

RENDERED: July 2, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-000942-MR

ROGER BROWN

APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER, JUDGE
ACTION NO. 97-CI-00063

JAMES MORGAN, WARDEN

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, EMBERTON and JOHNSON, Judges.

EMBERTON, JUDGE. Appellant, Roger Brown, appeals from a Boyle Circuit Court order dismissing his declaratory judgment action. We affirm.

In February 1997, Brown filed a declaratory judgment action alleging that the Eastern Kentucky Correctional Complex violated his constitutional rights under Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). Brown also filed a motion to proceed in forma pauperis, an affidavit of indigency

and a copy of his prison account statement covering the six months preceding the filing of his action. On February 11, 1997, the trial court issued an order permitting Brown to proceed in forma pauperis upon the payment of \$10 in court costs within thirty (30) days. The order provided that Brown's failure to pay would result in the dismissal of his case.

Following the February 11 order, Brown filed another motion to proceed in forma pauperis, affidavit of indigency and prison account statement. On March 4, 1997, the court issued an order giving Brown ten (10) days in which to pay the \$10 or face dismissal of his case. Finally, on March 24, 1997, the court dismissed the case due to Brown's failure to timely pay. This appeal followed.

On appeal, Brown has only addressed the merits of his claim for declaratory judgment. Without any determination on these issues by the circuit court, we cannot reach the merits of his claim. Regional Jail Authority v. Tackert, Ky., 770 S.W.2d 225, 228 (1989); Greason v. Prince, Ky., 415 S.W.2d 89, 92 (1967).

The appellee contends that the dismissal of Brown's case for failure to pay the \$10 in court costs should be affirmed pursuant to Kentucky Revised Statute (KRS) 454.410. Brown did not challenge the dismissal or the assessment of the court costs in the trial court nor has he raised the issues on appeal.

By adopting KRS 454.410 the legislature created a procedure for the circuit courts to follow when determining the amount of court fees and costs an inmate who has commenced an action must pay.

Initially, an inmate who commences an action must file a certified copy of his prison account statement for the six months preceding the commencement of the action. KRS 454.410(1). Next, the court determines the amount of fees and costs due based on the inmate's ability to pay. KRS 454.410(2). The fees and costs may range from a minimum of \$5 up to the full amount otherwise imposed by law. Id.

An inmate may move for a waiver of all court fees and costs by filing an affidavit of "special circumstances" explaining why he cannot pay the fee. KRS 454.410(3). If the court determines that all fees and costs should be waived, it must notify the inmate in writing. KRS 454.410(4). If the court denies the motion to waive all fees and costs it must notify the inmate in writing and give him at least forty-five (45) days in which to pay. Id. A failure by the inmate to pay the fees and costs or have them waived will result in dismissal of the case. Id.

The trial court correctly followed the procedure in this case. KRS 454.410(2) specifically permits the court to assess fees and costs in excess of \$5 as was done in this case. A review of Brown's account statement shows an average monthly

balance of \$12.93. The statement also shows that Brown makes deposits each month ranging from \$75 to \$117. Clearly, the court did not abuse its discretion in ordering Brown to pay \$10 in court costs.

Brown's second filing which included a motion to proceed in forma pauperis, an affidavit of indigency and an account statement cannot be considered a motion to waive fees and costs under KRS 454.410(3). It was identical to Brown's initial filing except that the account statement showed an average monthly balance of \$21.18. Even if Brown intended his second filing to be a motion to waive all fees and costs, he failed to include an affidavit of "special circumstances" which would justify relieving him of the duty to pay. In fact, Brown's second account statement, with an average monthly balance of almost \$9 more than the previous statement, supports the court's determination that he could afford the \$10 fee.

The forty-five day time period for payment provided by KRS 454.410(4) applies only if a motion to waive fees and costs is made under subsection (3). Thus, Brown was not entitled to any more time than the thirty days provided by the trial court because he never attempted to have the costs waived as required under subsection (3).

For all the foregoing reasons, the order dismissing Roger Brown's declaratory judgment action for failing to pay \$10 in court costs is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roger Brown, Pro Se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

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