OFFICIAL OPINION NO. 77-55, Sentences of hard labor: compensation and liability implications

June 20, 1977

Mr. Jack T. Klauck
State's Attorney
Pennington County Courthouse
Rapid City, South Dakota 57701

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Sentences of hard labor: compensation and liability implications

Dear Mr. Klauck:

You have requested an opinion based on the following facts:

FACTS:

Circuit judges in the Seventh Judicial Circuit are considering imposing sentences of hard labor (SDCL 24-11-28 through 24-11-32) for certain offenders. SDCL 24-11-28 provides that "such labor may be in the jail or jailyard, upon public roads, or streets, public buildings, public grounds, or elsewhere in the county."

The questions presented are:

QUESTIONS:

1. Does the court have the power on its own to order that a certain payment be given to the prisoner for work performed as part of the sentence, such as an hourly wage?

2. Is the court required by law to compensate a prisoner for work performed?

3. Does the court have to pay a minimum wage for such work performed?

4. What is the liability of the county or city for injuries to or caused by prisoners while

working?

5. Is Worker's Compensation applicable to prisoners of county jails?

IN RE QUESTION NO. 1:

In answer to your first question, yes, the court has inherent power to fix the amount of compensation to be given the prisoner for work performed as part of the sentence.

SDCL 24-11-32 provides:

Each prisoner performing labor may be paid a reasonable compensation by the county, city, town, or civil township benefited thereby. Such compensation or such portion thereof as the court or tribunal shall direct may be paid to the wife, family, or dependents of such prisoner, or such other person as the court or tribunal may direct, and shall be in such amount as such court or tribunal shall determine upon application of the person or officer under whose superintendency the work shall be performed, and shall be allowed by the board of county commissioners or governing body of the city, town, or civil township, upon the order of such court or tribunal.

The above statute clearly empowers the court to fix the amount of compensation “upon application of the person or officer under whose superintendency the work shall be performed.” The question remains, however, whether the court may fix the amount of compensation if no application is made by such “person or officer.”

In an official opinion issued by one of my predecessors, SDCL 24-11-32 was interpreted as follows:

The matter of compensation for such labor does not appear from the Act to be a discretionary power vested in the governing body of the political subdivision, but whether or not compensation is to be paid seems to rest in the person having superintendency of the work with authority vested in the court or tribunal to fix the amount. AGR, 1941-42 at 256.

I disagree with the above interpretation. The 1941 official opinion, which vests exceedingly broad powers in work superintendents, seems to fly in the face of SDCL 24-11-27:

The judge of the circuit court shall have power to . . . supervise all the jails in his circuit and *all county and municipal officers shall comply with the orders of such court relating to* jails or inmates therein, in accordance with law and the rules of the board of charities and corrections, and the violation of any such order may be punished as a contempt of court. [Emphasis added.]

The work supervisor takes orders from the court, and not vice versa. Sentencing powers are vested in the court, not in work supervisors.

SDCL 24-11-32 empowers the court to determine how much and to whom compensation for prisoners' work will be paid. When SDCL 24-11-32 is read in conjunction with SDCL 24-11-27, which gives the court sweeping supervisory powers over jails, inmates,*and* work supervisors, one may reasonably infer that the court has the inherent power to fix the amount of compensation to be given the prisoner for work performed as part of the sentence.

IN RE QUESTION NO. 2:

In answer to your second question, no, the court is not required by law to compensate a prisoner for work performed. SDCL 24-11-32 states that each prisoner "*may* be paid a reasonable compensation" for the work performed. Such payment is not mandatory.

IN RE QUESTION NO. 3:

In answer to your third question, no, the prisoner need not be paid the minimum wage for work performed. As a matter of policy, the deterrent effect of a sentence of hard labor would be drastically reduced if the prisoner was entitled to the minimum wage. Confinement might actually be "profitable" in a monetary sense for prisoners who had been unemployed on the outside. Therefore, one can hardly accept the notion that the Legislature, in providing for prisoners' compensation pursuant to SDCL 24-11-32, intended that prisoners be paid the minimum wage.

The applicable state and federal labor statutes support the conclusion that the minimum wage laws do not apply to prisoners performing hard labor as part of a sentence. The South Dakota minimum wage law applies only where an employer-employee relationship exists. "Employee" is defined at SDCL 60-11-2:

The term “employee” shall mean and include every person who may be permitted, required, or directed by any employer, as defined herein in consideration of direct or indirect gain or profit, to engage in any employment.

Clearly, a prisoner sentenced to hard labor does not fall within this definition. He is not working at the direction or for the economic gain of an “employer.” Any gain to the city or county is incidental. The primary purpose of the prisoner's labor is punishment. In a recent decision of the Alaska Supreme Court, Alaska's minimum wage law was held to be inapplicable to working prisoners:

Finally, the legislative history indicates that Congress did not intend the Fair Labor Standards Act [29 USCA 201 et seq.] to cover prisoners, and we find no indication that the state statute was not meant to have parallel noncoverage. *McGinnis v. Stevens*, 543 P.2d 1221 (Alaska 1975) at 1238-9.

I believe the decision reached by the *McGinnis* court is sound.

Further support for the conclusion that the Legislature did not intend that prisoners be entitled to all the wage and hour benefits of “employees” is found in the state Career Service Act, SDCL 3-6A-1, *et seq*. The law specifically excludes “patients and *inmates* who are employed by state institutions under the board of charities and corrections.” SDCL 3-6A-31(8).

In summary, only “employees” are entitled to the protection of the minimum wage law. Prisoners at hard labor are not “employees,” and hence are not entitled to the minimum wage.

IN RE QUESTION NO. 4:

Your fourth question concerns the liability of the county or city for injuries to prisoners while working, and for injuries caused by prisoners while working. In my opinion, the city or county is immune from liability in both instances.

The doctrine of sovereign immunity insulates the city or county from liability for injuries to prisoners. The doctrine, as applied to cities and counties, has been explained as follows:

Municipal corporations are regarded as having a rather curious dual character. . . . On the one hand they are subdivisions of the state, endowed with governmental powers and charged with governmental functions and responsibilities. On the other hand they are corporate bodies, capable of much the same acts as private corporations, and having the same special and local interests and relations, not shared by the state at large. They are at one and the same time a corporate entity and a government. The law has attempted to distinguish between the two functions, and to hold that in so far as they represent the state, . . . in their "corporate," "private," or "proprietary" character [e.g. supplying municipal utilities, garbage service, and municipal liquor stores] they may be liable. PROSSER, THE LAW OF TORTS (4th Ed. 1971), § 131, at 977-8.

The South Dakota Supreme Court adheres to the doctrine of sovereign immunity, and has held that governmental entities are immune from liability for injuries caused by the exercise of a purely governmental function. *Shaw v. City of Mission*, 225 N.W.2d 593 (S.D. 1975); *Conway v. Humbert*, 82 S.D. 317, 145 N.W.2d 524 (1966); *Burkard v. City of Dell Rapids*, 76 S.D. 56, 72 N.W.2d 308 (1955);*Jensen v. Juul*, 66 S.D. 1, 278 N.W. 6 (1938). See generally, 18 McQuillin, MUNICIPAL CORPORATIONS (3d Ed. Revised 1963) § § 53.01a, 53.04, 53.10, 53.23 and 53.94.

The doctrine of sovereign immunity thus insulates the city or county from liability for injuries caused to prisoners engaged in hard labor since the supervision of prisoners is a "purely governmental function":

In erecting, maintaining and managing jails, workhouses and police stations, according to the judicial decisions, the municipality is exercising a purely governmental function, and is not liable for injury suffered by reason of the excercise of such function, unless expressly so provided by statute. McQUILLIN, Id., § 53.94, citing *Lahner v. Williams*, 112 Iowa 428, 84 N.W. 507 (1900); *Gullickson v. McDonald*, 62 Minn. 278, 64 N.W. 812 (1895).

Applying the doctrine of sovereign immunity to cases where prisoners were injured while working at hard labor on public street, courts have held that the city is immune from liability, since supervision of the work of the prisoners is a governmental function and "a mere incident to the execution of sentence." *Warren v. Town of Booneville*, 118 So. 290 (Miss. 1928); See also, *Hurley v. City of Atlanta*, 208 Ga. 457, 67 S.E.2d 571 (1951).

The fact that the city or county may derive some revenue from the hard labor of the prisoners does not affect the rule "since the revenue is incidental to the main purpose." McQuillin, Id., § 53.92, citing *Braunstein v. Louisville*, 146 Ky. 777, 143 S.W. 372 (1912);*Bell v. Cincinnati*, 80 Ohio St. 1, 88 N.E. 128 (1909). *Kelly v. Chicago*, 324 Ill. App. 382, 58 N.E.2d 278 (1944).

The doctrine of sovereign immunity likewise protects the city or county from liability for injuries caused by prisoners. It has been held that the city or county is not liable to a former prisoner for injuries received from a fellow prisoner. *Bryant v. County of Monterey*, 125 Cal. App. 2d 470, 270 P.2d 897 (1954); *Blakey v. Boos*, 83 S.D. 1, 153 N.W.2d 305 (1967). (However, the court in *Blakey* indicated by way of dicta that if the violation of duty to supervise prisoners had been the proximate cause of one prisoner's injury to another, there may have been liability.) It has also been held that the city or county is not liable to third parties for injuries caused by blasting at a prison rock quarry. *Braunstein v. Louisville*, 146 Ky. 777, 143 S.W. 372 (1912).

In summary, whether the injury was caused by a prisoner (and directed at a fellow prisoner or a third party), or whether the injury was inflicted upon a working prisoner, the city or county is immune from liability, since supervision of prisoners is a governmental function.

IN RE QUESTION NO. 5:

Your final question concerns the applicability of Worker's Compensation to working prisoners. In my opinion, a working prisoner is not entitled to Worker's Compensation.

SDCL 62-1-3 defines "employee" for purposes of the Worker's Compensation statute as a "person . . . in the services of another under any contract of employment." A prisoner is not an "employee" within the statutory definition, and therefore is not entitled to receive Worker's Compensation benefits if injured while working within the prison. AGR 1930, p. 290; AGR 1932, p. 822.

A prisoner performing hard labor as part of a sentence is not working under any employment contract. A number of cases in other jurisdictions have so held: 60 Am.Jur.2d, *Penal & Correctional Institutions* 28; *Keeney v. Industrial Comm.*, 535 P.2d 31 (Ariz. App. 1975); *Frederick v. Men's Reformatory*, 203 N.W.2d 797 (Iowa 1973); *Tackett v. Lagrange Penitentiary*, 524 S.W.2d 468 (Ky. 1975);*Reid v. N.Y. State Dept. of Correctional*

Services, 387 N.Y.S.2d 589 (N.Y. App. Div. 1976); *City of Clinton v. White Crow*, 488 P.2d 1232 (Okl. 1971); *Abrams v. Madison County Highway Department*, 495 S.W.2d 539 (Tenn. 1973). Therefore, as a general rule, prisoners are ineligible for Worker's Compensation benefits.

Based on the foregoing it is my opinion that:

1. The circuit court has inherent power to order that a certain payment be given to the prisoner for work performed as part of his sentence.

2. The court is not required by law to compensate a prisoner for work performed.

3. The prisoner need not be paid the minimum wage for work performed as part of the sentence.

4. The city or county is immune from liability for injuries to or caused by prisoners while working.

5. The Worker's Compensation law is not applicable to prisoners of county jails.

Respectfully submitted,

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Attorney General

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