

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001273-MR

LAWRENCE M. FROMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 01-CI-005810

LONNIE LEACH

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: JOHNSON, SCHRODER AND TACKETT, JUDGES.

JOHNSON, JUDGE: Lawrence M. Froman has appealed from an order entered by the Jefferson Circuit Court on April 19, 2002, granting summary judgment to Lonnie Leach. Having concluded that there is no genuine issue as to any material fact and that Leach was entitled to a judgment as a matter of law, we affirm.

Froman brought this action against Leach as the owner of A & B Polygraph Professionals. This case arises from a polygraph examination administered to Froman by Leach at

Froman's request. At the time of the examination, Froman was an inmate at Kentucky State Reformatory (KSR) in LaGrange, Kentucky. Froman alleged in his complaint that Leach intentionally sent the results of the polygraph examination to Lieutenant Bill Searcy, the Internal Affairs Officer at KSR, without Froman's permission. Froman claimed that the report was then used against him at a subsequent parole hearing, whereby he was denied parole. Froman also claimed that Leach lied in the polygraph examination report.

On January 30, 2002, Leach filed a motion for summary judgment which was supported by affidavits from Froman, Leach and Lt. Searcy. The trial court granted one motion by Froman for an extension of time to file a response; however, the trial court denied his second motion requesting an extension of time. The trial court then considered the merits of the motion and granted summary judgment to Leach in an order entered on April 19, 2002. This appeal followed.

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."¹ "Only when it appears impossible for the nonmoving party to

¹ Kentucky Rules of Civil Procedure (CR) 56.03.

produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted.”² “There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.”³ “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.”⁴ However, “a party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial.”⁵

In his complaint, Froman alleged that Leach had violated his civil rights as guaranteed by numerous sections of the Kentucky Constitution and the Kentucky Revised Statutes.⁶ Froman also claimed that he was entitled to relief for damages for humiliation and emotional distress. The trial court addressed each of Froman’s constitutional and statutory claims and concluded that each failed to state a claim for which relief could be granted. We will not seek to reiterate each of the

² Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991).

³ Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

⁴ Steelvest, 807 S.W.2d at 480.

⁵ Id. at 482.

⁶ On appeal, Froman claims Leach violated his Fifth, Eighth and Fourteenth Amendment rights under the United States Constitution. Because he failed to make this claim in the trial court, those issues are not subject to appellate review. Kaplon v. Chase, Ky.App., 690 S.W.2d 761, 763 (1985).

constitutional and statutory claims. As to those claims, we adopt the analysis of the trial court as follows:

I. KRS Chapter 344

. . . .

KRS Chapter 344 governs civil rights and sets forth causes of action for discrimination by employers, employment agencies, labor organizations, and apprenticeships or training. Froman alleges that Leach, with whom he contracted to perform services, lied about the conversation they had prior to the polygraph test. Such an allegation does not involve any employer, employment agency, labor organization or apprenticeship or training. Thus, Froman has failed to allege an underlying claim pursuant to KRS Chapter 344 to support a "further" violation and the Complaint must be dismissed.

II. KRS Chapter 413

. . . .

Because KRS 413.120 does not set forth a cause of action, but a statute of limitation, Froman has failed to state a claim based upon KRS 413.120.

III. Kentucky Constitution

. . . .

Considering the allegations in Froman's Complaint, this Court finds that Froman has failed to make allegations supporting a cause of action pursuant to any of the cited sections of the Kentucky Constitution. In his Complaint, Froman alleged that the person he contracted with lied and sent a copy of the results to prison officials without his consent. Froman's allegations concern a breach of contract, not a

violation of Section 1. Furthermore, Sections 13 and 14 of the Kentucky Constitution concern criminal actions, not a civil breach of contract. Sections 26, 109, 112, and 113 set forth general principles and powers of government, not rights. Thus, considering Froman's allegations in the most favorable light, this Court finds that Froman has failed to state a claim under the cited sections of the Kentucky Constitution.

IV. Criminal Statutes

. . . .

KRS 514.050 provides the following, in pertinent part:

A person is guilty of theft of property, mislaid, or delivered by mistake when: (a) He comes into control of the property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient; and (b) With intent to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it.

KRS 466.070 provides that a "person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." While listing KRS 514.050 in his Complaint, Froman alleges that Leach "should have maintained custody and control of this confidential document," rather than sending it to prison officials. However, there is no allegation that Leach came into control of the document because it was "lost, mislaid, or delivered [to him] under a mistake as to the nature or amount of the property or the identity of the recipient." Thus, Froman has failed to

state a claim pursuant to KRS 466.070 and KRS 514.050 and his Complaint must be dismissed.

Similarly, KRS 506.040 sets forth the crime of criminal conspiracy and provides the following:

(1) A person having the intention of promoting or facilitating the commission of a crime is guilty of criminal conspiracy when he: (a) Agrees with one (1) or more persons that at least one (1) of them will engage in conduct constituting that crime or an attempt or solicitation to commit such a crime; or (b) Agrees to aid one or more persons in the planning or commission of that crime or an attempt or solicitation to commit such a crime.

Froman alleged a breach of contract, not conduct that constitutes a crime. Thus, he has failed to allege an action pursuant to KRS 506.040, through KRS 466.070, and the claim must be dismissed.

KRS 506.080 sets forth the crime of criminal facilitation. "A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime." KRS 505.080(1). Again, Froman's allegations of breach of contract [] will not support a statutory action for the crime of criminal facilitation as no underlying crime has been alleged. Thus, Froman has failed to state a claim and the Complaint must be dismissed.

Finally, KRS 514.110 provides that "[a] person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another

knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner." Leach performed the polygraph under a contract, and thus, it would be impossible for Froman to allege that the document containing the polygraph results was stolen property. Therefore, Froman has failed to state a claim and the Complaint must be dismissed.

We agree with the trial court's ruling that Froman failed to state a claim for which relief could be granted on any of his constitutional or statutory claims. We also agree with the trial court that Froman's claims sounded in contract and that Froman failed to produce any affirmative evidence of a genuine issue as to any material fact and that Leach was entitled to summary judgment as a matter of law.

The record contains affidavits by Leach and Lt. Searcy. Attached to Lt. Searcy's affidavit is a consent form dated January 6, 1998. This form authorized Leach to give a copy of the polygraph results to the Internal Affairs Office at KSR. The form was signed by Froman, Lt. Searcy and Lt. Erica Rueberger. Lt. Searcy explained that an inmate did not have the right to a polygraph test and that Internal Affairs conditioned the privilege of Froman being administered a polygraph test on Froman's consent to provide a copy of the test results to Internal Affairs. Lt. Searcy stated that the purpose of this release was to ensure that the test was being used for a proper

institutional purpose. Lt. Searcy also stated that he and Lt. Rueberger witnessed Froman sign the consent form authorizing Leach to forward the report to Internal Affairs.

Leach's affidavit stated that he performed the polygraph test in a professional manner, in good faith and that he obtained Froman's informed consent⁷ to administer the test and to release the results to the Internal Affairs Office. The fact that the report was marked "Confidential" does not prove, as Froman contends, that he did not consent to Internal Affairs receiving the report. It merely evidences that the contents were confidentially sent to Internal Affairs. Other than his protestations, Froman failed to produce any affirmative evidence that he did not consent to the release of the report, in order to establish a genuine issue of material fact for trial.

Froman's claim that the report was subsequently used against him at a parole board hearing is only relevant as to his claims against Leach if Leach was not authorized to release the report to Internal Affairs. Since the evidence establishes that Leach was authorized to release the information, its subsequent use cannot be attributed to Leach.

Froman also claims that Leach lied in the polygraph report. The only "evidence" Froman offers to support this claim

⁷ Leach stated that he had lawfully destroyed the informed consent form but provided the court with a blank form, stating that his was the form he always used with his clients.

is his assertion that because Froman knew that Froman was telling the truth, then the results of the polygraph test to the contrary must be lies. Froman's bald allegations, beliefs and speculations are not affirmative evidence sufficient to create a genuine issue as to a material fact sufficient to defeat the properly supported motion for summary judgment.

For the foregoing reasons, the order of the Jefferson Circuit Court granting summary judgment to Leach is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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