IN THE COURT OF APPEALS 8/15/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00181 COA

THOMAS HILL APPELLANT

v.

WILLIE GOODEN, ED HARGETT

AND EDDIE LUCAS APPELLEE(S)

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HOWARD Q. DAVIS, JR.

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT(S): THOMAS HILL, PRO SE

ATTORNEY(S) FOR APPELLEE(S): OFFICE OF THE ATTORNEY GENERAL

BY: JOHN L. CLAY

NATURE OF THE CASE: CIVIL: CONFISCATION OF MISSISSIPPI DEPARTMENT OF CORRECTIONS INMATE'S MONEY

TRIAL COURT DISPOSITION: THOMAS HILL WAS DENIED THE CONFISCATED MONEY

BEFORE THOMAS, P.J., KING AND MCMILLIN, J.J.

THOMAS, P.J., FOR THE COURT:

SUMMARY

Thomas Hill, an inmate with the Mississippi Department of Corrections, filed a *pro se* replevin complaint against Willie Gooden, Ed Hargett and Eddie Lucas, employees of the Mississippi Department of Corrections, seeking the return of $3,613 confiscated from Hill's cell. The circuit court, *sua sponte* and without an answer filed by any of the defendants, denied Hill's claim, held the money to be contraband, and ordered the Mississippi Department of Corrections to show the nature of the funds so the court could make a determination as to the disposition of the funds. Feeling aggrieved, Hill appeals to this Court, asserting the following errors:

I. DID THE CIRCUIT COURT OF SUNFLOWER COUNTY, MISSISSIPPI, ERR IN ALLOWING THE APPELLEE, PURSUANT TO MISS. CODE ANN. (1972), § 47-5-195 (SUPP. 1992), TO DEPRIVE APPELLANT OF HIS PERSONAL PROPERTY ($3,613), WITHOUT PROVIDING HIM DUE PROCESS OF LAW?

II. DID THE CIRCUIT COURT OF SUNFLOWER COUNTY, MISSISSIPPI, ERR IN SUMMARILY DISMISSING APPELLANT'S REPLEVIN COMPLAINT WITHOUT A HEARING ON THE MERITS?

III. DID THE CIRCUIT COURT OF SUNFLOWER COUNTY, MISSISSIPPI, ERR IN NOT GRANTING APPELLANT'S MOTION TO RECONSIDER AND/OR MOTION FOR SUMMARY JUDGMENT?

IV. DID THE CIRCUIT COURT OF SUNFLOWER COUNTY, MISSISSIPPI, ERR IN ORDERING THE MDOC TO REIMBURSE THEMSELVES WITH FILING FEES DEDUCTED FROM THE ($3,613) OF MONEY THAT BELONGS TO APPELLANT WITHOUT FIRST HAVING THE APPELLEE TO PROVE THAT THE MONEY DID NOT BELONG TO APPELLANT?

IV. IS APPELLANT ENTITLED TO HAVE THE APPELLEE'S REIMBURSE HIM FOR THE PROCESS AND FILING OF THIS APPEAL?

Finding that the route employed by the Circuit Court to be procedurally in error but the ultimate result correct, we affirm.

FACTS

On February 22, 1993, Thomas Hill filed a *pro se* replevin complaint against Willie Gooden, Ed Hargett and Eddie Lucas, all three of whom are employees of the Mississippi Department of Corrections (hereinafter, MDOC). Hill alleged that Gooden confiscated a cassette tape box and approximately fifty-five cassette tapes during a search of Hill's cell. Hill also alleged that Gooden,

acting as an agent for Hargett and Lucas, confiscated $3,613; the money was found hidden in the cassette tapes. Hill admitted that the cassette tape box and tapes were returned to him. Hill claimed the money was his property. On April 12, 1993, before any response was filed by MDOC, the Circuit Court of Sunflower County, *sua sponte*, ordered the MDOC to reimburse itself the filing fees paid for this case out of the confiscated monies and file a report with the circuit court to show the nature of the funds in order to determine the disposition of the funds. As stated, no answer had been filed by MDOC, nor had MDOC filed a motion for dismissal.

On May 11, 1993, the MDOC filed a report with the circuit court and stated that it believed the confiscated monies were proceeds from altered money orders. MDOC attached an affidavit to the report. The affidavit filed was by Sharon Kiihnl-McFadden, a Correction Investigative Chief with the MDOC; she stated that she had investigated an altered money order scam. Hill refused to cooperate in this investigation. The investigation revealed that an unnamed employee of MDOC interviewed by U.S. Postal Inspectors had admitted that she accepted a package for Thomas Hill that contained in excess of $8,500 in cash. This employee gave $6,000 to an individual (the record does not reveal the individual's name) who was sent by Hill to pick up the money. The $8,500 was identified as proceeds from altered U.S. Postal Money Orders.

On May 20, 1993, Hill filed a motion for summary judgment. On that same date, and without awaiting a response from MDOC or conducting any hearing, the circuit court entered an order which stated that the court had already determined that the money was not Hill's property. The court found that the money was contraband and should not be returned to Hill.

Thereafter, on May 24, 1993, MDOC filed a short response to Hill’s motion for summary judgment simply denying Hill was entitled to any relief; Hill responded to this by filing his own response on May 26, 1993, basically restating the position he had taken in his original summary motion.

Next, on June 1, 1993, Hill filed a motion requesting that the court make findings of fact and conclusions of law regarding its dismissal of his complaint. Then, on June 3, 1993, Hill filed a motion requesting that the court make findings of fact and conclusions of law regarding his dismissal of his complaint. Then, on June 3, 1993, Hill filed a motion requesting that the court reconsider its May 20, 1993, order denying Hill’s motion for summary judgment.

Finally, on December 20, 1993, the circuit court entered its last order basically restating the procedural history of the case and finding in conclusion that:

> Mr. Hill filed a Motion For Summary Judgment, dated May 18, 1993. The Court denied the Motion and directed the Department of Corrections to hold the funds until such time as the proper disposition can be determined. Mr. Hill has filed a "Motion For Findings By The Court" and a "Motion To Reconsider".
>
> The above mentioned facts are admitted. Sections 47-5-194 and 195 of the Mississippi Code of 1972, as amended, makes it clear that possession of currency in excess of $20.00 by an inmate is a crime punishable by not less than 2 years nor more than 15 and a fine of not more than $10,000.00. Mr. Hill, by his pleading , has admitted to violating the law; he is not entitled to the

> contraband, and no proper determination can be made concerning the disposition of this money until the investigation is complete.
>
> Mr. Hill's request for reconsideration is denied.

LAW

Hill's argument is that the confiscated money was his, that he was denied due process of law under the applicable sections of the Mississippi and United States Constitutions when the money was taken without affording him any opportunity to be heard and contest the seizure, that MDOC was under a duty to prove the money did not belong to him, that the confiscated money should have been credited to his inmate account, and that the circuit court erred in summarily dismissing his complaint without a hearing on the merits.

First and foremost, this is a case of first impression in this State. Although incidents such as are involved here have been litigated in other states and federal jurisdictions, involving statutes similar to those here, our Supreme Court has not yet addressed this issue. Secondly, the procedure employed by the circuit court was without precedent. We are cited to no statute, rule or case that authorizes the circuit court to summarily dismiss Hill's complaint as it did on April 13, 1993. Hill is correct on this point.

The court should not have acted on its own. It should have treated this case like any other and awaited an answer from MDOC, which could have responded by denying Hill's claim and, simultaneously or thereafter, filed a motion to dismiss under MRCP 12(b)(6) or 56. Under those circumstances, the circuit court could then have entered a final order of dismissal, and we would not now be witness to the convoluted pleadings and responses filed herein. Nonetheless, based on all that has been filed in the trial court, we have before us ample undisputed evidence which allows us to decide this case without resorting to remand.

The applicable sections of the Mississippi Code over which the parties are in dispute read as follows:

Section 47-5-119 of the Mississippi Code provides, in pertinent part:

> Offenders, when received into a facility of the correctional system, shall be carefully searched. If money be found on the person of the offender, or received by him at any time, it shall be taken in charge by the commissioner and placed to the offender's credit and expended for the offender's benefit on his written order and under such restrictions as may be prescribed by law or the rules.

Section 47-5-194 of the Mississippi Code, provides, in pertinent part:

> (1) It shall be unlawful for any offender committed to the Mississippi Department of Corrections to possess:

> (a) Coin or currency in excess of Twenty Dollars ($20.00) on his person or in premises assigned to him or under his control;
>
> . . . .
>
> (3) A violation of subsection (1) shall be considered a rules violation or a violation of the conditions of parole or probation as the case may be and shall be processed in the manner of similar violations.

Section 47-5-195 of the Mississippi Code provides:

> Any person who violates any provision of sections 47-5-191 to 47-5-195 shall be guilty of a felony and upon conviction shall be punished by confinement in the penitentiary for not less than two (2) years nor more than fifteen (15) years, and may be fined not more than ten thousand dollars ($10,000.00), or both.

The circuit court held that an inmate in possession of more than twenty dollars was in violation of prison rules under Section 194 and was subject to felony prosecution under Section 195. The circuit court held the money to be contraband and subject to seizure without any further necessity of hearing.

Hill claims that although he may have been subject to discipline under Section 194, he argues that the money was subject to disposition under Section 119. Hill also claims that the circuit court was in error in finding that he was subject to prosecution under Section 195, although he cites no other statute nor any case authority to support this proposition.

Hill reads Section 119 to mean that money "received by him at any time" must be placed in an account for him and held for his benefit. We agree that had MDOC received any monies from any source for Hill, by law it would have the duty to place the monies into Hill's inmate account. However, Hill's own pleadings, exhibits and briefs, without dispute, show that MDOC had no knowledge of the funds except by its accidental finding of the money hidden in Hill's cassette player during a search of Hill's cell. To allow Hill to profit from his subterfuge by simply having the seized money credited to his account would do violence to the plain reading and meaning of Section 119, particularly when read in conjunction with Sections 194 and 195. We hold that the term "received by him at any time" in Section 119 refers to the legitimate receipt by MDOC of monies for inmates from outside the penitentiary and does not refer to monies smuggled into the penitentiary or otherwise surreptitiously received by an inmate in custody. In sum, any money over twenty dollars found in Hill's cell, whether obtained legally or illegally is contraband and forfeitable. Regardless of MDOC's disposition of the forfeited money, Hill has not standing to complain.

Had MDOC received money for Hill from outside the penitentiary legitimately and had failed to properly credit the money to Hill's account, the case would be different. Here, Hill's reliance on Sections 119 is both misplaced and strains credulity.

As to Hill's assertion that MDOC was under a duty to prove that the confiscated money was not legitimately his and that he was entitled to some sort of contested hearing, this claim too must fail.

As the Mississippi Supreme Court has stated, the prison enforcement of a person's rules and regulations is committed ordinarily to the sound discretion of the prison administrator. *Morgan v. Cook*, 236 So. 2d 749, 750 (Miss. 1970). Prison administrators and not the courts, have the responsibility and duty to manage and administer the penitentiary system. *Hite v. Cook*, 264 So. 2d 887, 888 (Miss. 1972).

The United States Supreme Court has held that when a prison regulation impinges on an inmate's constitutional rights, the regulation will be held to be valid if it reasonably relates to legitimate penological interests. The Court held such a standard necessary if administrators of penal systems, and not the courts, are to have the power or authority to make difficult judgments concerning institutional operations. *Turner v. Safley*, 482 U.S. 78, 79, 107 S.Ct. 2254, 96 L.Ed 2d 64 (1987).

In a case strikingly similar to the case *sub judice*, the Fifth Circuit Court of Appeals, in sustaining the State's motion for summary judgment over the confiscation of money found in a prisoner's belongings, opined:

> Judicial interference with prison administration should be avoided whenever possible. We sustain prison regulations unless they are found to be unreasonable and arbitrary. *Hill v. Estelle*, 537 F.2d 214, 215 (5th Cir. 1976). Many valid reasons justify this restriction on the amount of currency that prison inmates are allowed. Large sums in possession of an inmate may invite attack by other inmates. Inmates with such funds are in a better position to escape, to procure drugs, or to bribe guards or other prison employees. Large caches of currency in a prison serve no useful purpose and pose a significant potential for mischief. Prison inmates necessarily suffer a limitation of the rights, including property rights, enjoyed by ordinary citizens. *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 41 L.Ed. 2d 495 (1974). A state has a compelling interest in maintaining security and order in its prisons and, to the extent that it furthers this interest in reasonable and nonarbitrary ways, property claims by inmates must give way.

Sullivan v. Ford, 609 F.2d 197, 198 (5th Cir. 1980).

A review of other federal circuits finds total support for the position stated in *Sullivan. Hanvey v. Blankenship*, 631 F.2d 296, 297 (4th Cir. 1980); *Kimble v. Department of Corrections*, 411 F.2d 990 (6th Cir. 1969); *Aragon v. Wathen*, 352 F.2d 77 (9th Cir. 1965); *Sell v. Parrot*, 548 F.2d 753, 759 (8th Cir. 1977); *Baken v. Diggott*, 833 F.2d 1539, 1540 (11th Cir. 1987); *Harris v. Forsyth*, 735 F.2d 1235 (11th Cir. 1984).

The monies seized from Hills cell was contraband *per se* under reasonable regulations and statutes promulgated by our legislature. Hill had no more right to complain here than if controlled substances or weapons had been seized. In view of the conclusions we reach herein, Hill's request that he be reimbursed for his fees associated with the filing of his appeal necessarily fails

The circuit court was in error in following the procedure it employed to dismiss Hill's complaint. However, in view of the opinions expressed herein, Hill had no legitimate interest in the money seized nor any due process claim over MDOC's denial of any hearing to determine ownership or source of the money. The circuit court's ultimate dismissal of Hill's claim was correct.

THE JUDGMENT OF THE CIRCUIT COURT OF SUNFLOWER COUNTY IS AFFIRMED. COSTS ARE ASSESSED TO HILL.

FRAISER, C.J., BRIDGES, P.J., BARBER, DIAZ, COLEMAN, KING, MCMILLIN, PAYNE, AND SOUTHWICK, **JJ., CONCUR.**

MCMILLIN, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY BARBER, PAYNE AND SOUTHWICK, JJ.

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APPELLEES

McMILLIN, J., CONCURRING:

I concur in the result reached in the majority opinion, but disagree that the trial court was without authority to dismiss the complaint *sua sponte* prior to a response from the defendants. In fact, I conclude that all subsequent proceedings regarding the money after the initial dismissal were beyond

the court's authority. Hill's possession of more than twenty dollars in cash in his cell is a crime under Section 47-5-194 of the Mississippi Code of 1972. Hill does not deny this violation; in fact, his complaint amounts to an admission of such violation. The mere possession of the money under those circumstances is a crime, and it matters not the source or the intended use of the funds. As such, the majority has correctly concluded that the money is contraband *per se*, which has been defined as "objects the possession of which, without more, constitutes a crime." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965). "It is well established that a claimant has no right 'to have (per se contraband) returned to him.'" *United States v. Farrell*, 606 F.2d 1341, 1344 (D.C.Cir. 1979) (quoting *United States v. Jeffers*, 342 U.S. 48, 54 (1951)). Such contraband *per se* is to be distinguished from *derivative* contraband, which are "articles which are not inherently illegal, but are used in an unlawful manner," in which a party may have some assertable property interest. *Id.* at 1344 (quoting *People v. Steskal*, 55 Ill.2d 157, 302 N.E.2d 321,323 (1973)). While it is not inherently illegal to possess money generally, it is within the power of the government to make possession of this and other otherwise legal articles illegal in certain circumstances. Certainly, there is a ready distinction that can be drawn between a homemade knife hidden in a jail cell and the work of a hobbyist craftsman, and the state's inability to confiscate the latter does not pose an impediment to the seizure of the former, nor would there appear to be any right to r eplevin the knife found in the jail cell conditioned upon its retention on behalf of the inmate pending his release. The almost self-evident proposition that illicit money, in the proper circumstance, can work a mischief equal to or greater than that caused by an illicit weapon appears a conclusion inherent in the cited statutory enactment.

Had Hill's complaint alleged facts that would suggest the possibility that the money was being held by him in circumstances that would not be in violation of Section 47-5-194, the trial court's *sua sponte* dismissal may well have been precipitous. However, Hill's complaint showed on its face that he was attempting to make a claim to contraband *per se*, and I would conclude that it was within the inherent power of the trial court to *sua sponte* adjudicate a lack of standing on the part of the defendant to commence such an action and to dismiss the complaint without the necessity of process on or response from the defendants.

Having so concluded, however, I would also suggest that all further proceedings undertaken by the circuit court regarding any exercise of jurisdiction over the defendants or over the fund of money was improper and would vacate any and all orders entered in the trial court other than the order of dismissal of Hill's complaint.

BARBER, PAYNE, AND SOUTHWICK, JJ., JOIN THIS OPINION.