

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000953-MR

CHRISTOPHER L. FLORENCE

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, JUDGE  
ACTION NO. 02-CI-00076

KENTUCKY DEPARTMENT OF CORRECTIONS,  
GEORGE MILLION, WARDEN, EASTERN  
KENTUCKY CORRECTIONAL COMPLEX

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

BUCKINGHAM, JUDGE: Christopher L. Florence appeals from an order of the Morgan Circuit Court dismissing his petition for *writ of mandamus*. We reverse and remand.

Florence is a prisoner in the custody of the Department of Corrections (DOC) at the Eastern Kentucky Correctional Complex (EKCC). On March 11, 2002, Florence filed

a petition for *writ of mandamus* pursuant to CR<sup>1</sup> 81 wherein he petitioned the Morgan Circuit Court to order DOC and/or the warden of the prison to either provide a law library at the minimum security facility at the prison or transfer him to a minimum security facility that has a law library. In support of his petition, Florence stated that he was unable to do the necessary research in connection with the direct appeal of his conviction, the filing of an RCr<sup>2</sup> 11.42 motion, and other legal problems.<sup>3</sup>

DOC filed a motion to dismiss Florence's petition for failure to state a claim upon which relief could be granted on the grounds that "the Petitioner is not entitled to access to a law library" and that Florence had not suffered actual injury. DOC noted that under Kentucky Corrections Policies and Procedures (CPP), Florence could request to be transferred to a prison institution with a more comprehensive law library. DOC further stated that Florence had been informed that he could request a transfer from the minimum security facility at EKCC to the main campus, a medium security facility, where he would have access to a comprehensive law library. On the other hand,

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<sup>1</sup> Kentucky Rules of Civil Procedure.

<sup>2</sup> Kentucky Rules of Criminal Procedure.

<sup>3</sup> In his brief to this court, Florence states that he is involved in a case involving the termination of his parental rights of his child in an Ohio court.

Florence claimed he was entitled to remain at the minimum security facility and that he was not required to transfer in order to have access to a law library.<sup>4</sup>

Although Florence filed a motion to be transported to the courtroom for a hearing, no hearing was held. Rather, on April 11, 2002, the circuit court entered a one-sentence order dismissing the case. Florence's appeal herein followed.

Two cases from the U.S. Supreme Court are relevant to this issue. First, in Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), the Supreme Court held "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828. However, in a subsequent case, the Supreme Court found that Bounds was overly broad. In Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996), the Supreme Court stated that Bounds did not establish the right of a prisoner to a law library or to legal assistance. 518 U.S. at 350. Rather, Bounds acknowledged the already established right of access to the courts. Id. Further, in

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<sup>4</sup> Florence states that he doesn't want to be transferred to the medium security facility in order to have access to the law library because that facility houses murderers, rapists, and other violent criminals.

discussing the Bounds case, the Supreme Court stated in Lewis as follows:

The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

Id. at 355. Also, the Court stated that the inmate "must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Id. at 351.

CPP 14.4(VI)(A) states that "[a] law library shall be maintained at all correctional institutions." Further, CPP 14.4(VI)(A)(1) requires that a complete law library be maintained at various prison institutions in Kentucky, including EKCC. Also, the CPP sets forth minimum requirements for materials that must be present in the law libraries at each minimum security institution. DOC acknowledges that the minimum security unit at EKCC, which is separate and apart from the rest of the prison institution, does not have a law library.

Florence's first argument is that DOC is violating his constitutional right to access to the courts and access to a law library because the minimum security facility at EKCC does not have a law library. Second, Florence argues that the minimum

security facility is in violation of its own mandatory policies and procedures by not having a law library. Third, Florence argues that, without access to a law library, he is being denied his right of access to the courts. He requests this court to order DOC install an adequate law library at the EKCC minimum security facility or, alternatively, to direct DOC and the prison authorities to transport him to the EKCC medium security facility so that he may use the law library there for at least six hours per week.

DOC raises two arguments in response to the arguments raised by Florence in his brief. First, DOC argues that Florence has not been denied access to the courts because he "has been pursuing several actions in various courts." Further, DOC argues that Florence has not shown any actual prejudice or injury. Second, DOC argues that inmates do not have the right to physical access to a law library. In connection with this argument, DOC asserts that Florence has a right under the CPP to request a transfer to a prison institution with a more comprehensive law library.<sup>5</sup> In short, DOC argues that Florence's petition for *writ of mandamus* failed to state a cause of action

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<sup>5</sup> Florence had written the law library at the EKCC medium security facility and requested legal materials, but his request was denied and he was advised to transfer to that facility if he desired use of those legal materials.

upon which relief may be granted and that the circuit court properly dismissed the petition.

A motion to dismiss a complaint for failure to state a claim upon which relief can be granted is made pursuant to CR 12.02(f). CR 12.04 requires that defenses and relief enumerated in CR 12.02 (and CR 12.03) "shall be heard and determined before trial on application of any party unless the court orders that the hearings and determination thereof be deferred until the trial." In other words, Florence was entitled to be heard on DOC's motion to dismiss. See also Gall v. Scroggy, Ky. App., 725 S.W.2d 867, 869 (1987).

DOC's motion to dismiss was filed on April 4, 2002, and was noticed to be heard "at the convenience of the Court." The certificate of service at the end of the motion stated that it was mailed to Florence on April 3, 2002. Although on April 5, 2002, Florence filed a motion to order him transported to the court for a hearing, no hearing was held and the circuit court entered an order dismissing Florence's petition on April 11, 2002. We conclude that the circuit court erred in dismissing Florence's petition for *writ of mandamus* for two reasons. First, it did not afford him a hearing as required by CR 12.04. Second, we conclude that his petition for *writ of mandamus* did state a claim upon which relief could be granted.

"A motion to dismiss for failure to state a claim does not test the merits of the action but is confined solely to the sufficiency of the pleading." White v. Brock, Ky., 487 S.W.2d 908, 909 (1972). "Concerning a dismissal under CR 12.02(f), the allegations contained in the complaint shall be liberally construed in the light most favorable to the nonmoving party, and all allegations taken in the complaint shall be deemed true." Kidd v. Board of Educ. of McCreary County, Ky. App., 29 S.W.3d 374, 376 (2000). Furthermore, "[a] motion to dismiss shall not be granted unless it appears that the pleading party is not entitled to relief under any set of facts which could be proved in support of the complaint." Id.

Florence alleged that DOC and the prison authorities were denying him the right of access to the courts in violation to the Bounds case. DOC acknowledged that Florence does not have access to a law library, and it did not deny Florence's allegation that he likewise does not have access to trained legal aides. Further, Florence asserted actual injury in that his efforts to file an RCr 11.42 motion to vacate or set aside his sentence were impaired by lack of legal resources. In short, we conclude that Florence's petition stated a claim upon which relief would be granted. Therefore, we reverse the order of the trial court and remand the case for a determination of Florence's petition for *writ of mandamus* on its merits.

The undisputed facts are that there is no law library at the minimum security unit of EKCC, and the prison authorities are not allowing Florence to use the law library at the main campus of EKCC. It appears to us that if the minimum security and medium security facilities at EKCC are considered together as parts of a single institution, then Florence is entitled to use the facilities at the main campus. On the other hand, if the medium security unit and the minimum security unit are separate prison facilities, then the CPP seems to clearly provide that there be a law library at the minimum security unit. Either way, based on the undisputed facts, it is clear that Florence does not have access to legal materials. Whether he is being denied his right to access to the courts is a matter that must be resolved on its merits by the trial court.

Regardless of whether Florence is being denied his right of access to the courts, a question remains concerning the CPP. "An agency must be bound by the regulations it promulgates." Hagan v. Farris, Ky., 807 S.W.2d 488, 490 (1991). "Further, the regulations adopted by an agency have the force and effect of law." Id. Therefore, DOC is bound by the CPP to provide a law library at minimum security institutions. Again, it seems clear that EKCC must either provide its minimum security facility with a law library in accordance with its regulations or allow Florence to use the library at the medium

security facility without requiring him to transfer there to do so.<sup>6</sup>

The order of the Morgan Circuit Court is reversed, and this case is remanded for a hearing on Florence's petition on its merits. The circuit court is reminded to follow the mandates of the U.S. Supreme Court in the cases of Lewis and Hagan.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Jennifer Hatcher  
Department of Corrections  
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<sup>6</sup> While it appears that Florence is being denied his right of access to the courts, we may not reach that conclusion at this time since we may not be aware of all pertinent facts. At this point, DOC has not even filed a response to Florence's petition. It merely filed a motion to dismiss which the trial court granted.