 25-1-3c(c)(1) and Division of Corrections Policy Directive 111.06 (incorporated as a legislative rule by W.Va. C.S.R. § 90-1-2).

**B. The Respondent Warden's Interpretation of the Court Order Violates the Explicit Terms of W.Va. Code § 25-1-3c(c)(1).**

The Respondent Warden's interpretation of the court order violates the explicit terms of W.Va. Code § 25-1-3c(c)(1) because this code section expressly states "The warden shall deduct from the *earnings* of such inmate, legitimate court-ordered financial obligations." (emphasis

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<sup>2</sup> On page 2 of the Supplemental Brief of Petitioner, the Petitioner erroneously stated that the Petitioner was "tried by a jury in the Circuit Court of *Fayette* County." The reference to Fayette County is a typographical error. As correctly set forth in the remainder of the brief, the Petitioner was tried and sentenced in the Circuit Court of *Berkeley* County.

added) As set forth in detail on pages 32-33 of the Supplemental Brief of Petitioner, the word "earnings" has a clear and precise meaning, and does not include gifts. As this Court emphasized in *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 24, 454 S.E.2d 65, 69 ((1994), quoting Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968), "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to rules of interpretation."

The Respondent Warden is similarly erroneous in stating that W.Va. Code § 25-1-3c(c)(1) "uses the term 'income' and 'earnings' interchangeably (thereby including "gifts" as under the term "income"). Respondent's Response to Supplemental Brief of Petitioner, at 12. The Respondent is erroneous because this statutory sub-section begins by stating, "The warden shall deduct from the earnings of each inmate, legitimate court-ordered financial obligations." The second sentence of this sub-section then repeats the word "earnings" in reference to child support obligations. Only then, in the third sentence of the sub-section, in determining the details of deductions from earnings, does the legislation for the first time use the word "income."

It is apparent from this context that, rather than being used interchangeably, the word "income" is subsidiary to the word "earnings" and does not transform the meaning of it. Read in context, the subsidiary use of the word "income" does not nullify the significance of the word "earnings" as set forth in the principle sentences of this section, and does not convert the meaning of the word "earnings" into a word that includes gifts.

C. The Respondent Warden's Interpretation of the Court Order Violates the Explicit Terms of DOC Policy Directive 111.06.

In addition to violating the explicit terms of W.Va. Code § 25-1-c(c)(1), the Respondent Warden's interpretation of the court order violates the explicit terms of Division of Corrections Policy Directive 111.06, adopted Dec. 1, 2006. The Policy Directive explicitly states that, in deducting funds from prisoner's earnings to pay court-ordered restitution, "Earnings shall further include all sums of money received by the inmate . . . *except funds provided the inmate by family or friends*" (emphasis added).

First, in the statute in question, W.Va. Code § 25-1-3c(c)(1), the Legislature specifically directed the Division of Corrections to adopt the Policy Directive, stating: "The Commissioner of the Division of Corrections shall *develop a policy* that outlines the formula for the distribution of the offender's income and the formula shall include a percentage deduction, not to exceed forty percent in the aggregate, *for any court ordered victim restitution . . .*" (emphasis added).

Second, Policy Directive 111.06, drafted as directed by the Legislature, is part of the DOC's Policy Directives Manual. For this reason, it is especially significant that W.Va. C.S.R. § 90-1-2, adopted Sept. 9, 1987, specifically states "The Policy Directives Manual is hereby incorporated by reference as a legislative rule."

D. DOC Policy Directive 111.06 is a Legislative Rule That Has the Force and Effect of Law And Is Therefore Binding on the Respondent Warden.

In his supplemental response, the Respondent Warden is erroneous in dismissing the effect of the Policy Directive by stating "A policy is not intended to have the force of law against

other persons and entities." Instead, as set forth below, DOC Policy Directive 111.06 absolutely has the force of law.

First, in *Simpson v. West Virginia Office of the Insurance Commissioner*, 223 W.Va. 495, 510, 678 S.E.2d 1, 16 (2009), this Court stated, "We hold that a legislative rule is valid if (1) it is submitted to the legislative rule-making review committee for approval, as required by W.Va. Code § 29A-3-9 *et seq.*, or (2) the Legislature expressly exempts it from such legislative rule-making review and approval pursuant to W.Va. Code § 29A-1-3(d) (1990) (Repl. Vol. 2002)."

As authorized by statute, in W.Va. C.S.R. § 90-1-2 the Division of Corrections incorporated its Policy Directives Manual as a legislative rule. As W.Va. C.S.R. § 90-1-2 states, "The Policy Directives Manual is hereby incorporated by reference as a legislative rule."

(W.Va. C.S.R. § 90-1-2, as set forth on the Secretary of State's website, begins with a document titled "Notice of Agency Adoption of a Procedural Or Interpretive Rule Or a Legislative Rule Exempt From Legislative Review." The Notice states that the legislative rule adopting the Policy Directives Manual is exempt from legislative review pursuant to the exemption set forth in W.Va. Code § 29A-1-3(c)).

The significance of legislative approval of a legislative rule (either by legislative review or by legislative exemption from legislative review) is that upon approval, the legislative rule is binding on all parties in the same manner as a statute itself. As this Court stated in *Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 583, 466 S.E.2d 424, 434 (1995), "Legislative rules have '*the force of law*,' W.Va. Code § 29A-1-2(d) (1982)" (emphasis added). In *Appalachian Power Co.*, this Court further stated, "legislative rules in West Virginia are

authorized by acts of the Legislature and we have treated them, as they should be, as statutory enactments." 195 W.Va. at 584, 466 S.E.2d at 435.

The significance of the Policy Directive as a legislative rule, with the force and effect of law, has been overlooked by the Respondent Warden and by the Circuit Court of Kanawha County, but it has not been overlooked by the Petitioner. In his *pro se* Petition for a Writ of Mandamus, the Petitioner began by stating, "Comes now the Petitioner, Wade Painter, acting *pro se*, to move this Honorable Court to order Respondent to show cause why a rule should not be issued directing him to follow W.Va. Division of Corrections Policy Directive (PD) 111.06, *a legislative rule with the full force and effect of law*, and cease restitution deductions from funds provided by family and friends." Petition for a Writ of Mandamus, No. 14-P-520 (Circuit Court of Kanawha County, Oct. 1, 2014).

Similarly, in the Petitioner's *pro se* Brief on Appeal, the Petitioner, in Assignment of Error 2, stated "Policy Directive 111.06, a legislative rule, has the force and effect of law and is legally controlling in this case."

As discussed above, and as set forth by this Court in *Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 583, 466 S.E.2d 424, 434 (1995), "Legislative rules have '*the force of law*'" (emphasis added). The Petitioner, in his *pro se* filings, is absolutely correct.

II. BECAUSE THE PETITION CHALLENGES THE ACTS OF THE WARDEN, A STATE OFFICIAL, VENUE IS PROPER IN KANAWHA COUNTY AND EITHER A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION IS THE APPROPRIATE REMEDY.

The Respondent Warden is erroneous in claiming, throughout his Supplemental Response, that the Sentencing Order of Berkeley County Circuit Court compels him to deduct

funds from gifts received from the Petitioner's family. The Respondent Warden is similarly erroneous in claiming, on page 14 of his supplemental response, that the Kanawha County Circuit Court "did not have venue and jurisdiction to review the Berkeley County Circuit Court's Order."

First, as discussed above, in its Sentencing Order, the Berkeley County Circuit Court simply stated " . . . restitution shall be paid from monies contained within any prison account or any assets of the defendant." Sentencing Order and Post Trial Motion Hearing, No. 06-F-24 (Circuit Court of Berkeley County, Nov. 16, 2007), at 4-5. There is nothing in the wording of this Order that compels the Warden to violate the explicit language in W.Va. Code § 25-1-3c(c)(1) and Policy Directive 111.06 and deduct funds from gifts.

When a government official complies with the terms of a court order, implicit in the compliance is the term "to the extent permitted by law." When a court order is capable of being applied in a lawful manner or an unlawful manner, the government official does not have the option of selecting the unlawful manner. The official does not have the option of interpreting the order in a vacuum and applying it in a manner that effectively nullifies the acts of the Legislature in prescribing the official's lawful authority.

In fact, initially the Respondent Warden did apply the Berkeley County Circuit Court order in a lawful fashion, limiting it to earnings, and excluding gifts. From the six-year period from the date of the Order's entry in 2007 until approximately 2013, the Warden did not deduct funds from gifts received by the Petitioner's family. Only in 2013, as stated by the Petitioner in his *pro se* filings (and after the appeal period had expired), did the Respondent Warden begin

interpreting the court order in a manner that violated the statute, policy directive, and legislative rule regarding restitution.

For this reason, the Petitioner, in his *pro se* filings, was absolutely correct in filing his Petition for a Writ of Mandamus in the Circuit Court of Kanawha County. The issue in this case involves the Respondent Warden's unlawful application of a court order, a policy decision by the Respondent Warden that applies not only to the Petitioner, but to all present and future prisoners who are the subject of similarly worded restitution orders.

Because the Petitioner's case challenges the acts of the Warden, venue is proper in Kanawha County. As more fully set forth on pages 17-20 of the Supplemental Brief of Petitioner, under the venue provisions of W.Va. Code § 14-2-2(a) and the ruling of this Court in *State v. Chance*, 224 W.Va. 626, 687 S.E.2d 564 (2009), venue is not only proper in Kanawha County, it is mandatory.

Additionally, because the Respondent Warden is acting in a manner that violates his statutory duty, either mandamus (to compel the Warden to perform his duty and follow the law), or prohibition (to prohibit the Respondent Warden from acting in an unlawful manner) is an appropriate remedy. With regard to the choice of remedy initially selected by the Petitioner while acting *pro se*, as a matter of practice, courts construe *pro se* filings liberally. As the federal court explained in *Royce v. Hahn*, 151 F.3d 116, 118 (3rd Cir. 1998), "The label placed on a petition . . . is not determinative," particularly in *pro se* filings. Additionally, as a matter of practice, this Court has explained that, even in cases brought by counsel, the Court "has, on occasion, treated a request for relief in prohibition as a petition for a writ of mandamus, or vice

versa, if the facts so warranted. *State ex rel. Affiliated Construction Trades Foundation v. Vieweg*, 205 W.Va. 687, 520 S.E.2d 854 (1999).

### CONCLUSION

For the above reasons, the Final Order of Kanawha County, denying the Petitioner's Petition for a Writ of Mandamus, should be reversed. The Respondent Warden should be compelled to comply with the provisions of W.Va. Code § 25-1-3c(c)(1) and Policy Directive 111.06 and deduct funds only from "earnings" and such other sources as are provided by statute. The funds deducted from gifts from friends and family should be returned the the Petitioner's account.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George Castelle, do hereby certify that on the 4<sup>th</sup> day of January, 2016, I served,  
by hand, a copy of the foregoing Supplemental Reply Brief of Petitioner, upon:

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\_\_\_\_\_  
George Castelle