

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001326-MR

JOSEPH L. SILVERBURG

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 02-CI-00532

CAROL TYREE WILLIAMS;  
GEORGE MILLION, WARDEN; AND  
KENTUCKY DEPARTMENT OF CORRECTIONS

APPELLEES

OPINION

REVERSING AND REMANDING

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BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Joseph Silverburg (Silverburg) appeals from an order of the Franklin Circuit Court dismissing his petition for declaration of rights. We reverse and remand for further proceedings.

For the most concise recitation of the facts, we shall adopt the appellees' statement of facts as set forth in their

motion to dismiss filed with the Franklin Circuit Court on May 8, 2002:<sup>1</sup>

### **MOTION TO DISMISS**

COME NOW the Respondents,<sup>2</sup> by counsel, and move the court to dismiss the Petition for Declaration for Rights because the petition is now moot. In support thereof, the Respondents state as follows:

In his petition, the Petitioner contends that he was wrongfully charged and found guilty of the charge of using the mail to obtain money, goods or services by fraud in violation of Kentucky Department of Corrections (DOC) disciplinary rules. He contends that there is no evidence to support the finding of his guilt for this offense; that he was denied due process rights at the hearing because he was not allowed call [sic] certain witnesses and present certain evidence; and that the filing of the disciplinary reports for this violation was in retaliation for his formal complaint to the U.S. Department of Justice complaining about certain conditions at Eastern Kentucky Correctional Complex (EKCC), including allegations of R.I.C.O. activities of Warden Million and threats of violence by Classification and Treatment Officer (CTO) Rucker.

### **FACTS**

In his petition, the Petitioner states that on or about February 16, 2002, he submitted to the Executive Director of the Kentucky Commission on Human Rights a letter

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<sup>1</sup> We should note that appellees have not filed an appellate brief in this matter. We also note that although Silverburg has filed an extensive brief herein and numerous statements with the circuit court, his pro se filings did not clearly set forth the factual basis for his appeal.

<sup>2</sup> Respondents refer to the parties named in the petition for declaration of rights by Silverburg. Those named are Carol Tyree Williams, Director Eastern Region, Warden George Million, Lt. John Underwood, et al. Petitioner refers to Silverburg.

complaining about certain problems at EKCC, and provided the director with a formal complaint addressed to the U.S. Department of Justice, and asked her to forward it to the Department of Justice. In support of his claims the Petitioner has attached to the petition as exhibits copies of the February 27, 2002, Disciplinary Report Form (Parts I and II) and copies of various correspondences. (Footnote omitted).

The formal complaint to the U.S. Department of Justice, dated February 16, 2002, alleges (1) that minority employees at EKCC are discriminated against in promotions; (2) that the lack of minorities in supervisory positions at EKCC promotes racial discrimination; (3) that complaints by minority prisoners results [sic] in physical retaliation by correctional staff; (4) that EKCC correctional officers, specifically CTO Earl Rucker, are out to assault or kill the Petitioner because of the grievances he has filed; (5) that minority prisoners at EKCC are discriminated against because they are not assigned the better paying work assignments; (6) that minority prisoners at EKCC are discriminated against in housing assignments; (7) that EKCC prison officials condone the use of racial slurs; (8) that EKCC officials, specifically Warden Million, are engaged in R.I.C.O. activities by stealing money paid by prisoners for HBO and Showtime movie programs; and (9) that minority inmates are discriminated against in the quality of medical care provided at EKCC. The Petitioner contends that accounting records he has obtained reflect a total absence of any accounting for the money paid by inmates for HBO and Showtime programming. Based on these records he contends that he has a reasonable basis for claiming that the Warden Million is stealing the money.

The Petitioner states that he provided a copy of the formal complaint to the U.S.

Department of Justice to Vertner Taylor, Commissioner of the DOC, and that he was subsequently advised by Respondent Carol Tyree Williams (Director of Adult Institutions - Eastern Region, for the DOC) that she had received a copy of the formal complaint from Commissioner Taylor. Referenced in the petition is the February 25, 2002, memorandum of Respondent Williams advising the Petitioner that she was forwarding a copy of the Petitioner's formal complaint to Warden Million. Also referenced in the petition is the March 6, 2002, memorandum of Warden Million wherein he advised Respondent Williams that the allegations made by the Petitioner had been investigated by the appropriate EKCC department heads, and were found to be false, and in some cases malicious. Contrary to the Petitioner's claims, all money paid by inmates for HBO and Showtime programming is properly accounted for. (Exhibit A affidavit omitted). Warden Million further advised Respondent Williams that, based on the nature of the statements, the Petitioner was issued a disciplinary report by Warden Million himself and CTO Earl Rucker.

Referenced in the petition are both disciplinary reports, dated February 27, 2002, charging the Petitioner with using the mail to obtain money, goods or services by fraud in violation of CPP 15.2, Category V-8. Specifically, Warden Million stated in his disciplinary report that, while prisoners have the right to make legitimate complaints, the petitioner had no legitimate or reasonable basis for asserting that Warden Million was stealing the money paid by inmates for HBO and Showtime programs, and that the statements were completely false. Furthermore, CTO Rucker stated in his disciplinary report that, while prisoners have the right to make legitimate complaints, the petitioner had no legitimate or reasonable basis for asserting Rucker had

made racial slurs against him, had assaulted him, and was planning future assaults against him.

At the conclusion of the March 22, 2002, disciplinary hearing, during which both disciplinary reports were heard, the Petitioner was found guilty of using the mail to obtain money, goods or services by fraud. The Petitioner was assessed 60 days in disciplinary segregation and 90 days good time loss. In the instant action the Petitioner contends that (1) there is no evidence to support the finding that he is guilty of using the mail to obtain goods or services by fraud; (2) that he was denied due process because the [sic] was not allowed to present certain witnesses or documents at the hearing; and (3) that the disciplinary reports were filed in retaliation for his filing of the formal complaint with the U.S. Department of Justice.

#### **PETITIONER'S CLAIMS ARE MOOT**

On April 15, 2002, the Petitioner filed the instant case. On May 1, 2002, John Motley, Deputy Warden for Programs at EKCC issued a memorandum modifying both disciplinary reports mentioned herein finding the Petitioner guilty of *disrespectful language about an employee* in violation of CPP 15.2, Category III - 20, and dismissing the finding of guilt for *using the mail to obtain money, goods or services by fraud*. (Exhibit B affidavit omitted). Accordingly, because the Petitioner is no longer guilty of using the mail to obtain money, services or goods by fraud, each of his claims - that there is no evidence to support his conviction of that offense; that he was denied due process at the hearing on that offense; and that he was retaliated against by the filing of disciplinary reports charging him with that offense - are [sic] moot.

WHEREFORE, the Respondents respectfully request that the court dismiss this case with prejudice.

The circuit court agreed with appellees' arguments and in an order entered June 3, 2002, granted the motion to dismiss finding Silverburg's primary claim to be moot and all other claims to be either without basis, non-justiciable, or non-prejudicial. This appeal followed.

Having thoroughly reviewed the case before us, we believe the circuit court erred in dismissing Silverburg's cause of action as moot. In his original and two amended complaints, Silverburg alleged that he was denied due process of law during his prison disciplinary action, and further that the disciplinary reports filed against him by Warden Million and Officer Rucker were in retaliation for the complaints he filed with the United States Department of Justice and the Kentucky Commission on Human Rights. Silverburg contends that the two charges of using mail to obtain money, goods or services by fraud (a Category 5 - 08 violation) were filed immediately after prison personnel had been notified of the complaints he filed with state and federal agencies. Furthermore, Silverburg maintained his disciplinary hearing and his subsequently appeal were procedurally flawed and his due process rights violated. The circuit court dismissed his petition for declaration of

rights as moot based upon the charges being subsequently amended and the penalty reduced. However, we fail to see how such action taken upon further administrative review renders Silverburg's claims of retaliation and due process violations moot. Appellees' argument seems analogous to dismissing an appeal based upon an illegal search and seizure issue as moot solely because the original charge had been amended from a felony down to a misdemeanor offense. We believe the initial issue of the validity of the search and seizure remains despite the amendment to the original charge. Similarly, in this case, the issues of retaliation and due process violations remain whether Silverburg is charged with a Category 3 - 20 offense (disrespectful language about an employee) or a Category 5 -8 offense (using mail to obtain money, goods or services by fraud). And the mere fact that his punishment was reduced from 180 days good time loss to 120 days good time loss does not, in our opinion, make the issues raised less relevant and certainly not moot.

While we do not comment on the ultimate outcome of Silverburg's petition filed in the Franklin Circuit Court, we do believe the circuit court erred in determining Silverburg's claims to be moot. As such, we reverse the order entered by the Franklin Circuit Court and remand this matter for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT PRO SE:           No Brief Filed by Appellees

Joseph L. Silverburg  
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