RENDERED: JULY 31, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000557-MR

ADAM ANTHONY BARKER — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 18-CI-01205

BRAD ADAMS, WARDEN,
NORTHPOINT TRAINING CENTER; AND
JAMES ERWIN, IN HIS OFFICIAL
CAPACITY AS COMMISSIONER OF THE
KENTUCKY DEPARTMENT OF CORRECTIONS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Adam Anthony Barker, *pro se*, brings this appeal from a March 7, 2019, Order of the Franklin Circuit Court dismissing his petition for declaration of rights. We affirm.

Barker is an inmate at Northpoint Training Center. On August 9, 2018, Warden Brad Adams issued a memorandum amending the Inmate Visitation Program. The memorandum provided that effective September 14, 2018, "[a]n inmate will not be permitted to utilize the restroom during the course of the visit unless he has a documented medical issue. If the inmate needs to utilize the restroom, he will be required to do so in his dormitory and his visit shall be terminated. Please plan accordingly." This change in policy was set forth in Northpoint Training Center's Institutional Policies and Procedures (IPP) NTC 16-02-01, Visiting (hereinafter referred to as "restroom restriction"). Prior to this change, inmates had been permitted to use the restroom during visits.

On September 3, 2018, Barker filed a grievance asserting that the restroom restriction was arbitrary, unreasonable, unfair, and unnecessary. Barker claimed the policy was an affront to inmates' dignity and basic human rights and that preferential treatment should not be given to inmates with medical issues. An informal resolution of Barker's grievance was issued on September 5, 2018, which provided that "the visitation memorandum dated August 9, 2018[,] shall remain unchanged." Unsatisfied with the resolution, Barker requested a hearing before the grievance committee. The grievance committee decided it "cannot cancel the implementation of the changes to NTC 16-02-01." Barker then filed an appeal to Warden Adams. Warden Adams issued a decision which provided: "I concur with

the informal resolution and the grievance committee, for security reasons, this memorandum will remain in effect pending policy change." Thereafter, Barker appealed the decision of the Warden to James Erwin, Commissioner of the Kentucky Department of Corrections. On October 1, 2018, Commissioner Erwin issued a decision that provided, in part, "[s]ince you are not being prevented from having a visit and this is an institutional operational issue, I will leave it at the discretion of the facility concerning this matter. No further response necessary."

On January 29, 2019, Barker filed, *inter alia*, the underlying petition for declaration of rights in the Franklin Circuit Court. Therein, Barker asserted his "Constitutional Rights guaranteed by the 5th, 8th, and 14th Amendments to the United States Constitution and Section 2, 3, and 17 of the Bill of Rights to the Kentucky Constitution were violated by . . . implementation and enforcement of changes to the Inmate Visitation Program which restrict restroom utilization during the course of a visit."

Thereafter, appellees filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f). By order entered March 7, 2019, the circuit court dismissed Barker's petition for declaration of rights pursuant to CR 12.02(f). This appeal follows.

A motion to dismiss for failure to state a claim under CR 12.02(f) is a question of law and is therefore subject to *de novo* review. *Campbell v. Ballard*, 559 S.W.3d 869, 870 (Ky. App. 2018) (citing *Carruthers v. Edwards*, 395 S.W.3d 488, 491 (Ky. App. 2012)). The pleadings must be liberally construed in a light most favorable to petitioner, and the allegations contained in the complaint are taken as true. *Id.* at 870-71 (citations omitted).

Courts generally give "deference and flexibility" to prison officials "in the fine-tuning of the ordinary incidents of prison life[.]" *Sandin v. Conner*, 515 U.S. 472, 482-83 (1995) (citations omitted). Although "prisoners do not shed all constitutional rights at the prison gate," incarceration inherently limits a prisoner's rights. *Id.* at 485 (citation omitted). And, "a highly deferential standard of judicial review is constitutionally appropriate with respect to both the factfinding that underlies prison disciplinary decisions and the construction of prison regulations." *Hopkins v. Smith*, 592 S.W.3d 319, 322 (Ky. App. 2019) (quoting *Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997)). With these principles as our guide, we address Barker's specific contentions of error.

Barker contends that the restroom restriction set forth in IPP NTC 16-02-01 violates his right to due process as guaranteed by the Fifth and Fourteenth Amendments. More specifically, Barker asserts that the restroom restriction requires an inmate to prematurely terminate a visit if he needs to use the restroom.

To set forth an actionable violation of a liberty interest protected by the due process clause, a prisoner must show that the challenged institutional action "imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.

In this case, Barker has failed to demonstrate that the restroom restriction imposes an atypical and significant hardship on the ordinary incidents of life. Barker has not been denied access to a restroom during visitation time; rather, he is required to terminate his visit and return to his dormitory if he needs to use the restroom. While terminating a visit to use the restroom is an inconvenience, it does not rise to the level of violating a liberty interest protected by the due process clause. Furthermore, we believe NTC IPP 16-02-01 imposes a rational and permissible effort by institution "officials to further the central goal of institutional safety." *Hopkins*, 592 S.W.3d at 323 (citation omitted).

Barker next contends that the restroom restriction constitutes a violation of his Eighth Amendment right to be free from cruel and unusual punishment. He argues "[c]ourts have repeatedly permitted 8th Amendment claims dealing with inmates being refused access to restrooms to proceed. Prisoners are entitled to sanitary toilet facilities." Barker's Brief at 4.

In order to bring a claim under the Eighth Amendment, an inmate must establish that the particular condition constitutes cruel and unusual

punishment. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). And, a two-prong analysis is utilized to make such a determination. *Id.* at 834. First, the inmate must demonstrate that the particular violation was objectively and sufficiently serious that the violation resulted in a denial of "life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Second, the inmate must demonstrate that prison officials acted with "deliberate indifference" to the health or safety of the inmate. *Farmer*, 511 U.S. at 834.

In the case *sub judice*, Barker cannot satisfy the first prong of the analysis. As the restroom restriction at issue does not refuse inmates access to restroom facilities, it does not deny access. As such, we believe Barker's contention is without merit as his Eighth Amendment guarantee against cruel and unusual punishment was not violated.

Barker also asserts that the restroom restriction constitutes a violation of his rights under the equal protection clause of the Fourteenth Amendment. We have gleaned from Barker's *pro se* brief that he is asserting that excusing inmates with certain medical conditions from the restroom restriction is a violation of his right to equal protection.

It is well-established that the equal protection clause commands that no state shall deny any person within its jurisdiction equal protection under the law. In *Mahoney v. Carter*, 938 S.W.2d 575, 578 (Ky. 1997), our Supreme Court

stated the following as to the protections afforded inmates under the equal protection clause:

> Appellant has not asserted that he is a member of a suspect class, nor has it been claimed that a fundamental right is involved. Therefore, the Court need apply only the lowest level of scrutiny, or rational basis, when considering the actions of the State.
>
> The actions of the prison official were taken in furtherance of their duty to protect the safety and security of the prison, the public, and appellant himself. This meets the modest judicial scrutiny standard whereby state action must be rationally related to a state interest. It does not fail on equal protection grounds.

Barker has not alleged he was a member of a protected class so we review his claim under the rational basis test. As the restroom restriction is rationally related to the institution's "duty to protect the safety and security of the prison, the public, and appellant[,]" it does not violate equal protection. *Id.* at 578.

In sum, we do not believe that the circuit court erred by granting appellees' motion to dismiss for failure to state a claim.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Adam Anthony Barker, *Pro Se*
Burgin, Kentucky

BRIEF FOR APPELLEES:

Kristin Wehking
Kentucky Justice & Public Safety Cabinet
Frankfort, Kentucky