United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

State of Wisconsin, Plaintiff v. Jonathan Pickett Cole, Defendant
(In re Jonathan Pickett Cole, Debtor)
Bankruptcy Case No. 98-30426-7, Adv. Case No. 98-3070-7

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

December 23, 1998

Richard E. Braun, State of Wisconsin Dept. of Justice, Madison, WI, for the plaintiff.
Jonathan P. Cole, Pro Se, Sturtevant, WI, for the debtor-defendant.

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

On July 4, 1995, Jonathan P. Cole (the "Debtor") was involved in a fight with his cellmate at the Columbia Correctional Institution. As a result of the fight, both inmates required medical treatment. Debtor was charged with violations of Wisconsin Administrative Code, DOC §§303.12 Battery and 303.16 Threats. The Disciplinary Board of the Columbia Correctional Institution (the "Disciplinary Board") followed its prescribed administrative procedures and found the Debtor guilty of battery. The Disciplinary Board imposed restitution in the amount of $7,515.80 as a portion of the Debtor's penalty.

After the Debtor filed this bankruptcy case, the State of Wisconsin timely filed this adversary proceeding asserting that the debt owed it by the Debtor is excepted from discharge under 11 U.S.C. §523(a)(6) as a debt "for willful and malicious injury by the debtor to another entity" or under 11 U.S.C. §523(a)(7) to the extent that the debt "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." The trial in this

adversary proceeding is set for January 21, 1999.

I. Issuance of Writ of Habeas Corpus

Debtor is currently serving a 40 year term in the Racine Correctional Institution and expects to continue to be incarcerated through the trial date. Debtor has requested that this court issue a writ of habeas corpus ad testificandum so that he might be present for the trial.

Generally, prisoners who bring civil actions have no absolute right to be present at any stage of the proceedings. Holt v. Pitts, 619 F.2d 558 (6th Cir. 1980) (citing Price v. Johnston, 334 U.S. 266 (1948)). Whether the Debtor is deemed to have commenced this action by filing this bankruptcy case or is deemed to be a defendant as he is designated in this adversary proceeding commenced by the state is not dispositive of his right to be present. Courts have the power to issue writs "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a). In concert with 28 U.S.C. §2241, this power extends to the issuance of a writ commanding the presence of a prisoner in court. Section 2241 provides that a writ of habeas corpus may be issued by "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. §2241 (1998). It is not clear whether a bankruptcy court as an adjunct of the district court has independent authority to issue such a writ. *See* In re Cornelious, 214 B.R. 588 (Bankr. E.D. Ark 1997) (finding no authority in bankruptcy court to issue writ of habeas corpus); In re Bona, 124 B.R. 11 (S.D. N.Y. 1991) (discussing the doubtful authority of bankruptcy courts to issue writs of habeas corpus).

The Cornelious and Bona cases differ from the present case in one important respect: The debtors in each of those cases were seeking permanent release from prison. This alone does not resolve the problem as §2241 specifically includes writs of habeas corpus ad testificandum. 28 U.S.C.

§2241(c)(5) states "The writ of habeas corpus shall not extend to a prisoner unless— . . . (5) It is necessary to bring him into court to testify or for trial." Because of the questionable statutory authority of bankruptcy courts to issue writs of habeas corpus, if it appeared that the Debtor were entitled to the issuance of the writ, this court would certify the matter to the district court, with a recommendation that the writ be issued by that court.

The issuance of a writ of habeas corpus ad testificandum is committed to the discretion of the court. Stone v. Morris, 546 F.2d 730, 735 (7th Cir. 1976) (citing Price v. Johnston, 334 U.S. 266 (1948)). The Seventh Circuit has laid out eight factors to be considered by a court in determining whether it should issue a writ of habeas corpus ad testificandum:

1) The costs and inconvenience of transporting the prisoner from his place of incarceration to the courtroom;

2) Any potential danger or security risks which the presence of the prisoner would pose to the court;

3) Whether the matter at issue is substantial;

4) The need for an early determination;

5) The possibility of delaying trial until the prisoner is released;

6) The probability of success on the merits;

7) The integrity of the correctional system;

8) The interests of the inmate in presenting his testimony in person rather than by deposition.

Stone v. Morris, 546 F.2d 730, 735-36 (7th Cir. 1976). Because the issuance of the writ is discretionary, no one factor is dispositive of the analysis.

My initial consideration of the factors suggests that a writ should issue for the Debtor if the case

proceeds to trial. Two factors weigh strongly in favor of this conclusion. First, the trial cannot reasonably be delayed until the Debtor is released from prison. Debtor is serving a forty year sentence. Although it is not clear when Debtor's release is scheduled, both parties appear to believe his release is not imminent. Second, Debtor, proceeding pro se, has a substantial interest in presenting his case in person. Without issuance of the writ, Debtor would not have a representative in court for the trial.

In analyzing whether the probability of success on the merits would support the issuance of the writ, the possibility of a summary adjudication must be considered. Although a court is not empowered to render summary judgment sua sponte without proper notice to the parties, *see* Hunger v. Leininger, 15 F.3d 664 (7th Cir. 1994); English v. Cowell, 10 F.3d 434 (7th Cir. 1993), a court can recommend that parties seek to resolve the case through motions for summary judgment. *See* Goldstein v. Fidelity and Guaranty Ins. Underwriters, Inc., 86 F.3d 749, 751 (7th Cir. 1996) (sua sponte summary judgment is largely unnecessary because a court "can always invite a nonmoving party to file a motion of summary judgment in its favor"). It appears that the issue of the dischargeability of Debtor's obligations to the State might be amenable to summary judgment. In any event, until the parties present further argument as to the probability of the Debtor's success on the merits, I shall withhold granting or certifying to the district court the motion for a writ of habeas corpus.

II. Possible Motion for Summary Judgment

Were this court to consider a motion for summary judgment on the uncontested allegations and facts previously submitted by affidavit in this proceeding, the analysis would be in the general form set out below. Obviously competing material facts may be asserted which might change the analysis which leads to the probable conclusion that the State of Wisconsin is entitled to prevail as a matter of law, but the analysis is set out here in some detail to focus the inquiry of the parties. Because no motion is

before me, what follows is merely a suggestion of how the arguments for summary judgment might be viewed if made.

The State argues that the actions of the Debtor fall within one or both of two exceptions to discharge. Section 523(a)(6) excepts from discharge debts incurred by the "willful and malicious injury by the debtor to another entity or to the property of another entity." Debtor's conviction for battery may preclude the relitigation of the factual issues of the State's claim. Section 523(a)(7) excludes a debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." Because the restitution was part of the penalty imposed for the battery conviction, the claim may fit within the §523(a)(7) definition as a matter of law.

A. §523(a)(6)-Willful or malicious injury

The Supreme Court has noted that in many cases, "principles of issue preclusion would obviate the need for the bankruptcy court to reexamine factual issues." Kelly v. Robinson, 479 U.S. 36, 48, fn. 8 (1986). If issue preclusion applies in this case, the Disciplinary Board's finding would control the factual determination for this court. There are four requirements for the application of issue preclusion in federal courts:

> 1) the issue sought to be precluded must be the same as that involved in the prior action;
> 2) the issue must have been actually litigated,
> 3) the determination of the issue must have been essential to the final judgment, and
> 4) the party against whom estoppel is invoked must be fully represented in the prior action.

See, e.g., People Who Care v. Rockford Bd. of Educ., 68 F.3d 172 (7th Cir. 1995).

The four conditions necessary to give a particular decision preclusive effect appear to be present. The issues in the two cases are the same. Section 523(a)(6) excepts from discharge debts incurred "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. §523(a)(6) (1998). The debt challenged by the State was incurred by Debtor as a portion of the penalty for a disciplinary judgment of guilt for battery. Debtor had been found guilty of a violation of the Wisconsin Administrative Code, DOC §303.12 which states that "any inmate who intentionally causes bodily injury to another is guilty" of battery. While battery is not defined as "willful and malicious" in the Wisconsin Administrative Code, courts have held that a wrongful act done intentionally, which produces harm or has a substantial certainty of causing harm, is "willful and malicious" within the meaning of §523(6). *See* In re Conte, 33 F.3d 303 (3d Cir. 1994). The exception to discharge applies to conduct which may be classified as an "intentional tort," like battery. *See* In re Geiger, 118 S.Ct. 974, 977 (1998). The Debtor's battery caused "willful and malicious" injury within the definition of §523(6).

The Disciplinary Board reached a final decision on the merits on the issue on which estoppel is sought. A factual finding that the Debtor committed a battery was essential to the decision. The Debtor appeared in the prior action as the defendant and handled his own defense.

The standard of proof in the prior case is identical to the standard of proof in the dischargeability action. In an action to determine the dischargeability of a debt, the challenging creditor has "the burden to prove by a preponderance of the evidence that her debt met one of the statutory exceptions to discharge." In re Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994). Debtor's guilt was established by a preponderance of the evidence in accord with Wisconsin Administrative Code, DOC §303.76.

When a federal court applies issue preclusion based on a state court judgment, the federal court must "treat [the] state court judgment with the same respect it would receive in the courts of the rendering state." Matsushita Electric Industrial Co., Ltd. v. Epstein, 516 U.S. 367, 373 (1996) (citing 28 U.S.C. §1738, the Full Faith and Credit Act). This means that a federal court must "accept the rules chosen by the State from which the judgment is taken." Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481-82 (1982) (applying 28 U.S.C. §1738). The court must then determine if any other federal law modifies the general rule of 28 U.S.C. §1738. *See* Matsushita, 516 U.S. at 375; Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985). This court has previously discussed possible limits on the application of Wisconsin issue preclusion law in a similar context. *See* Matter of Wagner, 79 B.R. 1016 (Bankr. W.D. Wis. 1987). Application of issue preclusion in this case would require use of Wisconsin law.

Wisconsin courts apply a test of "fundamental fairness" when issue preclusion is used offensively. *See* Michelle T. v. Crozier, 173 Wis.2d 681, 495 N.W.2d 327 (1993). The factors to be considered by a court include:

> (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment;
> (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
> (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;
> (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or
> (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Michelle T. at 173 Wis.2d at 689, 495 N.W.2d at 330-31. This fundamental fairness test is essentially a substitute for the basic test for applying issue preclusion. Application of issue preclusion in Wisconsin imposes a threshold requirement that "the issue sought to be precluded . . . have been actually litigated previously." Lindas v. Cady, 183 Wis.2d 547, 559, 515 N.W.2d 458, 463 (1994).

Whether the decision of the Disciplinary Board is entitled to preclusive effect is not entirely clear. Wisconsin courts have given preclusive effect to prior criminal verdicts and to agency decisions. *See* Michelle T. 173 Wis.2d 681, 495 N.W.2d 681 (giving preclusive effect to prior criminal verdict); Lindas v. Cady, 183 Wis.2d 547, 515 N.W.2d 458 (1994) (giving preclusive effect to prior agency decision). This court has been unable to locate a Wisconsin case that is precisely on point. Two cases from outside the state have dealt with similar issues of the preclusive effect of quasi-judicial decision makers. In Giakoumelos v. Conglin, et al., 88 F.3d 56 (2nd Cir. 1996), the court gave preclusive effect to a prior disciplinary hearing in a New York state prison. Under New York law,

> "issue preclusion applies when a litigant in a prior proceeding asserts an issue of law or fact in a subsequent proceeding and (1) the issue has necessarily been decided in the prior action and is decisive of the present action and (2) there has been a full and fair opportunity to contest the decision now said to be controlling."

The court found these elements met in light of the facts and applied collateral estoppel to the latter case.

In Banks v. Chicago Housing Authority, 13 F.Supp.2d 793, 794 (N.D.Ill. 1998), the plaintiff, a former employee of the Chicago Police Department, alleged that the defendants, police officers with the Chicago Police Department, violated her civil rights under 42 U.S.C. §1983. The Superintendent of the Chicago Police Department filed charges with the Police Board of the City of Chicago. *See id.* at 795. The Police Board issued a final decision, setting forth its factual and legal conclusions, after hearing the Chicago Police Department's evidence and witnesses. *See id.* The plaintiff then filed suit in

the U.S. District Court. The defendants asserted that the plaintiff was collaterally estopped from contesting the factual findings and conclusions of the Police Board. *See id.* at 795.

The Banks court determined that it could only give the Police Board's decision preclusive effect if it acted in a judicial capacity. *See id.* at 796; *see also* Wilson v. City of Chicago, 900 F.Supp. 1015, 1024 (N.D.Ill. 1995), aff'd 120 F.3d 681 (7th Cir. 1997). In Univ. of Tennessee v. Elliott, 478 U.S. 788, 799, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986), the Supreme Court stated:

> "When a State agency acting in a judicial capacity ... resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the state's courts."

The Banks court held that the Police Board acted in a judicial capacity. "Administrative agencies act in such capacity and their determinations are entitled to preclusive effect when the procedures entail the essential elements of an adjudication." *See* Banks, 13 F.Supp.2d at 796; *see also* Wilson, 900 F.Supp. at 1024. Those elements include:

> (1) adequate notice;
> (2) a right to present evidence on one's own behalf, and to rebut evidence presented by the opposition;
> (3) a formulation of issues of law and fact;
> (4) a final decision; and
> (5) the procedural elements to determine conclusively the issues in question.

Banks, 13 F.Supp.2d at 796; *see also* Wilson, 900 F.Supp. at 1024; Crot v. Byrne, 646 F.Supp. 1245, 1255 (N.D.Ill. 1986), aff'd 957 F.2d 394 (7th Cir. 1992). The court found that all the factors were met. *See* Banks, 13 F.Supp.2d at 796. The court then applied the four requirements for issue preclusion. Finding that the requirements of full litigation of the issue and representation of the party had not been met, the court did not give the Police Board's decision preclusive effect.

The facts before the court at this time indicate that the Disciplinary Board's decision may be entitled to preclusive effect. The Disciplinary Board appears to have been acting in a judicial capacity.

The Debtor had adequate notice of the Disciplinary Board's hearing. The Debtor was present at the Disciplinary Board hearing and had a full and fair opportunity to contest the decision. The issue of guilt was decided by the Disciplinary Board based upon the evidence presented. The Disciplinary Board examined the conduct report and physical evidence, heard testimony from various inmates and prison employees, and considered the Debtor's rendition of the facts. The Disciplinary Board found the Debtor was guilty of battery in accordance with the institution rules, policies and procedures, and ordered restitution be paid. The Debtor appealed the Disciplinary Board's decision and it was affirmed by the warden of the correctional institution.

B. §523(a)(7)-Fine or penalty

The Debtor's debt is also nondischargeable under §523(7). To fall within the provisions of §523(7), a debt must satisfy three requirements:

1) it must be for a fine, penalty, or forfeiture;
2) it must be payable to and for the benefit of a governmental unit; and
3) it must not be compensation for actual pecuniary loss.

In re Hollis, 810 F.2d 106, 108 (6th Cir. 1987); *see also* Kelly v. Robinson, 479 U.S. at 51; In re Merritt, 186 B.R. 924, 932 (S.D. Ill. 1995); In re Zarzynski, 771 F.2d 304, 306 (7th Cir. 1985). The restitution imposed by the Disciplinary Board meets the first and second requirements. Under Wisconsin Administrative Code, DOC §303.68(1)(a), restitution may be imposed "in addition to or in lieu of any major penalty." Although requirement number three has not been established clearly, it is well-settled law that restitution orders in criminal sentences are non-dischargeable debts. In Kelly v. Robinson, 479 U.S. at 50, the Court held that "section 523(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence." *See also* In re Thompson, 16 F.3d 576,

581 (4th Cir. 1994); In re Towers, 217 B.R. 1008, 1017 (N.D. Ill. 1998); State v. Mosesson, 356 N.Y.S.2d 483, 484 (1984) ("A discharge in bankruptcy has no effect whatsoever upon a condition of restitution of a criminal sentence."). The Disciplinary Board in this case is the equivalent of a criminal court, therefore, the claim for restitution can not be discharged so long as the restitution was not in compensation for actual pecuniary loss.

Conclusion

Based on the record established so far the Debtor has failed to establish that his motion for habeas corpus ad testificandum should be granted. However, if the State of Wisconsin fails to put in issue by motion for summary judgment, within 15 days following the date of this Memorandum Decision, those legal arguments which may preclude a hearing on the essential facts of their claims, then the motion for habeas corpus will be reconsidered without notice to any party. The motion is denied without prejudice on the terms herein stated. An order may entered accordingly.