

EXHIBIT A

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CR 2014-2707

ARTORIA SMITH

DEFENDANT

ORDER

Comes now for consideration the Defendant's Motion to Dismiss, and based upon a review of the pleadings and briefs of both parties and all other matters considered, the Court DOTH FIND:

The Defendant in this case is charged with a misdemeanor violation of Ark. Code Ann. §18-16-101, commonly known as Arkansas's "failure to vacate" law. The parties stipulate that Smith and her landlord, Primo Novero, entered into an oral lease agreement sometime prior to July, 2014. After an alleged breach of their oral contract, Novero gave the Defendant notice on July 9, 2014, that she had 10 days to vacate the premises under the criminal statute, and she did not do so. The Defendant was convicted under the statute in the Little Rock District Court on August 6, 2014, and a timely misdemeanor appeal to this Court followed. The Defendant filed the instant Motion to Dismiss on October 27, 2014, arguing that the failure to vacate statute was unconstitutional.

The Defendant asserts that the statute violates both the Arkansas and United States Constitutions. She specifically argues that it violates her rights to equal protection and due process, that it unconstitutionally chills her right to a trial, that it violates the state and federal prohibition on debtor's prisons, and that it constitutes cruel and unusual punishment. The State's response notes that the Arkansas Supreme Court has not passed on the constitutionality of the

current statute and that the prosecution “has reservations as to the constitutionality of the Failure to Vacate statute as applied because the statute may expose a defendant to different levels of punishment based on the defendant’s ability to pay into the district court registry.”

Introduction

Arkansas’s failure to vacate statute is codified at Ark. Code Ann. § 18-16-101. It states, in pertinent part, that “[a]ny person who shall rent any dwelling house or other building or any land situated in the State of Arkansas and who shall refuse or fail to pay the rent therefore when due according to contract shall at once forfeit all right to longer occupy the dwelling house or other building or land.” The landlord then must give notice to the tenant, and if, after ten days, they have not vacated the premises, they are guilty of a Class B misdemeanor. Where a defendant chooses to plead guilty or nolo contendere, or is found guilty at trial, they are assessed a fee of 25 dollars per day that they have failed to vacate. A defendant may only plead not guilty, however, if they place the disputed rent amount into “the registry of the court” and continue to pay it as it comes due.

Arkansas is the only state in America to criminalize a tenant’s failure to pay rent while remaining on the landlord’s property. A substantial percentage, if not most of these cases are brought in district courts located within Pulaski County. Little Rock District Court, where the Defendant Smith was initially charged, handles more of these cases than any other court in the state – and therefore any other court in the United States.¹

¹ Lynn Foster, The Hands of the State: The Failure to Vacate Statute and Residential Tenants’ Rights in Arkansas, 36 U. Ark. Little Rock L. Rev. 1, 50-55 (2013)(hereinafter “Foster”).

The statute in question was enacted by the legislature in 1901 as the state's "criminal eviction" law.² The Arkansas Supreme Court has previously rejected attacks on the constitutionality of the statute – once in Poole v. State, 244 Ark. 1222 (1968) and most recently in Duhon v. State, 299 Ark. 503 (1989). These opinions, however, were handed down before the legislature amended the statute in 2001 to add the provision regarding placing the funds in the court's registry. There seems to be very little consistency among the various district court jurisdictions in the state tasked with enforcing the law. Almost one in three courts refuse to hear these cases. Sometimes prosecutors refuse to bring the charges.³

Procedural Due Process

The Duhon Court found that the statute in effect in 1989 did not violate the procedural due process safeguards of the landmark U.S. Supreme Court case Mathews v. Eldridge, 424 U.S. 319 (1976). Mathews outlined a three-part test to determine whether a given government procedure satisfied an individual's procedural due process rights under the Fourteenth Amendment of the U.S. Constitution. The test requires that a court reviewing a given procedure determine

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.*, at 335.

The procedure challenged in Mathews was the method by which the Social Security Administration terminated a recipient's benefits before a formal hearing. The U.S. Supreme Court found that even though a beneficiary was only entitled to an evidentiary hearing *after* the

² *Id.*

³ *Id.*, at 11.

benefits had already been terminated, due process was still satisfied under the test, as Social Security benefits were not granted based on financial need, and any risk of erroneous deprivation would be solved by a grant of retroactive benefits where the initial determination had been found wrongful at the ultimate hearing.

The Duhon court found that the failure to vacate statute as enacted at the time did not deprive a defendant of procedural due process under Mathews, as it specifically required a hearing before a defendant could be convicted and fined. In 2001, however, the Arkansas legislature amended the statute to add that “[a]ny tenant charged with refusal to vacate upon notice who enters a plea of not guilty to the charge . . . and who continues to inhabit the premises after notice to vacate . . . shall be required to deposit into the registry of the court a sum equal to the amount of rent due on the premises.” In other words, a defendant seeking to defend against the charges might only do so and remain on the premises if he or she has access to the amount of disputed back rent and is able to make continuing payments. As such, the reason the Duhon court found the statute constitutional – the entitlement to a hearing – is no longer a part of the law, and the analysis to be found in that opinion no longer controls.

Applying the Mathews v. Eldridge balancing test to the statute as amended gives this Court pause. Duhon held that a defendant’s property interest – there, the interest in the rental property leased – was not abridged, as a hearing was required before a court could deprive that defendant of the property interest. The statute as amended, however, implicates a different property interest – the defendant’s interest in the disputed amount of rent that must be placed in the court’s registry before he or she may plead not guilty.

The only way a defendant may challenge an allegation of failure to vacate is by placing the disputed funds in the court's registry.⁴ The Defendant must utilize this "judicial escrow," though there will not yet have been a finding that all of the funds are indeed owing. Instead, the landlord, having complied with the notice requirements of the statute, files said notice and an affidavit with the local prosecutor or another applicable authority figure.⁵ Though the previous version of the statute entailed little risk of an erroneous deprivation – a defendant was unreservedly accorded an opportunity to be proven guilty beyond a reasonable doubt – the current statute ensures no such thing. No determination is made that a defendant has committed the act prohibited by the statute before he or she must surrender the funds in question. Nor could there be under the procedure as enacted. The prosecutor files charges based on the landlord's paperwork. The possibility that a mistake might have been made, that a landlord might be acting dishonestly, or any other argument that a defendant had a justifiable defense for remaining on the property after notice cannot be asserted, as the defendant is given no opportunity to be heard unless they have already been deprived of their funds by placing them with the court. Though jurisdiction of these cases has otherwise been granted to district courts – or circuit courts in a misdemeanor appeal – the power of a judge to try a case in their own court is removed where a defendant has not remitted the funds.

The Mathews test next has us consider whether there are additional or substitute procedural safeguards currently in place to achieve the ends anticipated by the statute. If the statute did not exist, it would not leave landlords powerless to remove a noncompliant tenant

⁴ As an aside, district courts, where misdemeanor charges are generally heard, do not *have* the registries to hold these funds. There is a marked lack of guidance given to prosecutors regarding this component of the law, which exacerbates the aforementioned inconsistency in application throughout the state. *See Foster*, at 18.

⁵ *Id.*, at 12.

from their property. Arkansas has a civil cause of action for landlords faced with nonpaying tenants or tenants who wrongfully refuse to quit the premises. The aggrieved landlord may bring a suit to obtain a civil writ of possession under the unlawful detainer action of Ark. Code Ann. § 18-60-304, *et seq.*, where a tenant has “[held] over any land, tenement, or possession after the determination of the time for which it was demised or let to him or her, or the person under whom he or she claims[.]” After a civil trial and a finding for the landlord, the landlord is granted a writ of possession, and the sheriff is ultimately empowered to remove the defendant and his property from the premises.

The failure to vacate statute has no parallel provision. A defendant found guilty of failure to vacate will have a misdemeanor conviction and possibly a fee, but the court is not granted authority under the statute to remove the defendant from the property. Though some district courts do routinely order convicted defendants to quit the premises,⁶ the statute does not anticipate this, and it gives no explicit authority for a court to order removal or a sheriff to aid in such. With this in mind, the failure to vacate statute seems little more than a way for a landlord to use the threat of criminal charges to leverage a tenant out of the property without availing himself of the costlier and more time-consuming civil process. An aggrieved landlord must still file the civil remedy to physically remove the defendant.

Our analysis does not discredit the state’s interest in criminalizing the behavior of tenants who wrongfully hold over leased property. Though this Court is given little guidance as to the legislature’s reason for enacting the amended statute, our Supreme Court in 1968 found the statute as enacted at the time protected “[t]he right of an individual to acquire and possess and

⁶ See Foster, at 19.

protect property” and was a “valid exercise of the police power of this state.”⁷ No doubt the state’s interest here remains legitimate, but the civil remedies available to landlords are sufficient to achieve that interest. This Court is not convinced that the existence of a criminal action directly furthers this interest when an effective civil remedy is available. No unreasonable fiscal or administrative burdens are placed on the state when a landlord uses an available civil remedy instead, especially where that remedy remains necessary to achieve the legal removal of the tenant.

Examining the current iteration of the statute in light of the three-part Mathews v. Eldridge test, this Court is convinced that the statute violates the Defendant’s due process rights under the Fourteenth Amendment to the U.S. Constitution.

Right to Trial

The requirement that a defendant surrender the disputed rent as a prerequisite to pleading not guilty also implicates procedural due process in that it impermissibly infringes on a defendant’s right to trial under the United States Constitution. This nation’s federal courts have made it clear that this is a fundamental right that may not be “chilled.” The United States Supreme Court, in U.S. v. Jackson, 390 U.S. 570 (1967), invalidated a federal statute permitting a defendant accused of kidnapping to be sentenced to death by a jury, but not giving a sitting judge that option where a defendant pled guilty or waived a jury trial. The Court found that the “inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to

⁷ Poole v. State, 244 Ark. 1222, 1225 (1968).

demand a jury trial.” The Court found the government’s assertion that the deterrence imposed was only incidental unconvincing. “Whatever might be said of Congress’ objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.”

This Court does not argue that the penalty of asserting a constitutional right here is as severe as the possible imposition of the death penalty. Nonetheless, courts in the wake of Jackson have extended that holding’s analysis to the procedural mechanisms of other crimes where the “chilling” effect was still apparent.⁸ Cases in other jurisdictions have found a penalty as low as \$25 assessed only to those defendants convicted in a jury trial (but not those who posted collateral in lieu of appearing for a hearing) violated the Jackson holding. Scharf v. United States, 606 F.Supp. 379 (E.D. Virginia, 1985) This Court finds that the chilling effect on the defendant’s right to pursue a jury trial here is analogous to Jackson and its progeny and is impermissible under the United States Constitution.

Equal Protection

The Defendant asserts in her brief that the statute violates the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution because it discriminates between two classes of individuals – those who can afford to place the disputed funds in the court’s registry and those who cannot. The State, in its response to the Defendant’s Motion to Dismiss, exhibited its

⁸ See, e.g., United States v. Durbin, 542 F.2d 486, 488 (8th Cir. 1976). In this Eastern District of Arkansas case, a defendant convicted of bank robbery was sentenced to twelve years in federal prison. The defendant’s petition to have his sentence vacated was denied, and the court instead imposed a fifteen year sentence. Citing Jackson, the 8th Circuit Court of Appeals found that the increased penalty on resentencing violated double jeopardy, and “[t]o condition Durbin’s attack upon his sentence on a coerced surrender of a valid claim of double jeopardy would create a dilemmatic unfairness that conflicts with the underlying nature of the constitutional bar against double jeopardy. To hold otherwise would cast a chill upon the exercise of fundamental constitutional rights.”

“reservations as to the constitutionality of the Failure to Vacate statute as applied because the statute may expose a defendant to different levels of punishment based on the defendant’s ability to pay into the district court registry.” Both the State and the Defendant seem to agree that there is constitutionally suspect discrimination here.

This Court is not convinced that the discrimination here is as clear. The statute does not necessarily discriminate against indigent defendants, as many defendants might not be able to pay the disputed funds into the court’s registry even though there has not been – or, in fact, could not be – a finding of indigency. The Defendant Smith, for example, is alleged to owe over \$20,000 in back rent. Any renter, even those of more substantial means, might find it hard to remit the months of disputed rent without having the diminished financial resources necessary for a finding of indigency. This could be the case especially where there a defendant is legitimately innocent of the charges but could not manage to pay the disputed amount again into the court’s registry.

Nonetheless, the statute distinguishes the right to trial differently between two groups of defendants who wish to plead not guilty – those who have the means to pay into the registry and those who cannot. Though this Court is not convinced that the distinction between groups here is constitutionally suspect, the right to a jury trial, as mentioned above, is fundamental. And any distinction that impinges upon the exercise of a fundamental right derived from the U.S. Constitution must survive strict scrutiny. The State must therefore demonstrate that the classification created by the law has been narrowly tailored to serve a compelling governmental interest. Plyler v. Doe, 457 U.S. 202, 216-217 (1982).

This Court is not convinced that the statute can withstand strict scrutiny. Again, the purported state interest is “[t]he right of an individual to acquire and possess and protect

property.” Even if we presume that this interest is compelling, the method by which the legislature has chosen to protect the interest is not narrowly tailored to that end. Though the statute can in effect leverage the tenant who wrongfully holds over into leaving the property, the law facially does not achieve that goal. Though some jurisdictions might issue an order to vacate commensurate with a conviction, the statute does not deliberately authorize this. A landlord would still normally need to sue in civil court for a writ of possession to regain actual possession of the property free from the tenant.⁹ The result is that a tenant might simply leave the property rather than face the charges. Though this achieves the indirect effect of protecting a landlord’s right to “acquire and possess and protect property,” it does not do so in a manner narrowly tailored to achieve the state’s ostensible interest. The statute does not survive Equal Protection analysis.

Debtors’ Prisons

The statute also implicates the state’s constitutional ban on debtor’s prisons. Article II, section 16 of the Arkansas Constitution states that a defendant may not be “imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.” This state’s highest court held unconstitutional a previous statute making it a crime for a “contractor or subcontractor to knowingly refuse to pay for materials.” State v. Riggs, 305 Ark. 217 (1991).¹⁰ The Court’s reasoning was that a finding that a defendant had acted fraudulently was not a prerequisite to a

⁹ See “Due Process” discussion, *supra*.

¹⁰ Though the statute at bar only exposes a defendant to a misdemeanor, while the statute in Riggs allowed the prosecutor the option of felony or misdemeanor, this distinction seemingly meant little to the Riggs Court. The opinion found the statute unconstitutional though the Defendant there had been charged with two misdemeanors and would not have been subject to an actual term of imprisonment.

finding of guilt. The State argued that the statute in question required a finding that the defendant had “willfully failed to pay,” and that this was sufficient “fraud” to overcome the aforementioned constitutional provision. Id., at 220. The Court was not convinced, finding that a willful failure to pay was not “fraud in the conventional sense[.]” i.e the sense contemplated by Arkansas’s Constitution. Though the Supreme Court noted that any legitimately enacted statute is afforded a presumption of constitutionality, this presumption is not enough to override the individual liberties of the citizen granted by the state’s constitution. “[E]very doubt must be resolved in favor of the citizen in the enforcement of the constitutional provision that no person shall be imprisoned for debt.” Id., at 220.

Here, likewise there is no requirement that a defendant be found guilty of having defrauded the landlord in a failure to vacate case. The requirement is simply that the tenant has “willfully” refused to vacate the premises. Like the statute in Riggs, there is no requirement that the tenant has been found to have committed “fraud in the conventional sense.” Nonetheless, the statute makes the failure to pay rent “according to contract” a crime. While the statute purports to only criminalize the trespass of the tenant who holds over after notice to vacate has been given, implicit within its terms is a finding by a criminal court that a party has failed to answer for a private debt – and, like Riggs, the statute commandeers the criminal court’s power to enforce that debt without a finding of fraud in the traditional sense.

Cruel and Unusual Punishment

The Eighth Amendment to the United States Constitution declares that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Arkansas, again, is the only state in the nation with a law like this. And, again, a substantial

percentage of Arkansas courts refuse to hear these cases, with some prosecutors even refusing to file these charges. This was noted by Judge Purtle's dissent in the Duhon case, where he noted that Arkansas was "the only state in the nation which imposes criminal sanctions on a person who does not pay his rent on time...I was of the opinion that we were joining the rest of the country in rendering an enlightened decision on the relationship between landlord and tenant. I was mistaken. The majority has, with all the speed of a crawfish, backed into the 19th century."¹¹ It should be repeated that this was his assessment of the less draconian law on the books at the time of Duhon.

Certainly Arkansas is the very definition of an outlier in continuing to criminalize failure to pay and vacate. The United States Supreme Court has declared that "courts should be guided by objective factors" when reviewing cases under the Eighth Amendment. Solem v. Helm, 463 U.S. 277, 290 (1983). The Court explained that a reviewing court might first "look to the gravity of the offense and the harshness of the penalty." Then, they should "compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." Finally, "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."

Reviewing the harshness of the penalty compared to the gravity of the offense, a misdemeanor is ultimately a rather mild penalty. However, the fact that the State rarely criminalizes the actions of one party to a private dispute, as illustrated by the Riggs decision discussed above, means that there are not a lot of comparable crimes.

¹¹ Duhon, supra, at 512.

Regarding the sentences imposed on other criminals in the same jurisdiction, failure to vacate is a Class B misdemeanor. Some examples of other Class B misdemeanors in Arkansas are prostitution and disorderly conduct. This Court is not prepared to say that the failure to vacate statute, if otherwise permissible, is significantly more or less serious than other misdemeanors in its class.

As previously mentioned, no other jurisdiction criminalizes failure to pay rent or vacate. The federal government also seems to disapprove of this law, as the Department of Housing and Urban Development does not permit landlords using Section 8 vouchers or otherwise maintaining federally subsidized housing to use this law against tenants.¹² The fact that Arkansas remains alone here counsels in favor of the failure to vacate statute being a cruel and unusual punishment.

The above factors support this Court's belief that even if the statute does not impose a facially "cruel" punishment on a defendant, it certainly imposes an unusual one. This Court finds that the statute violates the Eighth Amendment's protection against cruel and unusual punishments.

Conclusion

In 2011, the Arkansas legislature created the Commission for the Study of Landlord-Tenant Laws, led by members "appointed by the Governor, legislators, the two Arkansas law schools, the Arkansas Bar Association, and various pro-landlord entities." In 2012, they issued a report with the unanimous recommendation that the failure to vacate statute should be repealed.¹³

¹² See Foster, at 14.

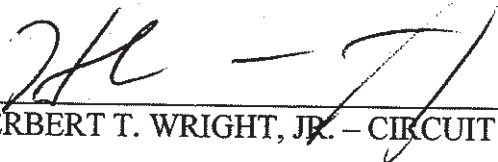
¹³ *Id.*, at 3.

This Court agrees with the Commission's findings, and it has been provided with no compelling argument to find otherwise.

If the matter were simply that the burden of remitting the disputed funds in the registry of the court violated due process and equal protection, this Court would find that provision unconstitutional and try Defendant without requiring compliance with that provision of the law. Again, this is the route taken by some Arkansas courts. The analogous decision in Riggs (handed down some two years after Duhon) renders any application of the failure to vacate law unconstitutional under the state's ban on debtors' prisons. The fact that Arkansas's sui generis law is – by definition – an “unusual” punishment only further convinces this Court that the statute is facially unconstitutional.

THEREFORE, the Court finds that the failure to vacate statute is unconstitutional both on its face and as applied to the Defendant. The Defendant's Motion to Dismiss should be, and is therefore, granted.

IT IS SO ORDERED.



HERBERT T. WRIGHT, JR. – CIRCUIT JUDGE

1-20-18

DATE