Cite as 2013 Ark. 12

SUPREME COURT OF ARKANSAS

No. 11-937

WINSTON HOLLOWAY

APPELLANT

V.

MIKE BEEBE, GOVERNOR, STATE OF ARKANSAS; LEROY BROWNLEE, CHAIRMAN, ARKANSAS PAROLE BOARD; BENNY MAGNESS, CHAIRMAN, ARKANSAS BOARD OF CORRECTION; EACH IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES

APPELLEES

Opinion Delivered January 17, 2013

PRO SE MOTIONS FOR APPOINTMENT OF COUNSEL AND TO SUPPLEMENT EXHIBITS [APPEAL FROM THE LINCOLN COUNTY CIRCUIT COURT, LCV 11-56, HON. JODI RAINES DENNIS, JUDGE]

MOTION TO SUPPLEMENT EXHIBITS TREATED AS MOTION TO SUPPLEMENT RECORD AND DENIED; MOTION FOR COUNSEL DENIED; AFFIRMED.

PER CURIAM

Appellant Winston Holloway is an inmate in the Arkansas Department of Correction serving a life sentence. He filed a complaint in the Lincoln County Circuit Court seeking declaratory judgment; injunctive relief, costs, and attorney's fees against the defendants for civil-rights violations; and relief as a taxpayer for an illegal exaction based on claims concerning the procedures for submission of applications for clemency. The defendants filed a motion to dismiss the complaint, and the circuit court granted the motion, finding that the complaint failed to state a claim upon which relief may be granted. Appellant lodged the instant appeal, and he has filed motions that seek appointment of counsel and to supplement the record with additional exhibits. We deny the two motions and affirm the circuit court's grant of the motion to dismiss the complaint.

Appellant provided no basis in his motion to support appointment of counsel. Although there is no right to counsel in a civil action, this court has held that it will appoint counsel where an appellant makes a substantial showing that he is entitled to relief and that he cannot proceed without counsel. *Pitts v. Hobbs*, 2011 Ark. 138 (per curiam). Where, as here, the appellant has made no such demonstration of merit in his motion, it will be denied. *Id.*; *see also Noble v. State*, 2011 Ark. 200 (per curiam); *Smith v. State*, 2010 Ark. 365 (per curiam); *Mixon v. State*, 318 Ark. 762, 887 S.W.2d 307 (1994) (per curiam); *Virgin v. Lockhart*, 288 Ark. 92, 702 S.W.2d 9 (1986) (per curiam).

In his "Motion to Supplement Exhibits," appellant seeks to add to the record exhibits concerning an application for clemency filed after the complaint in this proceeding. We therefore treat the motion as one to supplement the record. The exhibits that appellant seeks to add to the record were not included in the record considered by the circuit court, and we cannot consider materials or testimony outside of the record below. *See Guy v. State*, 2011 Ark. 305 (per curiam); *Smith v. Brownlee*, 2010 Ark. 266 (per curiam); *Munson v. Ark. Dep't of Corr. Sex Offender Screening & Risk Assessment Comm.*, 2009 Ark. 469 (per curiam). The motion is accordingly denied.

Our standard of review on a motion to dismiss is well established; we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Dockery v. Morgan*, 2011 Ark. 94, ___ S.W.3d ___. In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences are resolved in favor of the complaint, and the pleadings are liberally construed. *Id.* In applying this test, we

are mindful, however, that our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.* (citing Ark. R. Civ. P. 8(a)(1) (2010)). We treat only the facts alleged in the complaint as true, not a plaintiff's theories, speculation, or statutory interpretation. *Id.* The question to be resolved under this standard is whether the circuit judge abused his or her discretion. *Id.*

Appellant raises three points for reversal, each asserting error by the circuit court in failing to find that appellant had stated sufficient facts to support a cause of action on a particular basis. Appellant first contends that the trial court erred in failing to find that the statutes that the Parole Board and Department of Correction had used in determining the procedures, as applied to his submissions, for submitting requests for clemency were applied in violation of the prohibition against ex post facto laws. Appellant next asserts error because the trial court did not find that the statutory procedural requirements to apply for clemency were inequitably applied, assuming that high-profile cases and those with attorney representation were given benefits not available to him. Finally, he urges that the statutes establishing the procedures for application for clemency unconstitutionally diminish the governor's power to grant pardons because of restrictions on how often an application may be submitted.

Appellant's first point is without merit because appellant failed to plead any facts in his complaint to establish that the statutes at issue, Arkansas Code Annotated sections 5-4-607

& 16-93-207 (Repl. 2006),[1] are punitive in nature. The statutes do not impose criminal sanctions, and are clearly regulatory, simply placing restrictions on applications to obtain clemency for criminal sanctions already imposed. Appellant therefore failed to plead a basis to support his claim of an ex post facto violation, and it was not error for the trial court to find that no ex post facto violation had been set out in the complaint. *See Kellar v. Fayetteville Police Dep't*, 339 Ark. 274, 5 S.W.3d 402 (1999).

Appellant's second point concerns his claim in the complaint that he was denied due process and equal protection of law because those inmates who applied for clemency and who had friends and relatives that provided them access to counsel, or who were convicted in high-profile cases, were more often able to obtain direct access to parole board members. Appellant did not, and does not, however, identify how this access stems from some unequal application of the statutes. Appellant merely made conclusory allegations that application of the regulations established by the statutes resulted in the alleged disparity. Appellant did not plead facts in the complaint that would demonstrate, if proven, that there was a state action that differentiates among individuals without a rational basis for the classification. *See Ark. Beverage Retailers Ass'n v. Langley*, 2009 Ark. 187, 305 S.W.3d 427. He did not demonstrate that whatever classification that he contended existed was not the result of distinctions with

[1]Appellant contested application of the then-current statutes to his own applications for clemency. In particular, he contested changes to the waiting period to be observed after an application had been denied in Act 498 of 1999 and Act 183 of 2007. The provision that had been amended by Act 498 of 1999 to change the period to be observed from one to four years has since been repealed by Act 1975 of 2005. The waiting period that is still set out in section 16-93-207 was increased from four years to six or eight years by Act 1169 of 2011.

no rational basis. *See Bakalekos v. Furlow*, 2011 Ark. 505, ___ S.W.3d ___. Appellant has not established error in the trial court's failure to find that his complaint stated a claim for relief on that basis.

Appellant's final point on appeal is that the trial court erred in failing to find that the complaint stated a claim based on a separation-of-powers violation. Appellant alleged that the restrictions in the statutes that limit how often subsequent applications for clemency may be submitted to the governor, particularly when compounded with difficulties in correcting potential mistakes in the materials presented to the governor, diminish the governor's authority to grant clemency.

The governor is allocated the power to grant pardons and other acts of clemency in article 6, section 18, of the Constitution of Arkansas of 1874. The first sentence of that provision states, "In all criminal and penal cases, except in those of treason and impeachment, the Governor shall have power to grant reprieves, commutations of sentence, and pardons, after conviction; and to remit fines and forfeitures, under such rules and regulations as shall be prescribed by law." This court has acknowledged that legislation "which so hampered the right as to make the power substantially unavailing would be void as an abridgement of the power conferred." *Horton v. Gillespie*, 170 Ark. 107, 279 S.W. 1020 (1926). The court in *Horton* nevertheless recognized that the legislature, in the very sentence that granted the governor's power, was provided the authority to regulate the governor's use of the power of clemency. *Id.* at 113, 279 S.W. at 1022.

In *Horton*, the court considered and upheld an earlier act that regulated the governor's

power of clemency and imposed certain publication requirements on grants of clemency. This court has indicated that the power of the governor to pardon is not absolute but is subject in its exercise to such regulations as the legislature may impose that do not substantially deprive the chief executive of this power, and we have held that certain statutory requirements were indeed mandatory. *See Gulley v. Budd*, 209 Ark. 23, 189 S.W.2d 385 (1945). The restrictions on the governor's power that appellant contends diminish it are not sufficient to substantially deprive the governor of his authority to act. The regulations that appellant contends interfere with the governor's power to pardon place restrictions, with some exceptions, on the frequency with which subsequent applications for clemency, following an inmate's first application, may be submitted. Those restrictions do regulate access to the governor for such pleas, but the rules that appellant objects to do not proscribe the governor's ability to grant pardons.

The circuit court did not therefore abuse its discretion in concluding that appellant had failed to state a claim on the three bases that appellant raised in this appeal.[2] We accordingly affirm the order granting the motion to dismiss the complaint.

Motion to supplement exhibits treated as motion to supplement record and denied; motion for counsel denied; affirmed.

Winston Holloway, pro se appellant.

No response.

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[2]Appellees raise immunity and other bases in support of the circuit court's decision to dismiss the complaint. We need not consider those additional bases because the points appellant raised on appeal are without merit.