

STATE OF MICHIGAN
COURT OF APPEALS

STATE TREASURER,

Plaintiff-Appellee,

v

GILBERT R. JIVIDEN,

Defendant-Appellant.

UNPUBLISHED
February 28, 2008

No. 274345
Montmorency Circuit Court
LC No. 04-000826-CZ

Before: Wilder, P.J., Saad, C.J., and Smolenski, J.

PER CURIAM.

Defendant is currently serving a life sentence in a Michigan correctional facility for multiple counts of first-degree criminal sexual conduct, MCL 750.520b. He appeals a court order garnishing funds from his prison account and his National City bank account to reimburse the state for expenses incurred during his incarceration pursuant to the State Correctional Facility Reimbursement Act (SCFRA), MCL 800.401 *et seq.* For the reasons stated below, we affirm.

Defendant argues that plaintiff's action was barred by the statute of limitations. A statute of limitations defense must be raised in a responsive pleading, or in a motion prior to the responsive pleading. MCL 2.116(D). Defendant failed to raise his statute of limitations defense at trial and thus waived it. In any event, the SCFRA contains its own statute of limitations, MCL 800.404(8), which states that "[t]he state may commence proceedings under this act until the prisoner has been finally discharged on the sentence and is no longer under the jurisdiction of the department." Accordingly, defendant's argument is without merit.

Defendant next argues that his pension payments from General Motors (GM) should be excluded from the definition of "assets" found in the SCFRA. MCL 800.401a(a) provides that "assets" includes "income or payments . . . from social security, worker's compensation, . . . pension benefits, previously earned salary or wages, bonuses, annuities, retirement benefits, or from any other source whatsoever," with certain specified exceptions. One listed exception is for "[m]oney saved by the prisoner from wages and bonuses paid the prisoner while he or she was confined to a state correctional facility." MCL 800.401a(a)(ii). Citing *State Treasurer v Gardner*, 222 Mich App 62, 70; 564 NW2d 51 (1997), defendant argues that the disability payments in issue are earnings that were paid while he was confined. In other words, defendant argues that because the monies paid were earned while he was incarcerated, the § 1a(a)(ii) exception applies. However, the *Gardner* Court found disability payments to be earnings within the meaning of the Consumer Credit Protection Act, 15 USC 1671 *et seq.*, not as applied to the

SCFRA. *Id.* at 69-70. Further, the decision in *Gardner* was subsequently reversed. *State Treasurer v Gardner*, 459 Mich 1; 583 NW2d 687 (1998).

In any event, the monies at issue are from defendant's total and permanent disability retirement from GM on January 1, 1981. Thus, the payments received are retirement/pension benefits and do not qualify as wages or bonuses. Accordingly, the § 1a(a)(ii) exception does not apply.

The SCFRA requires each prisoner to provide accurate information to the state for the purpose of determining whether the state will seek reimbursement from the prisoner. MCL 800.401b. Failure to cooperate can affect parole decisions. MCL 800.403a. Defendant argues that compelling his cooperation in this manner violates the Fourth, Fifth, Sixth, and Fourteenth Amendments to the US Constitution. We disagree. Simply requiring defendant to disclose information about his assets does not constitute sufficient interference with a property interest to invoke the Fourth Amendment. And while defendant's statements were compelled, they were not a part of a criminal case. See *Chavez v Martinez*, 538 US 760, 767-768; 123 S Ct 1994; 155 L Ed 2d 984 (2003). As for defendant's due process claim, where the government seizes property to "assert ownership and control over" it, that seizure goes beyond the "traditional meaning of search or seizure" under the Fourth Amendment. *United States v James Daniel Good Real Prop*, 510 US 43, 52; 114 S Ct 492; 126 L Ed 2d 490 (1993). Such a seizure necessarily implicates the due process requirements of the Fifth and Fourteenth Amendments. *Id.* Generally, "individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *Id.* at 48. Here, defendant received notice of plaintiff's action, as well as an opportunity to be heard and participate in court proceedings. Finally, while the Sixth Amendment does require appointed counsel in cases other than purely criminal, there must be an interest of "personal freedom" at stake. *Lassiter v Dep't of Social Services*, 452 US 18, 25; 101 S Ct 2153; 68 L Ed 2d 640 (1981). That is not the case here.

Defendant argues that § 3(2) of the SCFRA is unconstitutionally vague because the statute requires the Attorney General to estimate the "cost of care of the prisoner," but does not state whether this cost of care is for the total period of a prisoner's maximum or the total period of the minimum sentence. MCL 800.403(2). Defendant also argues that while the statute states that the Attorney General must compare that estimate with the "estimated cost of care of the prisoner for 2 years," it does not indicate which two year period the Attorney General should use. The void for vagueness doctrine does not apply here. The purpose of the SCFRA is "to provide procedures for securing reimbursement to the state of expenses incurred by the state for the cost of care of certain prisoners." 1984 PA 282. See also *State Treasurer v Schuster* 456 Mich 408, 413; 572 NW2d 628 (1998). The SCFRA "was designed to regulate the responsibilities of certain state officials," not the prisoners whose assets are being tapped for reimbursement of the cost of care. *State Treasurer v Cuellar*, 190 Mich App 464, 467; 476 NW2d 644 (1991). Because no First Amendment freedoms are implicated and there is no conduct on the part of prisoners being proscribed by the statutory scheme, the doctrine is inapplicable.

Defendant also argues that defendant's assets were not within the ten-percent range required for plaintiff to bring this action. Because the ten-percent formula does not restrict plaintiff's discretion to bring an action if a prisoner has fewer assets, defendant's argument is without merit. *Id.*

Next, defendant argues that the SCFRA conflicts with the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.* The Michigan Supreme Court, however, has already decided the issue, finding that ERISA does not preempt the SCFRA. *State Treasurer v Abbott*, 468 Mich 143, 159-160; 660 NW2d 714 (2003). This Court is bound by the decisions of the Michigan Supreme Court. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007).

Defendant also argues that the court erred in not crediting his argument that the trial judge should have disqualified himself because he had presided over defendant's criminal case, and because the SCFRA requires the sentencing judge to assist the Attorney General in developing the facts for a reimbursement action. MCL 800.405 "A trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption." *Coble v Green*, 271 Mich App 382, 390; 722 NW2d 898 (2006). The fact that the trial court judge participated in defendant's criminal case does not disqualify him from presiding over this action. *Emerson v Arnold*, 92 Mich App 345, 353; 285 NW2d 45 (1979). Further, the requirement that the trial judge cooperate with the state agency is a procedural requirement that does not place the judge on either side of the controversy. There is no evidence of actual or perceived bias to form the basis for disqualification.

Finally, defendant argues that the trial court abused its discretion in denying his motion to have counsel appointed for him. However, this current action does not implicate his liberty interest, but only his property interest in a disability pension. See *Mead v Batchlor*, 435 Mich 480, 488-496; 460 NW2d 493 (1990). Defendant had no right to appointed counsel and the trial court did not abuse its discretion in denying appointed counsel to him.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Michael R. Smolenski