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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001242-MR

DARWIN GRAY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 19-CI-00314

DEPARTMENT OF CORRECTIONS,
JONATHAN GRATE, INTERIM COMMISSIONER,
AND ANDREA M. BENTLEY, OFFENDER
SERVICES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Darwin Gray appeals from a judgment of the Franklin Circuit Court dismissing his petition for declaration of rights pursuant to Kentucky Revised Statutes (KRS) 418.040 filed against the Kentucky Department of Corrections (KDOC), the then-KDOC interim commissioner, Jonathan Grate, and

KDOC offender information administrator Andrea Bentley. In his petition, Gray claimed he was improperly denied work-time credit, revocation of his work-time credit constituted an *ex post facto* violation, and he was entitled to reenter the work-time credit program.

The circuit court granted KDOC's motion to dismiss for failure to state a claim pursuant to Kentucky Rules of Civil Procedure (CR) 12.02. The circuit court found that KDOC has sole discretion to determine an inmate's participation in work-time credit programs, revocation of Gray's work-time credit did not constitute an *ex post facto* violation of Gray's rights, and Gray's action and his request for further relief were moot as he had been compensated for his labor.

Gray is incarcerated at the Northpoint Training Center serving time for twenty-four criminal offenses, one of those charges being first-degree robbery, a Class B felony. He was convicted in 2001.

On July 18, 2012, an override was entered on Gray's record allowing him to accrue work-time credit. Prior to that time, Gray was classified as ineligible for work-time credit.

In 2018, Gray filed a grievance at the Eastern Kentucky Correctional Complex (EKCC) alleging that his work-time credit totaling 555 days was no

longer on his time sheet.[1] EKCC determined that Gray's work-time credit was properly calculated. Gray filed an administrative appeal.

KDOC denied his appeal and cited a 2004 directive that inmates serving a sentence for first-degree robbery were ineligible for work-time credit no matter when the crime was committed. It was discovered that Gray had been erroneously permitted to participate in work-time credit programs after 2012 because of the override. KDOC then worked with each institution where Gray had been incarcerated from the time the override was entered to pay Gray one-half his pay, withheld pursuant to KRS 197.047(5),[2] and voided the work-time credit. Ultimately, 135 days of work-time credit earned while Gray was incarcerated was voided, and eleven days work-time credit earned while Gray was on parole was voided for a total of 146 days of work-time credit. It was determined that Gray never had 555 days of work-time credit, as he alleged.

[1] Between 2003 and April 2017, Gray has been granted parole, violated parole, and returned to prison with new charges. He alleges that he received work-time credit at each separate institution in which he was incarcerated.

[2] KRS 197.047(5) provides:

> A Department of Corrections administrative regulation shall set forth the amount of compensation a prisoner shall earn for any work-related project, and any prisoner who works on a governmental services program shall receive an amount equal to one-half (1/2) of the established compensation for such work and shall be eligible to receive a sentence credit as set forth below.

On March 26, 2019, Gray filed a petition for declaration of rights in the Franklin Circuit Court. He argued he was not a violent offender because his conviction for first-degree robbery predated that offense being added to the list of offenses in the violent offender statute, KRS 439.3401, and he was entitled to reinstatement into the work-time credit program while retaining the wages disbursed to him after his work-time credit was voided. Gray further argued that revocation of work-time credit constituted an *ex post facto* violation.

On July 11, 2019, an order was entered granting KDOC's motion to dismiss. The Northpoint Training Center's "History Outgoing Mail by Inmate Number" shows that Gray, *pro se*, deposited his notice of appeal from the Franklin Circuit's order in the internal prison mail system on August 9, 2019. However, it was not filed in the Franklin Circuit Court until August 15, 2019, after the expiration of his time to file a notice of appeal.

On August 30, 2019, this Court issued a show cause order requiring Gray to show cause why his appeal should not be dismissed because the notice of appeal was filed more than 30 days from the date of the Franklin Circuit Court's July 11, 2019 order. Gray responded arguing that his appeal was timely because he deposited his notice of appeal in the internal prison mail system on August 9, 2019. This Court passed the matter to the merits panel. This panel has now

considered the matter and, for the reasons stated below, deem Gray's notice of appeal as timely filed.[3]

In 2011, our Supreme Court adopted the prison mailbox rule applicable to the filing of a notice of appeal in criminal cases by an inmate. Kentucky Rules of Criminal Procedure (RCr) 12.04(5). The rule states: "If an inmate files a notice of appeal in a criminal case, the notice shall be considered filed if its envelope is officially marked as having been deposited in the institution's internal mail system on or before the last day for filing with sufficient First Class postage prepaid." *Id*. As explained by our Supreme Court in *Hallum v. Commonwealth*, 347 S.W.3d 55, 56-57 (Ky. 2011), the reason for the rule is that a prisoner faces challenges to accessing the courts not faced by individuals not incarcerated.

Despite the recognition of the challenges faced by an inmate filing an appeal, RCr 12.04(5) is limited to criminal appeals. This is so where, as here, the appeal is from a civil petition for declaration of rights. *See Anglin v. Justice & Pub. Safety Cabinet*, 480 S.W.3d 291, 293 (Ky.App. 2015) (holding that RCr 12.04(5) did not apply to an appeal in a declaration of rights case). "While the Supreme Court 'could have extended the prison mailbox rule to all documents filed

[3] By separate order, this Court ordered that this appeal shall proceed on the merits.

by prison inmates based on the underlying rationale for the rule,' it did not choose to do so." *Id.* (quoting *Willis v. Willis*, 361 S.W.3d 341, 344 (Ky.App. 2012)).

While *Anglin* and *Willis* held that RCr 12.04(5) does not apply to appeals from a denial of a declaration of rights, this Court did not address whether equitable tolling applied to save an inmate's untimely filed civil appeal. That omission was presumably because the issue was not raised. Here, Gray raised the issue in his response to this Court's show cause order. The issue of whether equitable tolling is applicable to an inmate's appeal from a denial of a declaratory judgment regarding sentence credit is directly before this Court.

As recognized long ago, "[e]quity is the correction of that wherein the law, by reason of its universality, is deficient." *Houston v. Steele*, 28 S.W. 662, 663 (Ky. 1894). From that concept emerged the doctrine of equitable tolling.

Equitable tolling is "a measure applicable to prisoners who attempt to get documents timely filed, yet fail." *Hallum*, 347 S.W.3d at 58. In *Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005), *overruled by Hallum*, 347 S.W.3d 55, "[t]he Kentucky Supreme Court first adopted the equitable tolling doctrine . . . to alleviate the procedural obstacles our rules posed to *pro se* inmates endeavoring to appeal." *Lee v. Haney*, 517 S.W.3d 500, 505 (Ky.App. 2017). Under the equitable tolling doctrine, "the critical inquiry remains whether the circumstances preventing a petitioner from making a timely filing were both beyond the

petitioner's control and unavoidable despite due diligence." *Commonwealth v. Stacey*, 177 S.W.3d 813, 817 (Ky. 2005) (citation omitted).

The viability of equitable tolling's application to inmate filings came into question after *Hallum.* In *Hallum*, the Court addressed what it characterized as "the burdensome equitable tolling test" set forth in *Robertson* and held that it "is now duplicative and superfluous, with its utility marginalized." *Hallum*, 347 S.W.3d at 59. The Court noted that "[t]he prison mail box rule was crafted to remedy the procedural deficiency our rules posed to *pro se* inmates seeking to appeal; thus, there is no longer a need for *Robertson*'s equitable tolling provision." *Id*. After *Hallum*, the question remained whether, in cases where RCr 12.04(5) is not applicable, there is still a need for equitable tolling to save an inmate's appeal that was timely deposited in the internal prison mail system but for reasons attributable solely to the delays inherent in that system, was untimely filed.

In *Lee*, this Court addressed whether the doctrine of equitable tolling had any viability post-*Hallum* in the context of an inmate administrative appeal. In doing so, this Court noted that several unpublished cases held that the doctrine applied to prisoner post-conviction appeals "that do not involve the prison mailbox rule" and "that meet strict standards of tolling relief." *Lee*, 517 S.W.3d at 505-06 (citing *Treat v. Commonwealth*, No. 2010-CA-002220-MR, 2012 WL 1886512, at *2 (Ky.App. May 25, 2012); *McAlister v. Commonwealth*, No. 2014-CA-001267-

MR, 2016 WL 1068998, at *3 (Ky.App. Mar. 18, 2016); *Anderson v. Commonwealth*, No. 2012-CA-001869-MR, 2014 WL 812886, at *5 (Ky.App. Feb. 28, 2014)). This Court rejected the notion that in *pro se* inmate civil appeals, equitable tolling was no longer applicable. This Court observed:

> While the equitable tolling doctrine has been superseded by RCr 12.04(5) in some instances, that rule, as explained previously, is not all encompassing and is of limited applicability. Equitable tolling has value and purpose. The adoption of RCr 12.04(5) and the mailbox rule did not eradicate the need for equitable tolling in some instances.

Id. at 506. This Court concluded that "if the *pro se* petitioner has otherwise complied with all of the requisites for filing a petition, the deadline for such filing is tolled on the date the prisoner delivers the correctly addressed petition to the proper prison authorities for mailing." *Id.* (quoting *Holt v. Cooper*, No. 2006-CA-000765-MR, 2007 WL 491605, at *2 (Ky.App. Feb. 16, 2007)).

We observed in *Lee* that the appellant was "not seeking to invoke RCr 12.04(5) or the equitable tolling doctrine to save his *judicial* declaration of rights petition." *Id*. at 505. However, this Court did not go so far as to say that equitable tolling could not apply to an appeal of a denial of a judicial declaration of rights petition. We now hold that it does apply.

As was explained in *Houston v. Lack*, 487 U.S. 266, 271-72, 108 S.Ct. 2379, 2382-83, 101 L.Ed.2d 245 (1988), the obstacles unique to a *pro se* inmate in filing an appeal are the same whether it is a criminal or civil appeal:

> Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the *pro se* prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service (or a private express carrier); and they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it. *Pro se* prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them. Worse, the *pro se* prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the *pro se* prisoner delivers his notice to the prison authorities, he can never be *sure* that it will ultimately get stamped "filed" on time. And if there is a delay the prisoner suspects is attributable to the prison authorities, he is unlikely to have any means of proving it, for his confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the notice on the date received. Unskilled in law, unaided by counsel, and unable to leave the prison, his control over

> the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access-the prison authorities-and the only information he will likely have is the date he delivered the notice to those prison authorities and the date ultimately stamped on his notice.

Our Supreme Court adopted the prison mailbox rule in our criminal rules, perhaps explaining why civil appeals were not included within its ambit. Whatever the reason, because RCr 12.04(5) does not include civil appeals in the prison mailbox rule, it necessarily does not supersede the equitable tolling doctrine or its "value and purpose." *Lee*, 517 S.W.3d at 506.

Gray appealed from a July 11, 2019, order of the Franklin Circuit Court and his notice of appeal was deposited in the internal prison mail system on August 9, 2019. Inexplicably, it was not filed in the Franklin Circuit Court until August 15, 2019, after the expiration of his time to file a notice of appeal. The delay was not attributable to a lack of diligence by Gray but caused by the inherent complications encountered by a *pro se* prisoner. We conclude it was timely filed because of equitable tolling.

However, that does not resolve this appeal. The question remains whether there is merit to Gray's substantive claim that he is entitled to work-time credit.

Inmates may file petitions for declaratory judgment pursuant to KRS 418.040 to seek review of their disputes with KDOC when *habeas corpus*

proceedings are inappropriate. *Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky.App. 1997). Although original actions, inmate petitions are similar to appeals because the circuit court's authority to act as a court of review is invoked. *Id.*

A petition should not be dismissed for failure to state a claim upon which relief can be granted "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved[.]" *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (quoting *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977)). "[T]he pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true." *Id.* (quoting *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky.App. 2009)). Because a motion to dismiss for failure to state a claim is a question of law, an appellate court reviews the issue *de novo*. *Id.*

Work-time credit is provided for in KRS 197.047, which states in pertinent part:

> (5) . . . any prisoner who works on a governmental services program shall receive an amount equal to one-half (1/2) of the established compensation for such work and *shall be eligible* to receive a sentence credit as set forth below.
>
> (6) The sentence credit provisions of this section shall not apply to a prisoner who is serving a:
>
> . . .

> (b) Sentence for a violent offense as defined in KRS 439.3401[.]

(Emphasis added.) KRS 197.047(7) provides that the decision to grant work-time credit is discretionary with the KDOC, stating that "[t]he department may grant sentence credits to inmates confined in a detention facility for labor performed in a governmental services program or within a detention facility for the maintenance of the facility or for the operation of facility services such as food service." *See also Martin v. Chandler*, 122 S.W.3d 540, 551 (Ky. 2003).

KDOC determined that Gray was not eligible for work-time credit because he was convicted of a violent offense as defined in KRS 439.3401. That statute "lists twelve offenses that are considered to be violent offenses."[4] *Commonwealth v. Merriman*, 265 S.W.3d 196, 199 (Ky. 2008). One of those offenses is "[r]obbery in the first degree." KRS 439.3401(1)(n).

Gray argues that because he was convicted of first-degree robbery prior to 2002, KDOC could not classify that conviction as a violent offense. He relies on KRS 439.3401(8), which states: "The provisions of subsection (1) of this section extending the definition of 'violent offender' to persons convicted of or pleading guilty to robbery in the first degree shall apply only to persons whose crime was committed after July 15, 2002."

[4] KRS 439.3401 has been subsequently revised and currently lists fourteen offenses that are considered to be violent offenses.

Gray ignores that by its plain language, KRS 197.047(6)(b) refers to the *nature* of the offense and not whether the inmate was actually classified for parole purposes as a violent *offender*. While Gray may not be classified as a violent offender, first-degree robbery is a violent offense. Therefore, KDOC did not abuse its discretion by determining that Gray was ineligible for work-time credit.

Gray also contends that the revocation of his work-time credit that he was permitted to earn after an override was erroneously entered in 2012 was an *ex post facto* violation of his rights. We disagree.

The *ex post facto* clause is "only one aspect of the broader constitutional protection against arbitrary changes in the law . . . [and] the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects." *Martin*, 122 S.W.3d at 551 (quoting *Lynce v. Mathis*, 519 U.S. 433, 440, 117 S.Ct. 891, 895, 137 L.Ed.2d 63 (1997)). An enhancement of the criminal punishment would fall within the *ex post facto* clause because it would alter the definition of the criminal conduct or increase the penalty by which the crime is punishable. *Id*. at 547.

In *Martin*, the Supreme Court held that "the statute's additional requirement for Appellant's eligibility to earn *discretionary* good time credits towards his sentence is not an 'increase in punishment' prohibited by the Ex Post

Facto Clause." *Id*. at 552. As the Court noted, because meritorious good time awards are discretionary, "the Commonwealth never made a 'bargain' with Appellant that would entitle him to good time reductions" and there was no *ex post facto* violation. *Id*. at 551.

The same is true in Gray's case. KDOC did not increase Gray's original sentence by voiding the work-time credit that was garnered through a clerical override. "Stated otherwise, at the time that [Gray] committed his crimes, there was no promise from the Commonwealth of Kentucky that, if convicted and sentenced to prison, [Gray] could satisfy his sentence prior to its maximum expiration date simply by [garnering work-time credit] during his confinement." *Id*. Because work-time credit is discretionary, KDOC never made a bargain with Gray that he could satisfy his sentence prior to its maximum expiration date by application of work-time credit.

As the circuit court noted, KDOC deposited $575 into Gray's account in January 2019 after his work-time credits were voided. Consequently, Gray has been compensated for his work in accordance with KRS 197.047(5).

In summary, we hold that the equitable tolling doctrine applies to civil appeals filed by *pro se* inmates. So that the law is clear as it is in criminal appeals filed by inmates, we urge the Kentucky Supreme Court to formally amend the procedural rules so that the prison mailbox rule is applicable to inmate civil

appeals. Having considered the merits of Gray's appeal, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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