IN THE

Supreme Court of Virginia

RECORD NO. 102270

JENNIFER BING,

Appellant,

v.

TERESA W. HAYWOOD, ET AL.,

Appellees.

BRIEF OF APPELLEES TERESA W. HAYWOOD, SGT. TEDDY BAGBY, AND LT. MARY HODGES

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STATEMENT OF THE CASE

The plaintiff, Jennifer Bing, sued Teresa Haywood ("Haywood"), Sgt. Teddy Bagby ("Bagby"), and Lt. Mary Hodges ("Hodges") (collectively, the "Appellees"), for personal injuries based on an allegedly illegal body cavity search conducted at the Middle Peninsula Regional Security Center ("the Security Center") on May 29, 2008. The Complaint, which was filed on May 20, 2010, raised three counts: Count I—Assault and Battery; Count II—Illegal Search; and Count III—Intentional Infliction of Emotional Distress. Appendix ("A.") 1-8.

Bing's Statement of the Case incorrectly states that Count II relates to violations of both "Virginia and federal law." See Brief of Appellant ("App. Br."), p. 2. To the contrary, the parties filed with the trial court their Stipulation that the Complaint "sets forth state-law causes of action only, and does not purport to set forth a cause of action under 42 U.S.C. § 1983 or under any other federal statute." A. 17.

The Appellees filed an Answer and Affirmative Defenses, a Demurrer to Count III, and—as relevant to this appeal—a Special Plea of the Statute of Limitations based on Virginia Code § 8.01-243.2, which sets a one-year statute of limitations for conditions-of-confinement claims by persons confined in state and local correctional facilities. A. 9, 14, 18.

On August 13, 2010, after a hearing on the Special Plea, the trial court sustained the Special Plea and dismissed the case, with prejudice. The trial court's Order was entered on September 3, 2010. A. 47.

STATEMENT OF FACTS

Bing alleged that after she was arrested by a Matthews County deputy sheriff on May 28, 2008 for drug possession, the arresting officer took her to the Security Center. The arresting officer had found contraband in his police cruiser, and told Security Center staff that Bing might be hiding narcotics on her person. The officer also recovered a bottle from the plaintiff, which Bing said she used to pass urinalysis tests. Accordingly, the arresting officer asked Security Center officials to search Bing's body cavities. A. 3 (Complaint, ¶¶ 9, 11).

The Security Center received custody of Bing shortly after midnight in the early morning of May 29, 2008. A. 2, 3 (Complaint, ¶¶ 2, 12). Haywood was the Security Center's medical supervisor, Bagby the shift commander, and Hodges a lieutenant in charge of programs and support. A. 4 (Complaint, ¶ 4). Bing alleged that with Bagby's authorization, Haywood and Hodges searched her body cavities without a court order. The search took place on May 29, 2008. A. 5 (Complaint, ¶ 18). The search took place at the Security Center. A. 6 (Complaint, ¶ 25).

Bing incorrectly states that "Early in the morning of May 29, 2010 [sic], Defendants conducted the illegal cavity search ...." See App. Br., p. 2. However, that year is clearly mistaken; the search occurred in 2008, not 2010. A. 5 (Complaint, ¶ 18).

Bing alleged that the cavity search, conducted without a search warrant, violated state law, a Virginia Attorney General's opinion, and the established policies of the Security Center. A. 4 (Complaint, ¶¶ 13-17).

Bing's Complaint was filed May 21, 2010. A. 1 (per Date Stamp).

The Appellees' Special Plea of the Statute of Limitations asserted that because the Complaint was filed more than one year after the incidents complained of, the lawsuit was barred in its entirety by the one-year statute of limitations set forth in Va. Code § 8.01-243.2.

PRINCIPLES OF LAW AND ARGUMENT

STANDARD OF REVIEW

The standard of review of a trial court's determination that a cause of action is barred by the statute of limitations is a question of law that is reviewed *de novo* by this Court. *See Ogunde v. Commonwealth*, 271 Va. 639, 644, 628 S.E.2d 370, 372 (2006).

STATUTE OF LIMITATIONS APPLIES TO BING

The applicable statute of limitations is set forth in Va. Code § 8.01-243.2, which 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." That statute of limitations applies to Bing because at the time of the incident about which she complains; (i) Bing was "confined" in a local correctional facility, *see* A. 1-2 (Complaint, ¶¶ 1, 2) (Bing "was in the custody and control" of the Security Center); and (ii) Bing's claim unquestionably "relates to" to the conditions of her confinement at the Security Center. (The statute also contains an exhaustion-of-remedies provision which was not mentioned by Bing, and is not implicated in this appeal).

Bing Was Confined at the Security Center

Bing argues that she was not a person confined in a state or local correctional facility. App. Br. pp. 5-6. That argument, however, never gets out of the starting blocks because Bing alleged that at the time of the search she was in the "custody and control" of the Security Center. A. 1-2 (Complaint, ¶ 1). She further alleges that the search was conducted by Security Center employees acting in the course of their employment. A. 5 (Complaint, ¶ 20). Moreover, Bing repeatedly alleged that the cavity search was in violation of the Security Center's policies and procedures. A. 4 (Complaint, ¶¶ 13, 16-17). That last allegation makes no sense unless

Bing was at the Security Center when the search took place. Thus, Bing was unquestionably "confined" at the Security Center when she was searched.

Bing's Status as Pretrial Detainee is Irrelevant

Because Bing was a "person" and was "confined" at the Security Center when she was searched, she falls within the purview of the statute of limitations. She nevertheless argues that she was not "confined" within the meaning of Va. Code § 8.01-243.2, because she was a pre-trial detainee—not yet convicted of a crime—when the search was conducted. App. Br., pp. 6-7. That argument fails because the statute of limitations does not differentiate between pre-trial detainees and convicted inmates. The law begins with the words "[n]o person confined ...." Thus, by its express terms the statute applies to persons confined, generally, and not to only a sub-set of confined persons comprising only convicted inmates.

When a statute contains no express definition of a term—such as "person confined"—the general rule of statutory construction is to infer the legislature's intent from "the plain meaning of the words." See *City of Virginia Beach v. Flippen*, 251 Va. 358, 362, 467 S.E.2d 471, 473-74 (1996); *Marsh v. City of Richmond*, 234 Va. 4, 11, 360 S.E.2d 163, 167 (1987). The General Assembly routinely uses the terms "person confined"

or "persons confined" or similar terms to include both pre-trial detainees as well as convicted inmates. For example:

Va. Code § 53.1-69 authorizes the Corrections Board to limit the "confinement of prisoners" in local correctional facilities, which, in context, must include both detainees and convicts, because both categories of inmate are "prisoners."

Va. Code § 53.1-129 refers to "*persons confined* in the jail of such county or city who are awaiting disposition of, or serving sentences imposed for, misdemeanors or felonies ...." (emphasis supplied). There, the General Assembly used the term "persons confined" expressly to include not only convicted inmates, but pre-trial detainees—i.e., those who are "awaiting disposition of" their charges.

Va. Code § 8.01-271.1 applies sanctions provisions to pleadings filed by "persons confined" in a state or local correctional facility. That statute necessarily applies to both convicted inmates and pre-trial detainees.

Va. Code § 18.2-55 criminalizes assaults by "persons confined" in correctional facilities. Again, that statute makes sense only if it applies to both detainees and convicts.

Moreover, the General Assembly knows the difference between pretrial detainees and convicted inmates. Compare, *e.g.,* Va. Code

§ 19.2-152.4:3 (relating to services "for those who are detained in jails … [and] awaiting an initial bail hearing before a magistrate") with Va. Code § 19.2-163.4:1 (providing for repayment of representation costs by convicted persons). Surely, had the General Assembly wished to limit § 8.01-243.2 to lawsuits filed by convicted inmates, it would have said so. Instead, the phrase "[n]o person confined" is manifestly of general application and applies to pre-trial detainees such as Bing as well as to convicted inmates. *See Chappell v. Perkins*, 266 Va. 413, 420, 587 S.E.2d 584, 587 (2003) ("Rules of statutory construction … assume that words in a statute are read according to their common meaning").

Cases Brought Under 42 U.S.C. § 1983 Inapposite

Bing cited a federal case that has nothing to do with the issues involved in this appeal, *Cramer v. Crutchfield*, 496 F. Supp. 949, 952 (E.D. Va. 1980), *aff'd.*, 648 F.2d 943 (4th Cir. 1981). *Cramer* was brought under 42 U.S.C. § 1983, and the federal court applied the two-year statute of limitations that governs personal injury claims. *Cramer* did not involve a lawsuit filed by a person "confined" in a state or local correctional facility, the case did not even cite, let alone discuss, § 8.01-243.2, and it is accordingly of no useful analytical guidance here.

Bing also cited *Billups v. Carter*, 268 Va. 701, 710, 604 S.E.2d 414, 418-19 (2004), but her argument conspicuously ignored the key holding of that case. To be sure, Bing correctly states that *Billups* applied the two-year statute of limitations governing personal injury claims to the plaintiff's claims under 42 U.S.C. § 1983. See App. Br., pp. 8-9. That holding is of course irrelevant because Bing did not bring any claims under § 1983. Notably, Bing failed to state this Court's *relevant* holding in *Billups* that the plaintiff's "common-law assault and battery count ... is governed by *the one-year limitation period prescribed by Code § 8.01-243.2*." 268 Va. at 710, 604 S.E.2d at 418-19 (emphasis supplied). That key *Billups* holding is precisely the position of the Appellees with respect to Bing's state law claims at issue here: those claims are governed by the same one-year limitations period as applied in *Billups*.

The plaintiff next cited *Owens v. Okure*, 488 U.S. 235, 249-50 (1989), which held that causes of action under § 1983 are governed by the "general or residual statute for personal injury actions." *Id.* Again, that is irrelevant because *Owens* was a § 1983 case and our case is not.

***Ogunde v. Commonwealth* Distinguished**

In *Ogunde v. Commonwealth*, *supra*, this Court held that a claim brought pursuant to the Virginia Tort Claims Act (the "Act") was governed

by the Act's statute of limitations (instead of the one-year limitations period under § 8.01-243.2) because the Act has a self-contained statute of limitations, and a contrary holding would imply the repeal of the Act's limitations period. Repeal by implication is disfavored. *Id.*, 271 Va. at 644, 628 S.E.2d at 372. In other words, because § 8.01-243.2 does not explicitly refer to the Act, to apply its statute of limitations to claims under the Act would amount to "repeal by implication" of the Act's self-contained statute of limitations. The Court also observed that the Act was in fact a narrower statute than § 8.01-243.2; the former applies to only claims against the Commonwealth, while the latter applies to all lawsuits brought by inmates relating to their conditions of confinement.

Ogunde is distinguishable because none of Bing's claims have a self-contained statute of limitations. Accordingly, the *ratio decidendi* of *Ogunde* is inapplicable. Specifically, applying the one-year statute of limitations to Bing's claims would not result in repeal by implication of any other limitations statute. *Ogunde* is thus of no controlling import.

No Exception for "Res Gestae" Searches

Bing next argues that because the allegedly illegal cavity search occurred shortly after her arrest, it was part of the "*res gestae*" of her arrest. That, however, is not an argument that § 8.01-243.2 should not apply. The

statute speaks of persons "confined"; it does not have an exception for "confined persons whose claims arise as part of the *res gestae* of their arrest," and it does not have an exception for claims which arise very shortly after the inmate is confined in jail. Bing is attempting to read words into the statute that are not present.

Bing's statement that the search was "conducted as part of her arrest" is both wrong and irrelevant. It is wrong because she was arrested by a Matthew County deputy sheriff, and the arrest was complete when she was taken into custody by him. The search at the Security Center took place *after* her arrest. See A. 3 (Complaint, ¶¶ 9-10) ("After her arrest" deputy sheriff found contraband and took Bing to Security Center). Bing's statement is irrelevant in any event because the search occurred while Bing was confined at the Security Center. She was clearly "confined" within the meaning of § 8.01-243.2, and it is unnecessary to inquire into how soon after her arrest she was placed in the custody of the Security Center. After all, § 8.01-243.2 does not contain a temporal threshold for its application; by its terms it applies to persons confined moments ago as well as to confined persons having served three decades of a life sentence. The operative provision is that the injury must relate to the confined person's conditions of confinement.

Bing also claims that she does not "challenge the conditions of her confinement." App. Br., p. 12. Bing is wrong. The search was as much a condition of her confinement as the food she ate and the bed she slept on. Indeed, the U. S. Supreme Court dealt with an analogous argument in *Porter v. Nussle*, 534 U.S. 516, 532 (2002), where an inmate alleged that corrections officers used excessive force on him. The Prison Litigation Reform Act (42 U.S.C. § 1997e(a)) requires inmates to exhaust administrative remedies before filing lawsuits based on their "conditions of confinement." The inmate in *Porter* alleged that use-of-force incidents did not concern "conditions of confinement." The Supreme Court disagreed, and held that the PLRA's provisions with respect to conditions of confinement claims applied to excessive force claims. *Id.* Indeed, the PLRA applies "to any claim that arises in the prison setting, regardless of the nature of the claim or the relief sought." *Graham v. County of Gloucester, Va.*, 668 F. Supp. 2d 734, 738 (E.D. Va. 2009) (citing *Porter*, 534 U.S. at 532).

The same rationale that led the U. S. Supreme Court to that conclusion applies here. The PLRA and § 8.01-243.2 share the common goal of cabining inmate lawsuits. The interpretation urged by the Appellees is justified not only by the plain words of the Virginia statute but also by the

clear policy considerations which inform that statute (and the PLRA). Indeed, in *Billups* this Court specifically held that an inmate's assault and battery claim (which is one of Bing's counts) was governed by the one-year limitations period in § 8.01-243.2. See *Billups*, 268 Va. at 710, 604 S.E.2d at 418-19. Bing's other claims—for illegal search and intentional infliction of emotional distress—should also be governed by the same one-year limitations period by the same rationale.

In *Harris v. Commonwealth*, 2008 U.S. LEXIS 33834 (E.D. Va., April 24, 2008), the plaintiff had been incarcerated at the Northern Neck Regional Jail, and brought claims under Virginia law and under § 1983 for, *inter alia*, excessive force, assault and battery, failure to train, and gross negligence. The court held that the state law claims for assault and battery, gross negligence, and failure to train related to the inmate's conditions of confinement, and were barred by the one-year statute of limitations set forth in § 8.01-243.2. The court specifically rejected the plaintiff's argument that the two-year statute of limitations for personal injury lawsuits applied. *See id.* at *16-18. Although that federal tribunal's decision is not controlling precedent here, the facts in *Harris* are strikingly similar to our facts for purposes of the statute-of-limitations analysis, and

the court's reasoning is persuasive. This Court should reach the same conclusion for the same reasons.

Bing's final argument fares no better. She posits that the cavity search cannot have amounted to a "condition of confinement" because the search violated the Security Center's policies and procedures. App. Br., p. 14. One would expect that *every* tort committed by jail officials violates a jail policy or procedure. Yet a violation of jail policies does not turn a claim based on conditions of confinement into something else. The exception would then swallow the rule: i.e., under Bing's hypothesis, the only condition-of-confinement claims cognizable would be those that *did not* stem from violations of a jail's policies and procedures. Again, Bing is trying to read words into the statute that are not there. Bing's argument requires the statute to say that the one-year limitations period does not apply where condition-of-confinement claims arise from violations of jail's policies and procedures. The statute says no such thing.

In other words, to be subject to § 8.01-243.2, a claim based on a "condition of confinement" need not result from execution of an adopted jail policy, and such a claim remains cognizable even when it results from violation of an adopted jail policy. Internal policies and procedures are simply irrelevant to the understanding of which claims fall under the statute,

for the compelling reason that the statute does not mention such policies and procedures. *See Andrews v. Commonwealth*, 280 Va. 231, 287, 699 S.E.2d 237 (2010) (Court may not "imply a meaning not found on the face of the statute by adding words not used by the General Assembly...."); *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) ("Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning.").

***Jackson v. Fletcher* Wrongly Decided**

Jackson v. Fletcher, 2011 U.S. LEXIS 4577 (W.D. Va. January 18, 2011) was not addressed in Bing's brief, but the case merits discussion because it interprets § 8.01-243.2 in a manner inconsistent with the statute's language, inconsistent with its evident purpose, and in a manner causing capricious results. *Jackson* held that § 8.01-243.2 governs only those claims brought by persons who are confined *on the day suit is filed*. See *id.* at *27-29 ("It is the plaintiff's status at the time he files suit that determines whether the statute applies.").

The first flaw in this ruling is that it improperly adds language to the statute. The ruling in effect adds the word "then" before the word "confined" in the initial sentence of the statute, so as to apply to only

persons "then confined" when suit is brought. Of course, the statute lacks the word "then," so *Jackson*'s gloss on the statute is unjustified at the outset.

Jackson's holding also produces arbitrary and unreasonable results. Assume there are four prisoners, each confined in a local jail when separately assaulted by a correctional officer on May 29, 2008. Prisoner A remained in jail for twelve months and a day, and on the morning he was released (i.e., on May 30, 2009) he walked over to the clerk's office and filed suit. Prisoner B also remained in jail for twelve months and a day, but he mailed his lawsuit papers to the clerk's office, which processed them an hour before Prisoner B was released from jail on May 30, 2009. Prisoner C was bailed out the day after he was assaulted, and then in the twelfth month was arrested on a different charge and incarcerated in a different jail in a different county. While so incarcerated, his attorney filed suit on May 30, 2009. Prisoner D, unfortunately, could not afford bail, and remained in jail. His attorney did not file suit until May 30, 2009.

Thus, we have four prisoners, each suffering damages from a tort committed on the same day, and each having filed suit on the same day.

Per *Jackson*, Prisoner A enjoys a two-year limitations period because he was not "confined" when he filed suit. See *Jackson* at *29 ("[A prisoner] after he has been released is no longer 'confined'").

Prisoner B, in contrast, would have a one-year limitations period because he was still "confined" when suit was filed, and his suit would thus be untimely. And if it is contended that *Jackson* dictates a different result because Prisoner B was released from confinement for at least part of the day on which he filed suit - exactly where in § 8.01-243.2 does the statute address that situation?

Next, Prisoner C—if *Jackson*'s holding is taken literally—*see id.* ("the plaintiff's status at the time he files suit" determines whether the statute applies) also has a one-year statute of limitations, even though the basis for his later confinement had nothing at all to do with the conditions of his original confinement. His lawsuit would thus be untimely. And if *Jackson* is read to impose a meta-gloss on § 8.01-243.2—namely, that the basis for confinement when suit is filed must be the same as the original basis for confinement—then confined Prisoner C would have a two-year limitations period. But again, where in § 8.01-243.2 is that meta-gloss?

Finally, poor Prisoner D—unable to afford bail throughout his twelve month plus one day confinement—finds his suit is untimely because of the

one-year limitations period required by *Jackson*. Ten more months pass. Then Prisoner D's rich uncle dies and leaves him enough money to make bail. Presto! Now a free man, Prisoner D is no longer "confined;" *Jackson* says that he now has a two-year statute of limitations on his claim. His ten-months-dead lawsuit has sprung back to life.

As can be seen, *Jackson* adds too many glosses to a simple statute. Under *Jackson* caprice reigns; a confined person has no idea what statute of limitations applies until the day suit is filed, and even then the period is in flux depending on whether the inmate is later released. Indeed, suppose a released inmate files suit and then is rearrested that afternoon—is he "confined" at the time suit is filed? Does a two-year limitations period revert back to one year if the inmate is confined at midnight of the day on which suit was filed?

A superior approach is to take § 8.01-243.2 as it is written, and apply it simply to confined persons bringing claims based on their conditions of confinement, regardless of their confinement status on the date suit is filed. The result is certainty and predictability, and is mercifully free of the numerous glosses and meta-glosses required by Jackson when dealing with divergent factual scenarios. At argument in the trial court (which took place five months before *Jackson* was decided) the Appellees addressed

the problems inherent in applying § 8.01-243.2 to only persons "then confined." The trial court did not "find that argument [*i.e., Jackson*'s approach] particularly persuasive." A. 30-31.

One final point about *Jackson*: the federal court said its decision was consistent with the PLRA, because that statute applies to only persons who are confined in prison when suit is filed. See *Jackson* at * 29-30. But the PLRA is exclusively an exhaustion-of-administrative-remedies statute, it is not a statute of limitations like § 8.01-243.2. An exhaustion-of-remedies statute perforce applies to only persons in a position to utilize those remedies, i.e., persons "then confined." Once an inmate is released, it makes no sense to require compliance with a prison grievance procedure. In contrast, § 8.01-243.2 has an exhaustion-of-remedies component, but the limitations period is the later of six months from the date of exhaustion of remedies -- or one year after accrual of the cause of action. The one-year-after-accrual limitations period is not perforce applicable to only confined persons (as is the PLRA); hence, the two statutes say different things and should not be interpreted as if they say the same thing. After all, why would the General Assembly set a one-year statute of limitations for a confined person if the day the inmate is released – after fourteen months, for example - the statute of limitations expands to two years?

Bing did not mention the *Jackson* approach in her brief, and while the Appellees discussed it below, Bing did not raise an objection based on this issue. See A. 48 (Bing objected to dismissal order "for the reasons stated during oral argument on August 13, 2010"). Accordingly, Bing has waived this issue. *See Andrews v. Commonwealth*, 280 Va. 231, 252, 699 S.E.2d 237, 249 (2010) (lack of argument in brief in support of an assignment of error constitutes a waiver of that issue.); *see also* Rules 5:25; 5:27(d).

The Appellees nevertheless raise this issue in their Brief should the Court find it appropriate to reach the issue by reason of one of the exceptions to the foregoing Rules.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the trial court.

Respectfully submitted, this 10th day of June, 2011.

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CERTIFICATE OF COMPLIANCE

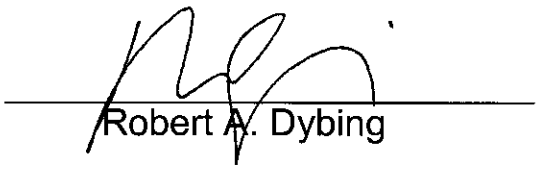
Pursuant to Rule 5:26 of the Rules of the Supreme Court of Virginia, counsel for the Defendants/Appellees Teresa W. Haywood, Sgt. Teddy Bagby, and Lt. Mary Hodges certifies as follows:

(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, phone 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 Robert A. Dybing, VSB # 32712, rdybing@t-mlaw.com, *Thompson*McMullan, P.C., 100 Shockoe Slip, Richmond, VA 23219, phone 804-698-6248, facsimile 804-780-1813.

(c) Fifteen (15) bound copies of the foregoing Brief of Appellees were filed by hand, and an electronic copy by email, with the Clerk's Office of the Supreme Court of Virginia, and the required number of bound copies and one electronic copy of the same have been served, via United States Postal Service, First Class Mail, to counsel for the Appellant at the above address, this 10th day of June, 2011.

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



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