IN THE COURT OF APPEALS

GINA M. C. SANJINES,	)	HAMILTON CIRCUIT
	)	C. A. NO. 03A01-9606-CV-00222
	)	
Plaintiff-Appellee	)	
	)	
	)	
	)	
	)	
	)	
vs.	)	HON. SAMUEL H. PAYNE
	)	JUDGE
	)	
	)	
	)	
	)	
	)	
J. ARIEL SANJINES, M.D.,	)	REVERSED AND REMANDED
	)	
Defendant-Appellant	)	

J. ARIEL SANJINES, M.D., Pro Se.

WILLIAM H. HORTON, Horton, Maddox & Anderson, PLLC, Chattanooga, for appellee.

OPINION

McMurray, J.

In this case the appellant, J. Ariel Sanjines (defendant) has filed a petition, pro se, asking the circuit court of Hamilton County for a modification of child visitation. The trial court summarily dismissed the petition without affording the appellant any type of hearing. We reverse the judgment of the trial court.

The parties were divorced in the Circuit Court for Hamilton County, by decree entered on the 14th day of July, 1992. The decree of the court incorporated by reference a marital dissolution agreement entered into by the parties. Among other things, the marital dissolution agreement provided that the wife (plaintiff) would have custody of the parties' minor children with the defendant having specified visitation privileges. By subsequent decree entered on July 7, 1993, the court modified the defendant's visitation privileges granting expanded privileges to him.

On April 22, 1996, the defendant filed the petition giving rise to this appeal. The verified petition, among other things averred that the defendant was now incarcerated in the Morgan County Regional Correctional Facility in Wartburg, Tennessee.[1] He further avers that since his incarceration in March 1994, he has been unable to visit with his children and has been able to

[1]The defendant, after the divorce, was convicted of attempting to murder his former wife and murdering his wife's companion. He entered a guilty plea and was sentenced to life imprisonment with possibility of parole.

successfully communicate with one of the children on only one single occasion. He further alleges that the facility in which he is incarcerated offers inmates Saturday, Sunday and holiday visitation from 8:00 a.m. to 3:30 p.m., and provides outside visitation areas for picnics and barbecues and a children's play area. He asks that the court modify visitation to allow visitation on two Saturdays or Sundays per month and on alternating holidays. He further asks that the court enter an order mandating that the children be transported by an "agreed upon party" to the Morgan County Regional Correctional Facility or other place wherein the petitioner is incarcerated for the express purpose of visiting with petitioner.

Incarceration, in and of itself, is not grounds for denying or suspending visitation by the inmate with his children. Suttles v. Suttles, 748 S.W.2d 427 (Tenn. 1988). Visitation may be suspended for the period of incarceration under proper circumstances. Suttles, supra. Although we find no authority touching the point, we hold as a matter of law that incarceration for a crime committed voluntarily is insufficient to constitute a change of circumstances which would warrant a change in visitation favorable to the inmate.

The defendant asked the trial court and now this court to require that the children be brought to his place of incarceration

so that he may exercise his visitation. Specifically, he asks that the court enter an order mandating that the children be transported by an "agreed upon party" to the Morgan County Regional Correctional facility so that he may exercise visitation privileges. Additionally, he charges that the plaintiff blocked communication with his children and he is unable to maintain a meaningful relationship with his children.

Under the circumstances set out in Suttles, the trial court and Court of Appeals allowed Suttles reasonable visitation privileges "on whatever basis the Department of Correction would allow." Suttles, page 429. The circumstances of Suttles were not altogether materially different from this case. The Supreme Court reversed the trial court and the Court of Appeals. In so doing, the Court found that suspension of visitation privileges was appropriate, however, the court stated: "... to prevent the bonds between the defendant and child from being severed completely, he is free to communicate with his child by telephone or mail or other means approved by the trial court, but may not utilize these opportunities to harass or threaten either his former wife or his child." In a footnote to the foregoing quotation the court stated: "Nor may plaintiff attempt to interfere with the relationship between defendant and their son."

We are of the opinion that there is a viable issue of fact raised in the pleadings and that a summary dismissal was error. Specifically, we hold that, at a minimum, there should be a hearing allowed on the matter of communication between the defendant and his children pursuant to the guidance of Suttles.

The defendant in his pleadings has further asked that he be transported to Hamilton County for the purpose of testifying and presenting evidence or testimony of other witnesses. We note that the question of whether a prisoner should be allowed to attend a hearing in a civil case wherein he is the plaintiff has been extensively addressed in Whisnant v. Byrd, 525 S.W.2d 152 wherein it is stated:[2]

> We ... hold that a prisoner has a constitutional right to institute and prosecute a civil action seeking redress for injury or damage to his person or property, or for the vindication of any other legal right; however, this is a qualified and restricted right.
>
> We quote with approval the following language from Tabor v. Hardwick, 224 F.2d 526 (5th Cir. 1955):
>
> (We) think that the principle of the cases [relating to restraint of personal liberty] should not be extended to give them an absolute and unrestricted right to file any civil action they may desire. Otherwise, penitentiary wardens and the courts might be swamped with an endless number of unnecessary and even spurious lawsuits filed by inmates in remote jurisdictions in the hope of obtaining leave to appear at the hearing of any such case, with the

[2]A petitioner in a post-divorce action stands in the shoes of a plaintiff.

consequent disruption of prison routine and concomitant hazard of escape from custody. As a matter of necessity, however regrettable the rule may be, it is well settled that, "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356. 224 F.2d at 529.

We further quote with approval the following language from Seybold v. Milwaukee County Sheriff, 276 F.Supp. 484 (E.D.Wis.1967):

Regardless of the merit of the causes of action stated in their complaints, it must be remembered that the prisoner-plaintiffs have, by their own acts resulting in conviction, placed themselves in a position such that effective prosecution by themselves is not possible without interference by the court with their detention, and it is our opinion that absent unusual circumstances that interference is not warranted. In other words, their unavailability for hearings and trials is due to their convictions, and although the court believes that they should not therefore lose their rights of action by operation of a statute of limitations, we know of no authority compelling us under ordinary circumstances to deliver them from their self-caused restrictions and proceed with their cases as though they could appear at will. 276 F.Supp. at 488.

We note that Sec. 41-604 T.C.A. [now T.C.A. Sec. 41-21-304(a)] provides that "in no civil case can a convict be removed from the penitentiary to give personal attendance at court, but his testimony may be taken by deposition, as in other cases . . . ."

The ensuing section provides for depositions in criminal cases and Sec. 41-606 T.C.A. [now T.C.A. Sec. 41-21-305] authorizes the presiding judge of any court to order the warden of the penitentiary to bring a convict before the court to give testimony for the state in criminal cases, and the next section makes it the duty of the warden to produce the convict witness. There are no such provisions in our law relating to civil suits. (Emphasis added.)

We hold that, absent unusual circumstances, prisoners who have filed their civil complaints, unrelated to the legality of their convictions ... will not be afforded

> the opportunity to appear in court to present their cases during their prison terms. Instead such matters will be held in abeyance until the prisoner shall have been released and present his case. We hold that in a proper case, and upon a proper showing of particularized need, the trial judge, in his discretion, may issue an appropriate directive requiring the attendance of the prisoner.

The defendant also seeks the appointment of counsel to represent him during the hearing. We are of the opinion that this is a matter that addresses itself to the discretion of the trial court. "It is rare and unusual that the occasion arises for the appointment of counsel by the court in a civil case ... ." Ferguson v. Paycheck, 672 S.W.2d 746.

We are of the opinion that the defendant should have been granted a hearing. Our discussion of the relief sought in the petition is not an indication of the opinion of this court on any issue. We discuss these issues for the sole purpose of outlining proper procedural steps that should be taken on remand to afford the defendant a proper hearing. In the event the trial court exercises his discretion and denies the defendant the right to be transported to Hamilton County for the hearing, the defendant, upon reasonable notice of the hearing, is entitled to present his evidence by deposition, interrogatories or other lawful means.

We reverse the judgment of the trial court and remand this case to the trial court for other and further action consistent with this opinion. In our discretion, we tax the costs equally between the parties.

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Don T. McMurray, J.

CONCUR:

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Houston M. Goddard, Presiding Judge

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Charles D. Susano, Jr., Judge

IN THE COURT OF APPEALS OF TENNESSEE

GINA M. C. SANJINES, Plaintiff-Appellee, v. J. ARIEL SANJINES, M.D., Defendant-Appellant.	)C/A NO. 03A01-9606-CV-00222)HAMILTON COUNTY CIRCUIT COURT)))))))))))HONORABLE SAMUEL H. PAYNE,)JUDGE

OPINION CONCURRING IN PART AND DISSENTING IN PART

I dissent from so much of Judge McMurray's opinion as holds

> . . . as a matter of law that incarceration for a crime committed voluntarily is insufficient to constitute a change of circumstances which would warrant a change in visitation favorable to the inmate.

Page 3, slip opinion. I am not willing to make such a broad, sweeping statement.

The question on this appeal is not whether a parent's incarceration entitles him or her to visitation at the site of that imprisonment. As Judge McMurray points out, that subject is comprehensively addressed in ***Suttles v. Suttles***, 748 S.W.2d 427 (Tenn. 1988). The real issue on this appeal is whether a petition that alleges, in effect, that visitation was established when the

petitioner was a free man in Hamilton County, and further alleges that he is now incarcerated in Morgan County, makes out a prima facie case of a change of circumstances warranting a hearing to determine, under the principles articulated in ***Suttles***, whether visitation should be adjusted and, if so, to what extent. I believe it clearly does. The circumstances that existed at the time of the divorce and the subsequent decree have changed substantially, at least according to the pleadings before us. I am not aware of any case holding that voluntary acts, even criminal acts, that place a parent in a position where that parent cannot exercise the visitation previously granted, do not qualify as a change of circumstances on a petition to modify a court's visitation decree. Having said this, I hasten to add that such a change of circumstances does not necessarily mean that the visitation requested by the petitioner is appropriate. As ***Suttles*** teaches, there are many factors to be considered, and the end result may well be that the trial court will find visitation at the penitentiary inappropriate. This issue addresses itself to the broad discretion of the trial judge. ***Suttles***, 748 S.W.2d at 429.

I concur in the majority's decision that the petitioner's request that he be transported to a hearing is controlled by ***Whisnant v. Byrd***, 525 S.W.2d 152 (Tenn. 1975); that his request for appointment of counsel addresses itself to the discretion of the trial judge; and that the judgment below should be reversed and this case remanded for further proceedings; however, I would remand for a full hearing on the issues raised by the petition.

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Charles D. Susano, Jr., J.