

Docket No. 081344

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

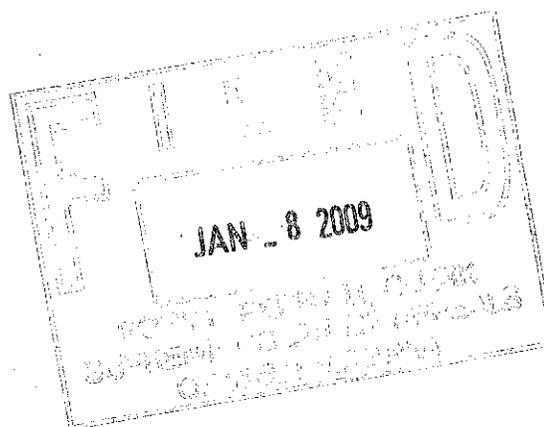
KENNETH EDWARD CHANCE, JR.,

Petitioner/Appellant,

vs.

GEORGE HILL, Superintendent, WV
Correctional Industries, Mount Olive
Correctional Complex,

Respondent/Appellee.



MEMORANDUM OF FACT AND LAW
IN SUPPORT OF PETITION FOR APPEAL

Comes now the Petitioner/Appellant (hereinafter Appellant), Kenneth Edward Chance, Jr., *pro se*, to present unto this Honorable Court, this Memorandum of Fact and Law in Support of his Petition for Appeal. By Order of this Court dated 29 December 2008, this Court granted review of the above-styled action, and ordered Appellant to file his brief in support of his petition within thirty (30) days of the entry of said Order, and the Respondent/Appellee to file his reply brief within fifteen (15) days of receipt of Appellant's brief.¹ In support of his Petition for Appeal, the Appellant respectfully offers the following.

II. **Question To Be Answered**

The question before this Court is whether or not venue for inmate civil actions within the meaning of the Prison Litigation Reform Act (PLRA), W.Va.Code, §25-1A, *et seq.*, rests solely within Kanawha County Circuit Court as Fayette County Circuit Court Judge John W. Hatcher, Jr.,

¹ Counsel for Respondent/Appellee has formally waived filing any response in this matter.

has held below in his April 15, 2008, dismissal Order of the Complaint below which this Court has previously held was not *frivolous*.² Appellant respectfully contends the answer to this question is easily **NO**, and as well that no extensive argument is needed to reach that conclusion.

III. **Statement of Facts**

- 1). On or about February 15, 2007, Appellant initiated a Complaint³ against Respondent/Appellee (hereinafter Appellee) George Hill,⁴ Superintendent of the West Virginia Correctional Industries at Mount Olive Correctional Complex in the Circuit Court of Fayette County; on the same date Judge John W. Hatcher, Jr., transferred the Complaint to Kanawha County Circuit Court asserting that pursuant to W.Va.Code, §14-2-2, the proper venue rested in that Court alone.
- 2). On April 3, 2007, Kanawha County Circuit Court Judge Tod J. Kaufman entered an Order dismissing the Complaint asserting that the Complaint was frivolous.
- 3). By Order of this Court in the matter of Kenneth Edward Chance, Jr., v. George Hill, Superintendent, West Virginia Correctional Industries, Mount Olive Correctional Complex, Order No. 33855, dated March 4, 2008, the summary dismissal Order was reversed, vacated, and the Complaint reinstated, remanded back to the circuit court with instructions to issue service of process.

² Said conclusion being drawn by this Court's reversal of Judge Tod J. Kaufman's summary dismissal Order holding the Complaint to be frivolous.

³ The Complaint set forth claims of Breach of Contract, Retaliation, Abuse of Authority/Discretion, Denial of Due Process. All of the claims arose from Appellee terminating Appellant from an inmate job position in retaliation of Appellant successfully pursuing a personal injury claim against Appellee for gross negligence, etc.

⁴ The Complaint specifically alert Appellee that he was being sued in his individual capacity for monetary damages.

- 4). On April 4, 2008, Judge Kaufman entered an Order transferring the Complaint back to Fayette County Circuit Court.
- 5). Various motion were filed in Kanawha and Fayette County Circuit Courts in this matter prior to this second erroneous dismissal; **By Appellant:** Motion for Appointment of Counsel; Motion for Entry of Time Frame Order; Motion for Order; Motion for Protective Order;⁵ Motion to Compel Production; **By Appellee:** - on April 2, 2008,⁶ defense counsel Mark E. Troy, Esq., of Bailey & Wyant, P.L.L.C., filed a Motion to Dismiss alleging various immunity theories.⁷
- 6). On April 15, 2008, Judge Hatcher entered a dismissal Order which concluded venue for this action rested solely in Kanawha County Circuit Court.

IV. Memorandum of Fact and Law in Support of Petition for Appeal

It cannot be disputed that the PLRA is the conclusive statute governing inmate litigation in state courts relating to issues of conditions of confinement. W.Va.Code, §25-1A-2, provides in full:

“Civil action” means any action or appeal from an action filed by any current or former inmate or his or her representative with respect to conditions of

⁵ On April 3, 2008, defense counsel was at the MOCC when he had several inmates summoned to the Classification area, at which time these inmates were placed under oath and were questioned by defense counsel relating to matters contained in the Complaint. All of the inmates questioned as well informed Appellant that defense counsel has informed them on record that he represented Appellant rather than Appellee. Appellant filed for a protective order asserting that what defense counsel was doing at the MOCC on 4/3/08 constituted “depositions,” from which he had not obtained a Court Order (approval) pursuant to Rule 30(a), R.C.P., nor had he provided advance notice pursuant to Rule 30(b), R.C.P., etc. The motion to compel production was to compel Mr. Troy to produce copies of the tapes and transcripts of the “depositions” to Appellant. Mr. Troy in turn sought costs against Appellant asserting he (Mr. Troy) was doing nothing more than conducting his own “investigation,” and that the tapes/transcripts were “work product,” thus protected from discovery.

⁶ Defense counsel previously filed a Notice of Bona Fide defense on or about March 31, 2008; the bona fide defense was nothing more than frivolous immunity arguments.

⁷ Appellant informed the circuit court that he intended to file a response to the motion to dismiss, but Judge Hatcher dismissed the Complaint before that response counsel be completed and filed.

confinement, including, but not limited to, petitions for extraordinary writs, civil actions under 42 U.S.C. §1983 and other federal and state laws and negligence actions. Actions that exclusively concern an inmate's sentence or conviction are not subject to the requirements of this article.

There is no language whatsoever within the PLRA that civil actions be brought solely in Kanawha County Circuit Court, which there certainly would be if the circuit court's statutory application/interpretation were correct. As stated, the sole purpose of the PLRA is to deal with inmate litigation regarding conditions of confinement. The circuit judge contends for the purposes of this case that venue for the underlying Complaint rests solely in Kanawha County Circuit Court, but the statutory application of W.Va.Code, §14-2-2, is not one which Judge Hatcher uniformly applies.

I.

Appellant contends that within the PLRA there exists a clear indication that venue for inmate civil actions over conditions of confinement can in fact be entertained within the circuit court of the county where the prison is situated, as opposed to just in Kanawha County Circuit Court. W.Va.Code, §25-1A-3(c), provides in full:

The custodian of the inmate's trust account shall place all funds deducted from the inmate's trust into a special account designated as the "filing fees account", to be established for each correctional facility and to be administered by the custodian and warden or chief administrator of each facility. **Biannually the custodian and warden or chief administrator of the filing fees account shall distribute the balance of the account, minus any expense in maintaining that account, to the circuit clerk of the county in which the state correctional facility resides as a filing fee for all suits filed by indigent inmates of that facility.**⁸

⁸ A plain interpretation of this section makes clear that an inmate could be "indigent" and therefrom not be required to pay a filing fee, yet this does not occur and there is no written criteria for making a indigency determination for an inmate litigant.

Emphasis added.

This section of the PLRA clearly would be an indication that inmates can file civil actions in the circuit court of the county in which the prison is located, why else would the Legislature direct that the filing fees from all actions within the definition of W.Va.Code, §25-1A-1(a), be distributed to the clerk of the circuit court in which the prison is located to pay for filing fees of indigent inmates?

Appellee in this action is, of course, a state employee. However, from the styling of the parties in the Complaint, it was clear that Appellant was suing Appellee in his individual capacity for monetary damages, and in his official capacity for injunctive and declaratory relief. The injunctive relief was in the form of job reinstatement at the former position and job category/pay, all of which involve entry of an Order to have effect in Fayette County, for that event which occurred within Fayette County. Declaratory relief is to declare that Appellee's acts were unconstitutional. No actual state agency was named as a party of this action as it was Appellee who acted in the abusive, unconstitutional manner on his own, not as Correctional Industries. W.Va.Code, §14-2-2(a)(1), plainly states that any suit in which a "state officer" is made a party defendant shall be brought and prosecuted solely in Kanawha County Circuit Court, but the PLRA certainly supercedes that requirement in actions brought by inmates relating to conditions of confinement. Furthermore, even if Judge Hatcher is correct in his statutory interpretation/conclusion, certainly Judge Kaufman made the persuasive argument for his decision to transfer back to Fayette County Circuit Court when, on unnumbered page 3, ¶2, the judge said:

This is a fact-driven case that, unlike habeas corpus, may require fact finding and not just a legal determination. In support of the Court's decision to transfer the instant case, the Court feels it imperative to point out that (a) the

Plaintiff is an inmate at the Mount Olive Correctional Complex located in Fayette County; (b) the Defendant is the Supervisor of the Mount Olive Correctional Complex located in Fayette County;⁹ (c) the Plaintiff's causes of action arose from actions alleged to have occurred at the Mount Olive Correctional Complex; (d) the potential witnesses are individuals located in Fayette County; (e) it would clearly be more convenient and cost-efficient for all those involved (including our state's taxpayers) for those people to remain in Fayette County without the expense or time for travel; and (f) *the safety and security of the parties/witnesses are best served by the case being heard in Fayette County, close to where the parties and witnesses reside.*¹⁰ Therefore, the Court finds, for all of the above-stated reasons, that the matter can be heard substantially more inexpensively and expeditiously in Fayette County than in Kanawha County or any other county in the State.

Italics in original.

II.

Inmate litigants, for a lack of better description, are being bounced back and forth between Fayette and Kanawha County Circuit Courts, with the decision on venue being decided by whether a particular judge wants to hear an issue or wants a particular litigant not before that judge, not whether or not W.Va.Code, §14-2-2, mandates any action naming a state official as defendant/respondent be heard solely in Kanawha County Circuit Court. Take these examples in consideration. In the underlying case here, Judge Hatcher invoked W.Va.Code, §14-2-2, asserting that any action naming a state official as a defendant/respondent belonged solely in Kanawha County. Yet in Custer v. [MOCC Warden Thomas] McBride, Civil Action No. 06-C-465-H, he did

⁹ Judge Kaufman erred here - Defendant is the Supervisor of the Correctional Industries at the Mount Olive Correctional Complex.

¹⁰ Judge Kaufman obviously means that within this reason, that the safety and security pertains to inmates being removed from the MOCC to testify. By Judge Hatcher's conclusions, §14-2-2 would mandate that every inmate civil action be heard solely in Kanawha County Circuit Court would, at some point and time during those actions, require that the inmate litigant(s) and inmate witnesses, would have to be transported to Kanawha County Circuit Court instead the much closer Fayette County Circuit Court for any hearing/trial.

not invoke such statutory provision, but rather entertained the action and issued a Court Order.¹¹ Next take a few decisions of Kanawha County Circuit Court Judge Jennifer Bailey Walker. In the case of State ex rel. Paul R. Robinson v. Jim Rubenstein, et al., Civil Action No. 05-MISC-115,¹² Judge Walker entered an Order transferring the civil action to Fayette County Circuit Court stating it was an action relating to conditions of confinement at MOCC which was proper in Fayette County Circuit Court.¹³ Yet in the case of Franklin v. Rubenstein, et al., Civil Action No. 02-MISC-160 & 163,¹⁴ civil actions which dealt with conditions of confinement at the MOCC, Judge Walker did not transfer those cases to Fayette County Circuit Court.

V. Conclusion and Relief Sought

Appellant believes this is indeed an odd case, because while the dismissal Order says one thing, when section "II" above is read, it leaves this Appellant scratching his head as to where the illusive Article III, §17, of the West Virginia Constitution is? Appellant is entitled to present his case on its merits, yet he cannot get his day in court because the case keeps getting dismissed. In fact, Appellee Hill is known for have been going around asking inmates, sarcastically of course, just how many times a lawsuit could be dismissed before it is dismissed. This is the first time Appellant

¹¹ Appellant erred on page 8 of the Petition for Appeal in the citation for a civil action. The correct citation is Goodmon v. McBride, Civil Action No. 06-C-30-H.

¹² This extraordinary writ dealt with two issues: (1) the inmate being disciplined by prison officials for violating a "secret" prison rule, which throughout the entire disciplinary process prison officials admitted there was NO WAY the inmate could have known about the secret rule; and, (2) the inmate was fired from his inmate job position because he obeyed the direct order of a Sergeant for the inmate to immediately return to his assigned cell for a formal security head count.

¹³ Where Judge Hatcher promptly dismissed it asserting it to be frivolous.

¹⁴ These extraordinary writ cases dealt with disciplinary issues, including over the 2000 Sitdown disturbance at the MOCC. These cases are still ongoing, in that there has been no dispositive Order entered in those cases yet.

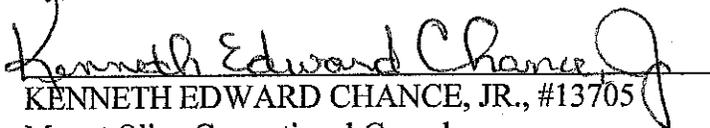
knows of where a circuit judge has dismissed an action because that judge did not like that another circuit judge disagreed with him. Judge Hatcher dismissed the underlying Complaint because Judge Kaufman transferred it back to him. As shown above in just the few cases cited, Judge Hatcher has not applied his interpretation/conclusions relating to W.Va.Code, §14-2-2 uniformly. If Judge Hatcher truly believed his position was correct, rather than taking the harsh action of dismissal, Appellant believes the judge should have suspended the case and certified the question to this Court to be answered.

Appellant believes that it is clear based upon all of the above that the circuit court below is in error, that the circuit court in which any state prison facility is located can in fact entertain any inmate civil action against any state official relating to conditions of confinement. Accordingly, Appellant prays that this Honorable Court will grant this appeal, thereafter vacating the dismissal Order of April 15, 2008, and remand the action back to the circuit court which this Court deems to be the proper court of venue.

Respectfully submitted;

KENNETH EDWARD CHANCE, JR.,
Petitioner/Appellant, *Pro Se*.

By;


KENNETH EDWARD CHANCE, JR., #13705

Mount Olive Correctional Complex
1 Mountainside Way
Mt. Olive, WV 25185

Petitioner/Appellant, *Pro Se*.

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF FAYETTE, to wit:

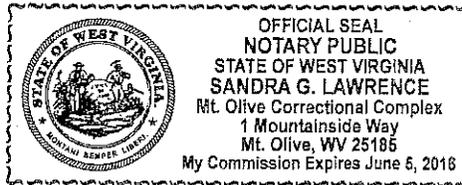
I, Kenneth Edward Chance, Jr., first being duly sworn according to law, do hereby depose and say that the foregoing information contained within this Memorandum of Fact and Law in Support of Petition for Appeal, is true and correct to the best of my knowledge and understanding, except that which may be based upon information, then which I have formulated a belief as to its truthfulness.

Kenneth Edward Chance, Jr.
KENNETH EDWARD CHANCE, JR., #13705

Taken, subscribed and sworn this 6th day of January, 2009.

Sandra Lawrence
NOTARY PUBLIC

My Commission Expires:

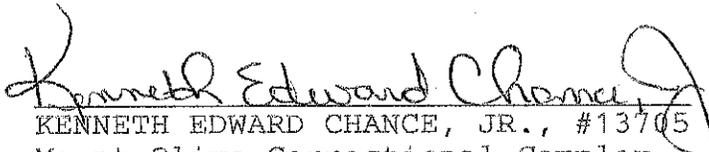


CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Memorandum of Fact and Law in Support of Petition for Appeal has been duly served upon counsel of record for the Respondent/Appellee by placing same in the United States Mail, postage prepaid, this 7 day of January, 2009, addressed as follows:

Mark E. Troy, Esq.
Bailey & Wyant, PLLC
P.O. Box 3710
Charleston, WV
25337-3710

By;


KENNETH EDWARD CHANCE, JR., #13705
Mount Olive Correctional Complex
1 Mountainside Way
Mt. Olive, WV 25185

Petitioner/Appellant, *Pro Se*