

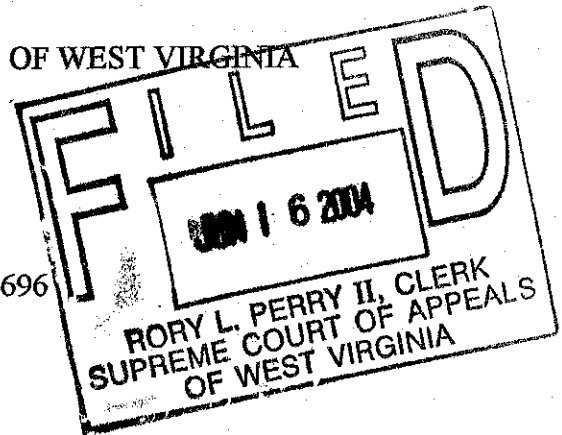
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
JAMES WILLIAM BERRY, SR.,
Petitioner,

v.

THOMAS MCBRIDE,
Respondent.

No. 30696



BRIEF OF RESPONDENT ON REHEARING

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C.S.R. 95-2-1 et seq.5,7,8,9

Comes now your respondent by the undersigned counsel and for his Brief on Rehearing states the following:

KIND AND NATURE OF PROCEEDINGS

In this case the Petitioner sought a writ of Mandamus asking the Court to order the Warden of the Mount Olive Correctional Complex not to place him in a double occupancy cell. As such, this is an original jurisdiction proceeding in mandamus before this Court. W.Va. Const. Art. VIII, sec. 3; W.Va. R. App. P. 14, W.Va. Code § 53-1-2 (1933). “[T]he primary purpose or function of a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created or imposed by law.” State ex rel Stull v. Davis, 203 W.Va. 405, 409, 508 S.E.2d 122, 126 (1998) (per curiam), citing State ex rel. Bronaugh v. City of Parkersburg, 148 W.Va. 568, 572, 136 S.E.2d 783, 785-86 (1964). The Court has stated the standard for original mandamus jurisdiction as:

A writ of mandamus will not issue unless three elements coexist: (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy at law.

State ex rel Deputy Sheriff's Association Inc., v. Sims, 204 W.Va. 442, 444, 513 S.E.2d 669, 671 (1998). Therefore the question is whether there is a clear legal right to a single cell.

It is undisputed that at the time of the petition, the petitioner was not housed in a double occupancy cell. Likewise, as of the present time, the petitioner remains housed in a single occupancy cell. Despite, the fact that the petitioner's claim was wholly anticipatory¹ and that this Court

¹ As Justice Maynard correctly noted in his dissenting opinion, the petitioner was the sole occupant of a handicapped cell. As such there was not a case in controversy. At best the issue was purely anticipatory.

previously issued a series of opinions which held that the Division of Corrections must move inmates from the county and regional jails to its prisons, this Court agreed with the petitioner and held that inmates cannot be double celled if the cells were designed for single occupancy. State ex rel Dodrill v. Scott, 177 W.Va. 452, 352 S.E.2d 741 (1986), State ex rel Smith v. Skaff, 187 W.Va. 651, 420 S.E.2d 922 (1992), State ex rel Stull v. Davis, 203 W.Va. 405, 409, 508 S.E.2d 122 (1998) (per curiam), and State ex rel Sams et al. v. Kirby, 208 W.Va. 726, 542 S.E.2d 889 (2000).² In reaching the decision the Court improvidently relied upon C.F.R. Title 95 Series 2. (Exhibit 1). However, only a few years prior to the decision at hand the Court had declared these regulations to be unenforceable. State ex rel White v. Parsons, 199 W.Va. 1, 11, 483 S.E.2d 1, 11 (1996)³. Additionally, the full legislature also removed the responsibility of these regulations from the Division of Corrections. As a result, the previous decision in this case is based upon reliance on a regulation that was judicially declared unenforceable and legislatively removed from this agency.

STATEMENT OF THE CASE

The petitioner is a prisoner incarcerated at the Mount Olive Correctional Complex. The petitioner utilizes a wheelchair as his means to move around the Mount Olive Correctional Complex. In addition to this action, the petitioner has pending litigation before the United States District Court for the Southern District of West Virginia, wherein he is advancing constitutional claims regarding his wheel chair and housing status⁴. (Exhibit 3). Although the petitioner is not double celled, it is

² In Stull this Court ordered a rapid movement of 50% of the prisoners in county and regional jails into the prisons. This created the initial need to double bunk cells at the Mount Olive Correctional Complex. As this Court's records will reveal there were numerous original jurisdiction petitions filed in the wake of that double bunking, which the Court refused to issue rules to show cause.

³ A copy of White is attached as Exhibit 2.

⁴ The Court has construed this claim as raising a possible ADA issue.

his goal to obtain an order that would prohibit prison officials from requiring him to ever be double celled.

DISCUSSION

I.

THE EXCLUSIVE ISSUE FOR CONSIDERATION IS WHETHER THIS COURT IMPROVIDENTLY APPLIED THE STANDARDS SET FORTH IN C.S.R. TITLE 95 TO THE DIVISION OF CORRECTIONS THAT IT HAD PREVIOUSLY RULED UNENFORCEABLE AND BECAUSE THE LEGISLATURE SUBSEQUENTLY EXEMPTED THE DIVISION OF CORRECTIONS FROM THESE RULES AND HAS REMOVED THE STANDARDS COMMISSION'S JURISDICTION TO ENACT FURTHER RULES GOVERNING THE DIVISION OF CORRECTIONS

It is not necessary that this Court revisit claims of the petitioner under either an Eighth Amendment basis or under ADA. While the Court correctly decided both matters in the initial decision, the petitioner has also advanced litigation before the United States District Court for the Southern District of West Virginia. (Exhibit 3). The existence of such litigation negates the third element necessary for mandamus, namely the absence of an adequate remedy at law. Sims, 204 W.Va. at 444, 513 S.E.2d at 671. Clearly, if the petitioner can proceed in federal court on such matters he is not without recourse, and need not seek mandamus here. Likewise, because this matter involves a prisoner advancing conditions of confinement claims, he cannot advance the same claims in separate forums. W.Va. Code § 25-1A-4 prevents the filing of inmate litigation when the inmate has advanced a substantially similar claim in another forum and has not substantially prevailed. Consequently, matters touched upon in the federal proceedings should not be re-litigated in this forum. As a result, the respondent asserts that there is a single issue that remains. Namely, whether C.S.R. Title 95 Series 2 can prohibit double bunking when both this Court and the legislature have declared its provisions unenforceable.

The Court's application of C.S.R. Title 95 Series 2 was improvident because these rules have been a "dead letter" for some time. First, only a few months after taking effect the Court ruled that Title 95 Series 2 was unenforceable. White, 199 W.Va. at 11, 483 S.E.2d at 11. As if this should not be enough to have rendered this rule void, the legislature further "sealed the lid on its coffin" by making a series of modifications that would prevent its resurrection on the Division of Corrections. Historically speaking, West Virginia Code section 31-20-8 initially established a "jail and correctional facility standards commission." W.Va. Code § 31-20-8 (1993). West Virginia Code section 31-20-9 originally defined the powers of this standards commission to include development of standards for the maintenance and operation of correctional facilities, regional jails and local jails. W.Va. Code § 31-20-9 (1993). The commission was also mandated to develop their rules pursuant to the rule making process under W.Va. Code 29A-1-1. Accordingly, Title 95 Series 2 was promulgated. Seeing the folly of attempting to apply these rules to the Division of Corrections, the legislature took corrective action to revise the composition, and scope of authority of the jail and correctional facilities standards commission in 1998 in Enrolled House Bill 4702 (1998).

The first change the Legislature made was to amend the title to West Virginia Code section 31-20-8 to delete the words "correctional facility." W.Va. Code § 31-20-8 (1998). The current title of this section reads "Jail facilities standards commission; purpose, powers and duties." Id. The second change was made to the body of West Virginia Code section 31-20-9. Previously the body of this section stated that the purpose of the commission was to assure proper standards for jail, work farm, and correctional facility operation, maintenance and management of inmates for correctional facilities, regional jails and local facilities used as temporary holding facilities. W.Va. Code § 31-20-9 (1993). However, the legislative changes of 1998 completely removed the terms "correctional facility and correctional facilities" from the statute. W.Va. Code § 31-20-9 (1998). Thus the commission's

jurisdiction no longer extended to the Division of Corrections. However, most importantly, the legislature specifically exempted the Division of Corrections from the previously promulgated rules of the commission. W.Va. Code § 31-20-9 (1998). As a result Title 95 C.S.R. Series 2 is a “dead letter.” It has no application to the Division of Corrections. Moreover, its promulgating body has lost its jurisdiction to regulate the Division of Corrections, thus it is to no avail for the commission to promulgate new rules when it no longer has jurisdiction. As a result this “dead letter” has been left adrift in the C.S.R. Thus this Court’s application of an eviscerated legislative rule, which the Court itself had held to be unenforceable, was improvident and should held for naught as the standards relied upon no longer apply to the Division of Corrections. Id.

II.
**DOUBLE OCCUPANCY CELLS ARE A REALITY OF INCREASING DEMANDS
PLACED ON CORRECTIONAL SYSTEMS**

Both Corrections and the jails are faced with the pressure of how to deal with increasing populations. One solution has been limited use of double occupancy cells. In the wake of the Stull decision, Corrections fitted its cells at the Mount Olive Correctional Complex with an additional bunk to permit the housing of two inmates in many cells.⁵ (An example of a double celled unit at Mocc is depicted in Exhibit 4, the Petitioner’s Cell is depicted in Exhibit 5). This practice also has occurred at the Northern Correctional Facility. Ultimately, the prison population is increasing beyond Corrections’ ability to expand its beds, either through double occupancy cells or otherwise. When

⁵ Because C.S.R. 95 Series 2 has been both judicially and legislatively rendered unenforceable, there is no need to conduct a detailed analysis. However, it is worthy of noting that the language relied upon by the Court in the initial decision in this case was the C.S.R. 95-2-8.7 (cited as 8.6 in the decision) which provides that “[o]nly one inmate shall occupy a room designed for single occupancy. . .” Obviously the question from that regulation would be what is meant by design. Does that mean that the prison must be preserved as it was originally built forever or may cells be adapted for double occupancy as needs change?

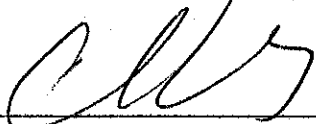
this happens, inmates back up in jails awaiting a bed. (Exhibit 6 depicts some cells at the Southern Regional Jail where a mat is placed on the floor of the cell to allow double occupancy). Imposing a blanket ban on double occupancy cells is only going to make the situation in the jails more difficult. The difference in a jail and prison cell is well summarized by the public defender in the Sams case. (Exhibit 7). Thus pushing inmates out of prison beds will result in a greater harm.

CONCLUSION

This Court's ruling was based upon a regulation with no effect. C.S.R. 95 Series 2 does not apply to the Division of Corrections. W.Va. Code § 30-20-9 (1998). Even prior to the legislation, it was ruled unenforceable by the Court. As such, there is no regulatory right to a double cell. Consequently, the elements for a writ of mandamus have not been met in this case and it must be dismissed.

RESPECTFULLY SUBMITTED,
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