

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000619-MR

JACTA EST ALEA

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 03-CI-00061

GLENN E. HAEBERLIN

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellant Jacta Est Alea (Alea), appeals, Pro Se, from the Lyon Circuit Court's denial of his motion for CR 60.02 relief. We affirm. Appellees, Kentucky State Penitentiary, et al, failed to file a brief in support of the trial court's ruling. Failure to file a brief can jeopardize a client's position.

In earlier criminal proceedings in Lyon Circuit Court, Appellant Alea physically attacked a circuit judge while appearing before him. Alea was given 180 days of disciplinary

segregation and two years non-restorable good time loss as a result. After Alea completed a year of segregation with no bad behavior, the Classification Committee at the correctional institution recommended that the remaining 2,669 days of disciplinary segregation be suspended, and Alea be returned to general population. The warden approved the recommendation of the committee and met with Alea to explain the action taken. Less than a month after being returned to general population Alea committed another disciplinary infraction. He was given an additional 45 days in segregation as punishment, and that new sentence was added to the 2,669 days which had been suspended. Alea claims that the Committee's suspension, rather than revocation of the term of disciplinary segregation, was in violation of policy and law.

The correctional institution asserted that CPP 10.2VI.G.i.d.2 permits the committee leeway by which to suspend a sentence with the approval of the warden. This policy does not specifically provide for the suspension of a term of disciplinary segregation, but similarly does not prohibit such a suspension. According to a Department of Corrections memorandum made part of the record, the Corrections Committee takes similar action in many cases where inmates have accumulated a large number of days of segregation as punishment. The suspension of that sentence and return to the general population is seen as an

incentive to the inmate to act in accordance with institution policy. Deference and flexibility are given to prison officials as they are "trying to manage a volatile environment." Mackey v. Dyke, 111 F.3d 460, 463 (6th Cir. 1998). "[P]rison regulations [are] primarily designed to guide correctional officials in the administration of a prison" and not to "confer rights on inmates." Sandin v. Conner, 515 U.S. 472, 481-482, 115 S.Ct. 2293, 132 L.Ed.2d 148 (1995). The trial court found that the action taken by the Corrections Committee was permitted by its policies and dismissed Alea's action for that reason.

Alea filed a civil action against the Appellee in 2003 claiming that the warden took improper action by suspending, rather than reducing, the time he had to spend in segregation. On July 11, 2003 the Lyon Circuit Court dismissed the action with prejudice. Alea then filed a motion pursuant to CR 60.02(f) claiming that the dismissal was improper and should be set aside. As grounds for his motion, Alea claimed a "state of lawlessness" in Lyon Circuit Court. Alea cited the indictment of a prosecutor and the refusal of a different circuit court to obey a Supreme Court order as grounds for his claim of lawlessness. Neither the prosecutor nor the judge referenced had anything to do with Alea's case. The assertion that the dismissal should be set aside due to claimed "lawlessness" in the court is without merit.

Alea also claimed that the dismissal was improper because the dismissal was rendered by the same judge he had physically attacked in earlier proceedings. Alea asserts that the judge should have recused himself *sua sponte* from the case. Alea states that the judge recused himself from the criminal matter, but did not recuse himself from civil actions concerning Alea. Alea cites several different post-conviction motions which were dismissed by the judge as proof that the judge was improperly biased against him. At no time in this case or earlier actions did Alea make a motion asking the judge to recuse. The circuit court denied Alea's motion, stating that Alea had failed to show grounds of an extraordinary nature justifying relief. This appeal follows.

Alea claims that the judge's error in failing to recuse himself from the matter *sua sponte* warrants extraordinary relief. Alea claims that the judge should have recused himself from the matter due to bias. Alea claims that the judge must be biased against him due to the attack Alea made on his person. He shows that the judge recused himself from all criminal matters involving Alea, but failed to recuse himself from the civil motions. Alea cites adverse rulings by the court on his motions as proof of bias.

Although it would appear possible that a judge who has been attacked by a defendant in his court might harbor some bias

or prejudice, after review of the motion underlying this action, no reversible error was found. Our Supreme Court has addressed that assertion as follows. "In the absence of a per se disqualification or statutory prohibition, recusal is a personal matter to be decided by the judge himself." Commonwealth Revenue Cabinet v. Smith, 875 S.W.2d 873, 879 (Ky. 1994). The burden of proof is on the complainant to show that the judge is prejudiced to such a degree that he cannot be impartial in the matter before him. Brand v. Commonwealth, 939 S.W.2d 358, 359 (Ky.App. 1997). There must be a showing of facts "of a character calculated seriously to impair the judge's impartiality and sway his judgment." Stopher v. Commonwealth, 57 S.W.3d 787, 794 (Ky. 2001), citing Foster v. Commonwealth, 348 S.W.2d 759, 760 (Ky. 1961). No such showing was made in the present case. There is no reversible error in the trial court's ruling. Therefore, the ruling is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Jacta Est Alea, Pro Se
West Liberty, Kentucky

BRIEF FOR APPELLEES:

No Briefs Filed.