In The

Supreme Court of Virginia

RECORD NO. 102270

JENNIFER BING,

Appellant,

v.

TERESA W. HAYWOOD, *et al.,*

Appellees.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

1. The trial court erred by sustaining Defendants' Special Pleas, by holding that Plaintiff's claim was barred by the statute of limitations, and by dismissing with prejudice the instant cause of action. (A. 43-44, 47)

QUESTION PRESENTED

1. Did the trial court err by sustaining Defendants' Special Pleas, by holding that Plaintiff's claim was barred by the statute of limitations, and by dismissing with prejudice the instant cause of action. (A. 43-44, 47) This Question Presented relates to Assignment of Error # 1.

NATURE OF CASE AND MATERIAL PROCEEDINGS IN TRIAL COURT

This case involves a suit for personal injuries by Plaintiff, Jennifer Bing ("Bing" or "Appellant"), arising from an illegal cavity search performed on Bing by Teresa Haywood, Teddy Bagby and Mary Hodges (collectively referred to as "Appellees" or "Defendants"), who were employees of the Middle Peninsula Regional Security Center ("the Security Center"). Bing's Complaint alleged that she was arrested by a Matthews County Sheriff's Department deputy on the evening of May 28, 2008. (A. 2-3) The Complaint further alleged that the deputy who arrested Bing transported her to the Security Center and requested that Defendants perform a cavity search on her prior to processing and receiving her as an inmate. The

arresting deputy requested the cavity search because he suspected that Bing might be hiding narcotics on her person from the time of her arrest. (A. 3) Early in the morning of May 29, 2010, Defendants conducted the illegal cavity search of Bing, searching her anus and vagina without a court order in violation of state law and federal law, and in violation of the policies in place at the Security Center. (A. 4-5)

On May 20, 2010, Bing filed the instant Complaint. The Complaint contained three counts arising under state law: 1) assault and battery; 2) illegal search in violation of Virginia and federal law; and 3) intentional infliction of emotional distress. (A. 5-7) Bing also sought punitive damages. (A. 7-8) On June 9, 2010, Defendants filed a special plea claiming that Bing's state law allegations were barred by the one-year statute of limitations contained in the so-called "inmate statute," Va. Code § 8.01-243.2. (A. 18) On August 13, 2010, the trial court conducted a hearing on this issue, but heard no evidence. At the conclusion of this hearing, the Court granted Defendants' special pleas and dismissed the case with prejudice. (T. 43-44)

The final order dismissing the case was entered on September 3, 2010. (A. 45) Bing timely filed a Notice of Appeal and timely filed the transcript of the pertinent proceedings. In this Opening Brief, Bing

requests that the Court reverse the trial court's ruling that her action was time-barred and remand the case for a jury trial.

STATEMENT OF FACTS

At the hearing held on August 13, 2010, the trial court heard no evidence. However, counsel for Defendants conceded that Bing was a pre-trial detainee who had been arrested for various offenses, but had not been convicted, at the time of the illegal cavity search. (A. 23) Defendants argued that it made no difference whether Bing was a pre-trial or post-trial detainee for purposes of applying the one-year statute of limitations contained in Va. Code § 8.-01-243.2. (A. 26) Bing responded that this case did not arise from the "conditions of her confinement," but rather that the illegal search was part of the *res gestae* of her arrest. (A. 32-33) Accordingly, Bing asserted that the two-year statute of limitations for personal injuries, Va. Code § 8.01-243(A), applied and that, therefore, her complaint was timely filed within two years of the illegal search.

The Court conceded that the issue of whether a pre-trial detainee is covered by the one-year limitation period of the "inmate statute", or the two-year limitation period applicable to most personal injury actions, is a question of first impression in Virginia. (A. 34-35) The Court also acknowledged that its ruling "seems to give a crazy result" whereby the

victim of an illegal cavity search outside the jail is covered by a two-year statute of limitations, but the victim of a cavity search inside the jail is covered by a one-year limitation. (A. 43)[1] However, the trial court, nonetheless, concluded that the one year statute of limitations applied and granted Defendants' special pleas. (A. 43-44)

ARGUMENT

I. THE TRIAL JUDGE ERRED BY SUSTAINING DEFENDANTS' SPECIAL PLEAS IN BAR AND BY DISMISSING THIS CASE WITH PREJUDICE BECAUSE VA. CODE § 8.01-243.2 DID NOT APPLY IN THE PRESENT CASE.

A. Standard of Review

In reviewing the trial court's ruling sustaining Defendants' pleas in bar/motions to dismiss and dismissing Appellant's Complaint with prejudice, the Court reviews this purely legal determination *de novo*. In *Ogunde v. Commonwealth*, 271 Va. 639, 644, 628 S.E.2d 370, 372 (2006), this Court held that the "trial court's ruling regarding which statute of limitations applies was based upon the pleadings and presents a pure question of law to be reviewed de novo by this Court." Thus, this Court

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[1] The trial court also relied on an unpublished opinion from Judge Spencer from the Eastern District of Virginia which held that a pre-trial detainee was covered by the shorter limitation of the inmate statute. *See Harris v. Commonwealth*, 2008 U.S. Dist. LEXIS 33834 (E.D. Va. 2008).

should review *de novo* the trial court's decision that the one-year limitation period of Va. Code § 8.01-243.2 applied rather than the two-year statute of limitations of Va. Code § 8.01-243(A).

B. The Trial Court Erred by Applying the Wrong Statute of Limitations because Bing was not a "Person Confined in a State or Local Correctional Facility" and her Complaint Did Not Relate to the Conditions of her Confinement

It is a question of first impression in this Court whether a citizen who has been the victim of an illegal cavity search conducted at a local jail shortly after her arrest, at the request of the arresting officer, is governed by the inmate statute's one year limitation period. Va. Code § 8.01-243.2 provides that "[n]o person confined in a state or local correctional facility shall bring ... any personal action relating to the conditions of his confinement" more than one year after the cause of action accrues.[2] Thus, in order for the one-year statute of limitations of the "inmate statute" to apply, Appellees had to show two things: 1) that Bing was a person confined in a state or local correctional facility; and 2) the instant Complaint

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[2] The code section also provides that a covered plaintiff must exhaust all administrative remedies before filing suit. However, no evidence was presented at the hearing on this matter in the trial court as to whether such remedies were available to Bing and whether she availed herself of them. Moreover, the record in this case does not even indicate whether Bing was held continuously in custody until her trial, or whether, in fact, she bonded out on the charges which led to the illegal cavity search.

was a "personal action relating to the conditions of (her) confinement." Appellees failed to demonstrate that either prerequisite existed for application of the shorter limitation period contained in the inmate statute. In a similar case, applying Virginia law, the United States District Court for the Eastern District of Virginia held that an allegation of an illegal search and seizure "is characterized under Virginia law as a personal injury" and the applicable statute of limitations for such actions is two years. *See Cramer v. Crutchfield*, 496 F. Supp. 949, 952 (E.D. Va. 1980), *aff'd*, 648 F.2d 943 (4th Cir. 1981). In *Cramer*, the Court emphasized that "Virginia's two-year statute of limitations for personal injuries has also been adopted for use in all actions brought under 42 U.S.C. § 1983." *Id.* Thus, where a plaintiff, such as Bing, has alleged an illegal search in violation of state or federal law, the courts have consistently applied the two-year statute of limitations prescribed by § 8.01-243(A).

Appellees contend that this general rule of law does not apply to Bing's complaint because she was a "confined" person under Va. Code § 8.01-243.2 and her Complaint challenged the conditions of her confinement. The trial court agreed with this misinterpretation of the statute. This Court has not addressed a situation analogous to Bing's assertion that she was the victim of an illegal cavity search conducted as

part of the *res gestae* of her arrest and at the request of the arresting officer. Moreover, Appellees have cited not a single published opinion to support their novel interpretation of the inmate statute that it applies to pre-trial detainees. In *Ogunde*, this Court reversed the trial court's finding that the shorter statute of limitations prescribed by Va. Code § 8.01-243.2 applied to a claim brought under the Virginia Tort Claims Act. In *Ogunde*, plaintiff was a prisoner incarcerated at a state correctional facility who alleged that prison employees were negligent in assigning him to an upper bunk at the prison and allowing him to fall when he climbed down from his bunk. *Ogunde*, 271 Va. at 641. Ogunde timely filed a notice of claim under the Tort Claims Act; the Commonwealth filed a plea in bar claiming that Ogunde's action "was barred under Code § 8.01-243.2 (the inmate statute), which **limits the time that persons confined in correctional facilities may bring actions pertaining to conditions of their confinement**." *Id.* (emphasis added) As in the present case, the Court had to decide if the inmate statute applied, in which case the complaint was time-barred, or if the longer limitation of the Tort Claims Act applied. *Id.* at 642-643.

The Commonwealth asserted that the inmate statute should apply because it was a more specific statute of limitations applying only to

prisoners, while the Tort Claims Act applied to all plaintiffs. *Id.* This Court disagreed. The Court first declined to reach the question of whether the litigation arose from the conditions of Ogunde's confinement: "we do not reach for decision the question whether this inmate's action involving allegedly negligent conduct of state employees relates to 'the conditions of his confinement,' as that phrase is used in the inmate statute." *Id.* at 643. The Court assumed, without deciding, that Ogunde's action did relate to the conditions of his confinement. *Id.* Importantly, the Court held that it would not impute to the General Assembly "an intention to repeal" the limitations provisions of the Tort Claims Act because "the implied repeal of an earlier statute by a later enactment is not favored." *Id.* at 644, quoting *Sexton v. Cornett*, 271 Va. 251, 257, 623 S.E.2d 898, 901 (2006), *superceded on unrelated grounds by statute* (2007). Finally, the Court held, in dictum, that the inmate statute "is not limited to tort actions" but "may cover, for example declaratory judgment actions, suits for injunctive or other equitable relief, and mandamus petitions, so long as they relate to the conditions of a prisoner's confinement." *Id.* at 644-645.

More recently, this Court reversed a trial court and affirmed that a two-year statute of limitations applies to § 1983 actions brought in state court. In *Billups v. Carter*, 268 Va. 701, 604 S.E.2d 414 (2004), plaintiff, a

female prisoner in a state correctional facility, brought an action under 42 U.S.C. § 1983 in state court against the Department of Corrections and an employee who had coerced plaintiff into having sex with him. *Billups*, 268 Va. at 705. Plaintiff included a count for assault against the prison employee. The trial court held that the one year limitation of the inmate statute applied. This Court reversed. It first noted that this statute "governs personal actions brought by inmates of correctional institutions relating to the conditions of their confinement." *Id.* at 710. The Court underlined that "[o]ur general or residual statute of limitations provides ... that every action for personal injury 'whatever the theory of recovery ... shall be brought within two years after the cause of action accrues.'" *Id.* Therefore, the Section 1983 actions were timely because they were brought within two years of the last assault on plaintiff. *Id.*[3]

Finally, in the context of Section 1983 actions, the United States Supreme Court has held that "where state law provides multiple statutes of

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[3] The common law battery account against the correctional employee was governed by the one year limitation period of Va. Code § 8.01-243.2 because it related to the conditions of her confinement. However, her suit was timely because it was filed within six months of her exhaustion of her administrative remedies. This finding is distinguishable from the instant case. Unlike plaintiff in *Ogunde*, Bing was not an inmate at a state correctional facility who was challenging the conditions of her confinement post-conviction. Rather, she was challenging an illegal cavity search performed pursuant to her recent arrest, but at the jail.

limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions." *Owens v. Okure*, 488 U.S. 235, 249-250 (1989).

Applying these precedents to the instant case, the trial court erred by applying the one-year limitation prescribed by Va. Code § 8.01-243.2. This Court has not addressed the issue of whether a pre-trial detainee who alleges an illegal search as part of the *res gestae* of her arrest is governed by the inmate statute with a one-year limitation period or the residual personal injury limitation of two years. However, both *Ogunde* and *Billups* reversed the trial court's decision to apply the shorter statute of limitations. The defendants in both of those cases had been convicted of crimes, sentenced to serve prison terms, and were actually serving prison terms in a state correctional facility at the time their causes of action accrued. Bing, by contrast, had only been arrested hours before her cause of action arose. In fact, the sheriff's deputy who arrested Bing was the individual who requested the illegal cavity search because he suspected that she might have secreted drugs in a body cavity. It is clear that Bing was not confined in a correctional facility at the time of the illegal search, and that the one year limitations statute is designed only to apply to "persons confined in correctional facilities" who are challenging the "conditions of

their confinement."). *Ogunde*, 271 Va. at 641. *Accord Billups*, 268 Va. at 710 (inmate statute "governs personal actions brought by inmates of correctional institutions relating to the conditions of their confinement."). Bing was neither confined in a correctional facility, nor does she challenge the conditions of her confinement. Instead, Bing filed suit to seek redress for an illegal cavity search conducted as part of her arrest.

Additionally, Bing's cause of action is closely analogous to actions brought in state court for violations of federal civil rights laws. As described more fully above, case law has definitively established that the residual two year limitation statute, Va. Code § 8.01-243(A), applies to such cases. Moreover, the holding in *Owens* suggests that where two possible limitations periods apply, the Court should borrow the general or residual limitation period, in this case the two year limitation of § 8.01-243(A). Finally, had the legislature intended that the one year provision of Section 8.01-243.2 should apply to pre-trial detainees challenging the legality of a search carried out as part of her arrest, it could have made clear that this was the intention of the statute. To the contrary, the plain language of the statute strongly suggests that it should only apply to prison or jail inmates challenging the conditions of their confinement post-conviction. Because Bing contested an illegal search conducted

within hours of her arrest, at the behest of the arresting officer, not the conditions of her confinement post-conviction, the trial court erred by applying the one year limitation period contained in the inmate statute.

In their Brief in Opposition to Bing's petition, Appellees erroneously assert that the cavity search performed on her "was as much a condition of her confinement as the food she ate and the bed she slept on." Brief in Opposition at 6. Appellees' argument might have some merit if the jail routinely conducted cavity searches for **all** inmates processed for entry at the jail. However, the jail's rules expressly proscribed cavity searches without a court order. Indeed, at the time of the illegal search, the Correctional Center had a written policy which in two separate places forbade cavity searches unless performed pursuant to a court order. (A. 4) Moreover, it is hard to see how Bing's illegal search was part of the conditions of her confinement when it was carried out at the behest of the arresting officer before she was even assigned a cell. Clearly, Bing's cause of action relates to an illegal search conducted as part of her arrest, not to the conditions of her confinement.

Appellees' Brief in Opposition also argued that the trial court's ruling was correct based on a comparison with the federal Prison Litigation Reform Act ("the PLRA") and the case of *Porter v. Nussle*, 534 U.S. 516,

532 (2002). However, neither the federal law, nor the decision in *Porter* is apposite. In *Porter*, the United States Supreme Court did not address a statute of limitations issue. Rather, "this case concerns the obligation of prisoners who claim denial of their federal rights while incarcerated to exhaust prison grievance procedures." *Id.* at 519. The underlying law, the PLRA prohibited § 1983, or other actions, "with respect to prison conditions" until the inmate had exhausted administrative remedies. *Id.* at 520. Unlike, Bing, the plaintiff in *Porter* was an inmate at a state correctional facility. The Court in *Porter* held that allegations of specific instances of excessive force by state prison officials were suits relating to "prison conditions" triggering the requirement of exhaustion of administrative remedies: "we hold that the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes ...." *Id.* at 532.

Thus, if Bing were a state prison inmate challenging a purportedly illegal cavity search, and had not exhausted her administrative remedies prior to commencing such a suit, *Porter* would likely bar her cause of action. However, *Porter* did not address the temporal argument that Bing makes: namely, that a suit challenging an illegal cavity search shortly after an inmate's arrest conducted at the behest of the arresting officer is simply

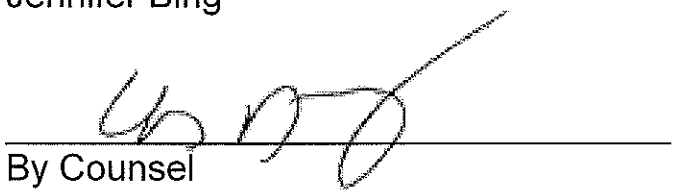
not a suit challenging conditions of confinement. Perhaps the best evidence that the illegal search did not challenge the conditions of Bing's confinement can be found in the Correctional Center's policies and procedures which expressly prohibited cavity searches performed without court order. Far from being a condition of her confinement at the Correctional Center, the cavity search was outlawed without a court order. The trial court erred because the shorter statute of limitations prescribed by Va. Code § 8.01-243.2 did not apply in this case. Bing was not an inmate confined in a state or local correctional facility. More importantly, Bing's suit, challenging an illegal cavity search performed at the request of the arresting officer, shortly after her arrest, before she was even assigned a jail cell, and in violation of the jail's policies and procedures, did not relate to the conditions of her confinement.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Appellant, Jennifer Bing, respectfully requests the Court to reverse the trial court's ruling improperly dismissing the case with prejudice, and to remand the case for a jury trial against these Appellees.

Respectfully submitted,

Jennifer Bing



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CERTIFICATE

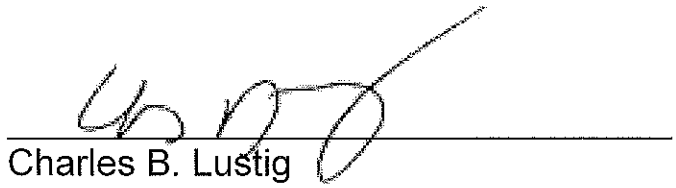
Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, counsel for the Plaintiff/Appellant certifies as follows:

(a) The appellant is Jennifer Bing, who is represented by Robert J. Haddad, VSB # 22298, rhaddad@srgslaw.com, and Charles B. Lustig, VSB # 29442, clustig@srgslaw.com, Shuttleworth, Ruloff, Swain, Haddad & Morecock, P.C., 4525 South Boulevard, Suite 300, Virginia Beach, VA 23452, tel. (757) 671-6057 (Haddad), (757) 671-6057 (Lustig), facsimile (757)-671-6004.

(b) The appellees are Teresa Haywood, Teddy Bagby, and Mary Hodges who are represented by Robert A. Dybing, VSB # 32712, rdybing@t-mlaw.com, Thompson McMullan, P.C., 100 Shockoe Slip, Richmond, VA 23219, tel. (804) 698-6248, facsimile (804) 780-1813.

(c) Fifteen (15) bound copies and one (1) electronic copy on CD of the foregoing Opening Brief of Appellant and Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia, and the required number of bound copies and one electronic copy on CD of the same have been served, via UPS Ground Transportation, to counsel for the Appellee's at the above address, this 25th day of May, 2011.

(d) Counsel for appellant requests oral argument on this Opening Brief.



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