

RENDERED: NOVEMBER 7, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001018-MR

KENNETH DEAN WHITE

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 00-CI-00728

LINDA FRANKS, CHAIR OF THE KENTUCKY
PAROLE BOARD; LUTITIA F. PAPAILLER,
KENTUCKY PAROLE BOARD MEMBER;
FRANCES G. CLINKSCALES, KENTUCKY PAROLE
BOARD MEMBER; VERMAN RAY WINBURN,
KENTUCKY PAROLE BOARD MEMBER; JOHN M. COY,
KENTUCKY PAROLE BOARD MEMBER; JAMES PROVENCE,
KENTUCKY PAROLE BOARD MEMBER; BRUCE HEWELL,
K.S.P. PAROLE OFFICER; T.K. AND M.L.G.,
PERSONS REPRESENTED BY INITIALS SITTING ON THE
JUNE 1999 PAROLE BOARD; MR. KIMSEY;
MICHAEL WURTH; HARLAN VEAL; DANNY YEARLY;
DON YOUNGER; MARIBETH SCHMITT; RON FLETCHER,
K.S.P. CASE WORKER AND ADMINISTRATOR;
PHIL PARKER, K.S.P. WARDEN; DOUG SAPP,
CORRECTIONS COMMISSIONER; ROBERT STEPHENS,
SECRETARY OF JUSTICE CABINET; MR. NEWSOME,
K.S.P. CORRECTIONS OFFICER; JOHN DOE,
BOARD OF DIRECTORS MEMBER AT PADUCAH
COMMUNITY CENTER; JOHN DOE, BOARD OF DIRECTORS
MEMBER AT SAINT ANDREWS HOUSE; AND JOHN DOE,
BOARD OF DIRECTORS MEMBER AT TRANSITIONS, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Kenneth Dean White has appealed from an order of the Franklin Circuit Court denying his motion to vacate the trial court's dismissal of his civil action against the appellees. White presents six issues for our review concerning whether the trial court abused its discretion in dismissing his complaint based upon his claim that the Kentucky Parole Board improperly rescinded its recommendation that White be paroled. Having concluded that the trial court properly dismissed White's complaint, we affirm.

White is an inmate currently in the custody of the Kentucky Department of Corrections and is lodged in the Western Kentucky Correctional Complex. In 1981 White was convicted of murder and received a sentence of 30 years' imprisonment. Additionally, from 1983 to 1988, White was sentenced to an additional six years in prison after being convicted of several unrelated charges.¹ White was granted a parole hearing in June 1999, and the Parole Board recommended that White be granted parole. White's parole, however, was conditioned upon his acceptance into a halfway house program. Unfortunately for

¹ In 1983 White received a jail sentence of 12 months after being convicted of a crime that was not disclosed in the record. In 1986 White was convicted of escape in the second degree and sentenced to two years' imprisonment. In 1987 White was sentenced to one year in prison after being convicted of assault under extreme emotional disturbance. Finally, in 1988, White received another prison sentence of one year following his conviction for promoting contraband in the first degree.

White, the halfway houses to which he was recommended refused to admit him to their programs. Since the requisite condition of placement into a halfway house program was not achieved, the Parole Board voided its recommendation in January 2000. White was never released on parole, nor was a parole certificate issued and signed granting White a release from custody.

On June 20, 2000, White filed his 37-page complaint with the trial court, naming the Kentucky Parole Board and its members, numerous halfway houses and their directors and various officials of the Department of Corrections as defendants. In his complaint, White alleged that the Parole Board had wrongfully rescinded its recommendation that he be released on parole. White also alleged that the Parole Board's condition that he be paroled only upon acceptance by a halfway house was unconstitutional as an ex post facto law. Furthermore, White claimed that the Parole Board had failed to examine all possible halfway house placements on his behalf, lacked the legal authority to void his parole and punished him because of a mental disability that was caused by his incarceration. The trial court rejected these assertions and initially dismissed this matter on the Parole Board's motion by an order entered on September 14, 2000.² White appealed the trial court's order to

² Of the 20 defendants named in White's complaint, only the Kentucky Parole Board and Linda Franks were served with a summons.

this Court on October 24, 2000. On March 14, 2001, this Court dismissed White's appeal as interlocutory.

On April 9, 2001, White filed a motion to vacate the trial court's September 14, 2000, order. In this motion, White reasserted his claims that the Parole Board had wrongfully denied him parole and violated the Americans with Disabilities Act by discriminating against him because of a mental disability. Moreover, White asserted that the trial court had improperly dismissed his complaint without providing him with an opportunity to respond to the Parole Board's motion. On April 16, 2001, the trial court denied White's motion to vacate its previous order and reaffirmed its dismissal of White's complaint pursuant to CR³ 12.02(f)⁴. This appeal followed.

White presents six assertions of error for our review. First, White argues that the trial court erred in dismissing his complaint because only one defendant, Franks, was served with a civil summons. In support of this argument, White argues that his status as an in forma pauperis plaintiff requires the trial court to ensure that his complaint is served upon all named defendants. We disagree.

³ Kentucky Rules of Civil Procedure.

⁴ In this order, the trial court specifically dismissed White's complaint with regard to each defendant. Further, the trial court noted that this order was final and appealable.

White argues that KRS⁵ 453.190(1) requires the trial court to have civil process served upon defendants in any proceeding where the plaintiff is proceeding in forma pauperis.

KRS 453.190(1) states as follows:

(1) A court shall allow a poor person residing in this state to file or defend any action or appeal therein without paying costs, whereupon he shall have any counsel that the court assigns him and shall have from all officers all needful services and process, including the preparation of necessary transcripts for appeal, without any fees, except such as are included in the costs recovered from the adverse party, and shall not be required to post any bond except in an amount and manner reasonable under the circumstances of his poverty.

While White correctly points out that he is entitled to all needful services and process from all officers of the court, this statute must be read together with the Kentucky Rules of Civil Procedure. CR 4.01(1)(a) and (b) provide that, upon the filing of the complaint, the clerk shall issue a summons and, at the direction of the initiating party, serve the summons and the complaint either by mailing it via certified mail or by having these documents transferred to any individual authorized to personally serve the named defendants. Pursuant to the plain language of CR 4.01(1), the party filing the complaint is required to inform the clerk as to which method he wishes to use to complete service of the complaint and summons.

⁵ Kentucky Revised Statutes.

Here, the record does not indicate that White directed the Franklin Circuit Court Clerk to use a particular method to serve the appellees. Neither CR 4.01(1) nor KRS 453.190 provides the clerk with the authority to unilaterally decide how a defendant should be summoned to court. Accordingly, the clerk of the trial court is not empowered to serve the defendants without some direction from the in forma pauperis plaintiff as to the method of service that should be employed. Thus, at a minimum, White was required by the Rules of Civil Procedure to direct the circuit court clerk as to the manner in which these defendants should have been served. By failing to make this direction as required by CR 4.01(1), White cannot now complain of any failures by the trial court or its officers to have these defendants brought within its jurisdiction.

Next, White argues that the trial court erred by denying him the opportunity to amend his complaint as a matter of right. Our review of the record reveals that White's amended complaint was never filed with the Franklin Circuit Court Clerk. Instead, White mailed his complaint only to the trial judge. CR 5.05(2) requires all pleadings to be filed with the clerk of the court except when the trial judge has permitted the papers to be filed with him. The record does not contain any order permitting White to file his amended complaint with the trial judge. White simply failed to properly file his amended

complaint with the clerk as required by CR 5.05(2). By failing to abide by the Rules of Civil Procedure, White deprived himself of the opportunity to file an amended complaint and his argument on this issue must fail.

Next, White argues that the trial court erred in not addressing his claim that the Parole Board had denied his open records request for a copy of the audiocassette of his parole hearing. We reject this argument because White failed to exhaust administrative remedies available to him before filing this appeal. As an inmate of a penal institution, White was first required to seek relief from the Attorney General regarding the denial of a records request.⁶ If he had still been aggrieved, he could then have filed an appeal in circuit court.⁷ Furthermore, there is no documentation in the record to substantiate that White had, in fact, actually sought the Attorney General's review of the alleged denial by the Parole Board. We hold that White was not entitled to file an action in circuit court seeking redress from the denial of a records request without having first exhausted his administrative remedies. Hence, we find no error in the trial court's refusal to consider this issue.

⁶ KRS 197.025(3).

⁷ Id.

Fourth, White asserts that the trial court erred in not appointing counsel to represent him during the litigation of his civil action. In support of this argument, White states that, because the Parole Board regarded him as suffering from a mental disability, the Americans with Disabilities Act of 1990⁸ required the trial court to appoint counsel to represent him in this matter. White fails to identify a specific section of the Americans with Disabilities Act supporting his claims. We have reviewed the Americans with Disabilities Act in its entirety and have found no specific section requiring the trial court to appoint counsel to represent a litigant making a claim under its provisions. Furthermore, White's assertion that he is entitled to appointed counsel is contrary to the Supreme Court's decision in May v. Coleman:⁹

It is now elementary that an indigent criminal defendant is entitled to appointment of counsel in any proceeding in which he could be sentenced to a term of imprisonment. U.S. Const., Amendment 6; Ky. Const., § 11; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). We have extended that right to civil contempt proceedings where imprisonment is a potential punishment. Lewis v. Lewis, Ky., 875 S.W.2d 862 (1993). If a prisoner fails to defend a civil action brought against him, a guardian ad litem must be appointed for him before judgment may be entered. CR

⁸ 42 U.S.C. §§ 12101 et seq.

⁹ Ky., 945 S.W.2d 426, 427 (1997).

17.04; Davidson v. Boggs, Ky.App., 859 S.W.2d 662 (1993). However, CR 17.04 has no application where, as here, the action is brought by, rather than against, the prisoner. Except in these limited circumstances, there is no constitutional right to counsel in a civil case. Parsley v. Knuckles, Ky., 346 S.W.2d 1 (1961).

These specific directions from our Supreme Court concerning when an indigent prisoner is entitled to appointed counsel coupled with the Americans with Disabilities Act's silence concerning this issue support the trial court's refusal to appoint counsel for White for the prosecution of his civil action.

Next, White argues that the trial court erred by dismissing his complaint because he adequately stated numerous claims against these appellees under the United States Constitution and the Kentucky Constitution. Again, we disagree.

Kentucky's parole statutes do not provide inmates with a protected due process liberty interest in parole.¹⁰ In fact, this Court has noted that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."¹¹ However, even though White cannot mount a serious challenge against

¹⁰ Belcher v. Kentucky Parole Board, Ky.App., 917 S.W.2d 584, 585 (1996).

¹¹ Belcher, at 586 (citing Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104, 60 L.Ed.2d 668 (1979)).

Kentucky's parole review procedure on procedural or substantive due process grounds, White does have a legitimate interest in a decision rendered in conformity with established procedures and policies, based upon consideration of relevant criteria.¹² We conclude that the Parole Board's decision to rescind its recommendation that White be paroled was in conformity with established procedures and policies.

KRS 439.340(3) grants the Parole Board the authority to adopt administrative regulations concerning parole decisions. The Parole Board has taken advantage of this statute and developed a thorough procedural structure in making decisions concerning an inmate's parole request. 501 KAR 1:030(1)(5) defines "parole" as "the release of an inmate with a signed parole certificate to . . . the community prior to the expiration of his sentence, subject to conditions imposed by the board and subject to its supervision." Based upon this definition of parole, the Parole Board can issue a "parole recommendation," concerning an inmate. A "parole recommendation" is a decision of the Parole Board that an inmate may be released from custody prior to the expiration of his sentence.¹³ The parole recommendation, however, is not absolute.

¹² See Belcher, 917 S.W.2d at 587.

¹³ 501 KAR 1:030(1)(6).

501 KAR 1:030(4)(2) allows the Parole Board to rescind a parole recommendation anytime prior to the inmate's release on parole.

Here, the Parole Board issued White a valid parole recommendation. The Parole Board recommended that White be granted parole, but his parole was subject to his acceptance into a halfway house program. Unfortunately for White, he was not accepted into any halfway house program. Since the requisite condition of his parole recommendation was not met, the Parole Board had the authority to rescind White's parole recommendation pursuant to 501 KAR 1:030(4)(2). The Parole Board's action was proper since White had not actually been released from custody, nor had he signed his parole certificate. Thus, we conclude that the Parole Board's action in rescinding White's parole recommendation was a valid exercise of its discretionary powers and was conducted pursuant to established procedures and policies. Since the Parole Board's action was lawful, the trial court did not commit reversible error by dismissing White's complaint.

Finally, White asserts that the trial court erred in dismissing his complaint because the individual defendants named therein are not entitled to any type of immunity. White's assertion is misguided. The Parole Board, being an agency of state government, is granted sovereign immunity pursuant to KRS 44.072 and Kentucky Constitution § 231. Moreover, this Court

has previously held that the responsibility of a Parole Board member is functionally comparable to those of a judge when making decisions concerning whether an inmate should be granted or denied parole, or whether the inmate's parole should be revoked.¹⁴ It is clear that the Parole Board and its members were performing a quasi-judicial function when they rescinded White's parole. Consequently, White's damage claims against the Parole Board and its members must fail because the Parole Board and its members are accorded absolute immunity from civil liability.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth Dean White, Pro Se
Fredonia, Kentucky

BRIEF FOR APPELLEES:

Karen Quinn
Frankfort, Kentucky

¹⁴ Belcher, 917 S.W.2d at 589.