

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 7, 2003

HOWARD FISHER v. STATE OF TENNESSEE

**Appeal from the Tennessee Claims Commission
No. 20201853**

No. M2003-01007-COA-R3-CV - Filed April 21, 2004

An inmate in the custody of the Department of Correction filed a claim in the Tennessee Claims Commission for the loss of seventy-eight cartons of cigarettes, which he alleged were removed from his prison cell during a search. The Commission denied his claim. We affirm the Claims Commission.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Tennessee Claims Commission
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Howard Fisher, Only, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter; Stephen R. Butler, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

I. A “SHAKE DOWN”

On March 8, 2002, correctional officers at the Turney Center Prison conducted a “shake down,” a search of the cell of inmate Howard Fisher. The officers found an astonishing stock of contraband material, including \$500 in cash, a portable cassette/CD player, and hundreds of commissary items, including canned foods, soft drinks, candy, coffee, packaged cookies, chewing tobacco, cigars, rolling papers, soap, shampoo, mouthwash, and deodorant.

Mr. Fisher was disciplined for possessing contraband items by being sent to segregation. The confiscated items were piled in the middle of the pod, and the officers inventoried the property. A Personal Property Storage Request Form was prepared, listing the confiscated items. The form was shown to Mr. Fisher while he was in segregation, and signed by him. The commissary items were

placed in the back of the laundry supervisor's pickup truck, and were later delivered to Mr. Fisher's daughter. The \$500 was given to the Inmate Trust Fund Account. The portable cassette/CD player was donated to charity.

After Mr. Fisher was returned to the general population of the prison, he filed an Inmate Grievance for the return of his property. His grievance was rejected, and he filed a claim with the Division of Claims Administration for monetary compensation in the amount of \$3,626. In his handwritten claim, he contended that the State had no right to take his cassette/CD player, that the \$500 had not appeared in his personal inmate account, and that seventy-eight cartons of cigarettes, which were not included on the inventory list, were taken from his cell and not returned.

The Division of Claims Administration denied Mr. Fisher's claim on September 2, 2002. He then filed an appeal with the Tennessee Claims Commission. The State filed a Motion for Summary Judgment, accompanied by a Memorandum which stated that in the absence of negligence by its employees, it could not be held liable for a prisoner's personal property losses. The Memorandum asserted that its employees' handling of the confiscated cash and cassette/CD player were appropriate, and were consistent with correctional rules.

The State also denied that any cigarettes were taken from the inmate's cell during the shake down. An attached affidavit by Correctional Officer David Gary stated that the officer was present when the shake down occurred, and that no cigarettes were taken from Mr. Fisher's cell, but that correctional officers disposed of several empty cigarette cartons that they found in the cell.

Mr. Fisher filed a Memorandum in opposition to the State's motion, supported by his own statement, and those of four other inmates. Mr. Fisher's own statement asserted that 38 cartons of Kools and 40 cartons of Marlboro cigarettes were removed from his cell, and that Corporal Gary allowed him to take one pack of cigarettes from the cartons into the segregation unit with him. In regard to the allegedly missing cigarettes, the other inmates stated as follows:

Affidavit of C. Copeland #85597: "... That I have adequate knowledge that this convict had possession of large amounts of cigarettes, because that was his business, and seen numerous cartons on display in the pod, exhibited before the Warden and other officials."

Affidavit of D. Buckner #152377: "... That large amounts of Commissary was removed from the Claimant's cell, well as numerous cartons of cigarettes. That its common knowledge in the Unit, and most of the prison population that, out of all of the items listed that was confiscated by the Defendants not one (1) pack of cigarettes is listed, why?"

Affidavit of C. Hudson #104485: "... That I have direct and substantial knowledge that Inmate Fisher, at one (1) time had extensive Cartons of Cigarettes, consisting of

Kools and Marlboro. That Claimant continued to accumulate large amount of cigarettes, until the March 8, 2002, shakedown.

Affidavit of A. Short #135361 (Mr. Fisher's cellmate): "... That I have direct and substantial knowledge that Inmate Fisher, at one (1) time had over one Hundred (100) Carton of Cigarettes, consisting of Kools and Marlboro. That prior to affiant's transfer to segregation about a week earlier and prior to the March 8, 2002, shakedown, nearly that amount of cigarettes was in the cell.

None of these statements was notarized.

The Claims Commissioner ruled on March 14, 2003, dismissing all of Mr. Fisher's claims. The Commissioner noted that inmates are prohibited from possessing free world money, and found that Mr. Fisher's \$500 was placed in the general inmate recreation fund, as is required by the rules for handling of contraband money, rather being deposited in Mr. Fisher's personal account. The Commissioner also found that the cassette/CD player was disposed of in accordance with rules regarding personal property in the prison.¹ Finally, the Commissioner noted that the law placed the burden on the claimant to prove his claims, and found that he had not proven that any cigarettes were confiscated from his cell.

On March 26, 2003, Mr. Fisher filed a Motion to Alter or Amend the Commissioner's Order, asking that his claim be removed from the Commission's small claims docket to its regular docket. The reason for this request is that under Tenn. Code Ann. § 9-8-403(a) there is no right of appeal from a Commissioner's decisions on claims in the small claims docket, but decisions on the regular docket may be appealed directly to this court under the Rules of Appellate Procedure.

On April 8, 2003, the Commissioner granted the claimant's motion, in an order which referred to his previous order as having "granted a motion by the State for summary judgment." This appeal followed.

II. SUMMARY JUDGMENT?

The main issue in Mr. Fisher's appeal is the alleged confiscation of cigarettes. His argument hinges on a question of procedure. He asserts he should have been given the benefit of the established standard for summary judgment. Such a judgment may be rendered for a moving party only where there is no genuine issue of material fact, and the party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993). Since Mr. Fisher submitted affidavits that appear

¹The proof showed that the claimant was denied possession of the JVC player because he already had another one on his property list. Inmates are allowed to own only one tape player/recorder at a time. Mr. Fisher claimed that the one on his personal property list had been destroyed before his transfer, but not removed from the list. There was no evidence that the claimant had notified prison officials that he no longer had the device. The Commissioner accordingly held that it was reasonable for the JVC confiscated during the cell search to be donated to charity.

to contradict the facts asserted by the State, he insists that he has raised a genuine issue of material fact, and that the Commissioner therefore erred in rendering judgment for the State on the matter.

Summary judgment has been characterized as “an important vehicle for concluding cases that can and should be resolved on legal issues alone.” *Byrd v. Hall*, 847 S.W.2d 208 at 210. Summary judgment motions are typically decided on the basis of opposing affidavits. Where examination of these affidavits in light of the pleadings of the parties raises a genuine issue of material fact, summary judgment is denied, and the case goes to trial for a more thorough examination of the facts. Mr. Fisher’s claim involved questions of fact; the primary one being whether he possessed the cigarettes he claims were lost or stolen.

Thus, Mr. Fisher’s argument would ordinarily have precluded resolution of his claim on summary judgment. However, the procedures to be followed in cases that fall within the jurisdiction of the Tennessee Claims Commission are regulated by statute. *See* Tenn. Code Ann. § 9-8-401 *et seq.* These procedures deviate in some important respects from the procedures followed by our trial courts. The most relevant departure for purposes of this case is found in Tenn. Code Ann. § 9-8-403(h):

Claims based on the negligent care, custody or control of personal property by persons in the legal custody of the state shall proceed on affidavits only, except where the commission determines that witnesses should be heard.

It appears to us that in this case, the Commissioner proceeded to judgment on the basis of affidavits only, in accordance with Tenn. Code Ann. § 9-8-403(h). Examination of the relevant documents shows that even though the State captioned its Motion as one for Summary Judgment, the Commissioner’s March 14, 2003 Order of Dismissal does not refer to summary judgment at all. It also does not say that there is no genuine issue of material fact, or that the State is entitled to judgment as a matter of law.

Instead, the Commissioner merely notes that “the claimant has not shown that the State or its employees removed 78 cartons of cigarettes from his cell.” Such a statement indicates that the Commissioner engaged in weighing evidence and finding facts. Neither procedure plays any part in summary judgment determinations. *See Byrd v. Hall*, 847 S.W.2d 208, 212 (Tenn. 1993); *Smith v. Bridgestone/Firestone, Inc.*, 2 S.W.3d 197 (Tenn.Ct.App. 1999); *Warren v. Estate of Kirk*, 954 S.W.2d 722, 724 (Tenn. 1997). As for the Commissioner’s order of April 8, 2004, we can only conclude that he spoke in error when he referred to his earlier order as a summary judgment.

III. THE STANDARD OF REVIEW

Having determined that the Commissioner’s judgment was a final judgment on the facts rather than a summary judgment, we must now turn to the substance of that judgment. The Commissioner stated that the burden of proof is on the claimant, and found that he did not carry that burden. Our review of this finding is governed by Tenn. R. App. P. 13(d), which accords a

presumption of correctness to findings of fact by the trial court, unless the evidence preponderates otherwise.

The claimant relies solely upon his own statement, and those of four other inmates for his contention that State employees removed 78 cartons of cigarettes from his cell. Though these statements are captioned as affidavits, none of them is notarized, and thus they are missing one important indication of reliability.²

The State relies on the affidavit of Corporal Gary, in which he stated under oath that no cigarettes were taken from Mr. Fisher's cell, but that correctional officers disposed of several empty cigarette cartons that they found in the cell. The State also relies on the inventory list, signed by Mr. Fisher, which does not contain any mention of cigarettes.

The State argues that the affidavits of the inmates do not necessarily contradict Officer Gary's affidavit. Mr. Copeland stated that the claimant possessed large quantities of cigarettes, "because that was his business, and seen numerous cartons on display in the pod, exhibited before the warden and other officials." The State contends that the officers would not have let the inmates get too close to the contraband, and that what he and Mr. Buckner saw may have been the empty cartons Corporal Gary spoke of. The State further argues that if selling cigarettes was Mr. Fisher's business, he may have sold his stock before the shake down.

Whatever the validity of these arguments, we have to agree with the Commissioner that it is the burden of the claimant to prove his claim. In light of the countervailing evidence presented by the State, we cannot find that the evidence preponderates against the determination of the Commissioner.

IV. CONCLUSION

The judgment of the Claims Commission is affirmed. We remand this case to the Commission for further proceedings that may be necessary. Tax the costs on appeal to the appellant, Howard Fisher.

PATRICIA J. COTTRELL, JUDGE

²The State points out that Tennessee has chosen not to adopt the rule of 28 U.S.C. § 1746 which allows unsworn declarations under penalty of perjury to be used as evidence of the matter asserted. *See Griffin v. State*, No. E2001-01932-CCA-R3-PC, 2002 WL 236697 (Tenn. Crim. App. Feb. 19, 2002) (no Tenn. R. App. P. 11 application filed).