

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001827-MR

DAVID HUSBAND

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 99-CI-00709

DEPARTMENT OF CORRECTIONS

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: BUCKINGHAM, EMBERTON, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: David Husband appeals from an order of the Franklin Circuit Court affirming an order of the Board of Claims dismissing his claim against the Department of Corrections. We reverse and remand.

On November 14, 1998, Husband, a prison inmate at Marion Adjustment Center, was placed in segregation. His personal property was inventoried on the following day, and he signed an inventory sheet on November 16, 1998. The only property listed as confiscated on the inventory sheet was ten coat hangers.

On November 17, 1998, Husband was transferred to the Northpoint Training Center. Personnel from Northpoint's property section inventoried the items transferred with Husband from Marion, and they discovered that a portion of Husband's property was missing. Also, a Northpoint employee completed a "DISPOSITION OF UNAUTHORIZED PROPERTY" form that listed items that were in Husband's possession but were over his authorized limit or designated as contraband.¹ On the same day, a member of the staff at Marion partially completed a "DISPOSITION OF UNAUTHORIZED PROPERTY" form which summarized the property that did not accompany Husband to Northpoint. The form was neither signed nor dated by Husband in the space provided.

On December 3, 1998, Northpoint received Husband's missing property from Marion. On December 26, 1998, Husband was notified that his missing property had arrived. Husband was allowed to sort through the property, exchange some items for others in his possession, and receive additional items through issue.

On the same day, a Northpoint employee filled out "DISPOSITION OF UNAUTHORIZED PROPERTY" forms on the remaining items. The forms, dated December 26, 1998, were signed by Husband. They contained a clause just above his signature which stated that "I understand the above instructions. I have been

¹ The record indicates that "unauthorized property" was property in quantities beyond that allowed, property received from sources not accounted for in the inmate's property records, or property considered as contraband. The property that was the subject of Husband's claim apparently fell into the category of property received from sources not accounted for or property beyond the authorized quantity.

given the choice of disposal for my belongings. I understand that if I do not dispose of these items within 45 days/5 days from the above date that the institution will donate the property to a charity or will destroy them." On or about January 1, 1999, Husband sent some property out with a visitor. On or about January 14, 1999, the remaining property was destroyed by Northpoint employees.

On March 2, 1999, Husband filed a claim in the Board of Claims against the Department of Corrections, claiming that it and its employees lost his personal property while transferring him from Marion to Northpoint². Corrections filed a motion to dismiss and argued 1) that Marion employees were not state employees and, therefore, the Board had no authority to compensate Husband for their actions, and 2) that the items were properly disposed of on January 14, 1999, in compliance with Corrections' policies. Husband filed a response asserting that his property was destroyed before the expiration of the forty-five day time period provided in the Corrections policy. He noted that he had signed the "DISPOSITION OF UNAUTHORIZED PROPERTY" form on December 26, 1998, and that his remaining property was destroyed on January 14, 1999. In reply, Corrections argued that Husband had received notice pursuant to the "DISPOSITION OF UNAUTHORIZED PROPERTY" form filled out at Marion on November 17, 1998, and that the property was destroyed after the expiration of the forty-five day period. Corrections further argued that it was irrelevant that the notice was given

² Husband's claim for lost property amounted to \$2,194.00.

to Husband at Marion and that the property was destroyed at Northpoint.

Based on the pleadings before it, the Board granted Corrections' motion to dismiss. Husband was not allowed to present any evidence to support his claim, and the Board entered an order dismissing it with prejudice. The order, which was entered on May 20, 1999, contained no findings of fact and gave no explanation for the decision.

Pursuant to KRS³ 44.140, Husband appealed the Board's order dismissing his claim to the Franklin Circuit Court. Husband argued once again that Corrections' policies were not followed concerning the destruction of his property because he was given neither written notice that the property had been confiscated nor an opportunity to dispose of it within forty-five days before its destruction. In its answer filed in the circuit court, Corrections denied that its policies were violated or that the forty-five day period ran from December 26, 1998. Rather, Corrections asserted that the forty-five day period ran from November 17, 1998.

In rejecting Husband's appeal, the circuit court held as follows:

This Court finds that the Department is correct that they had forty-five (45) days from the date of Petitioner's transfer, November 17, 1998, to dispose of Petitioner's remaining property. Since Petitioner's property was not disposed of until January 14, 1999, we find that Petitioner had adequate notice of the Department's intent. Therefore, this court finds that Petitioner

³ Kentucky Revised Statutes.

has failed to prove negligence on the part of the Department, and he has no claim upon which relief can be granted.

Following the entry of the circuit court's order affirming the Board of Claim's order, Husband appealed to this court.

The applicable Corrections' policy reads as follows:

An unauthorized item shall be inventoried and packaged for mailing and held forty-five (45) days after which the packaged item may be mailed at the expense of the inmate. If the inmate does not want to mail the property to anyone, he may request that his property be donated to a charitable or non-profit organization as an option for disposal. This request shall be in writing and a receipt obtained from the receiving organization. If the inmate refuses or fails to take any action regarding the disposition of his property, the property may be donated to charity by the institution after forty-five (45) days. In order to ensure that the inmate has been given adequate notice to dispose of certain property, the inmate shall be given written notice of the property at the time the inmate is received or transferred and the property is inventoried.

CPP⁴ 17.1 (VI) (A) (11). In his appeal to this court, Husband continues to argue that Corrections did not follow its own policies and give him timely written notice that the property would be destroyed or otherwise disposed of after forty-five days. He asserts that there is no proof that he received notice of the November 17, 1998, action and that his first notice that unauthorized property of his was being held was on December 26, 1998, when he signed and received the forms at Northpoint. Further, he claims that there is even a lack of proof that the

⁴ Corrections Policies and Procedures.

personnel at Marion actually filled out and signed the November 1998 form at that time.

In its brief Corrections raises a single argument which it has not heretofore raised. Rather than continuing to maintain that it gave Husband written notice pursuant to its policy, Corrections now argues that Husband's claim filed with the Board of Claims contained no allegation that his property had been unlawfully destroyed. It maintains that Husband may not now raise the issue of the destruction of his property in violation of CPP 17.1 because this allegation is a separate and distinct claim from that presented to the Board.

First, we conclude that Corrections' argument before this court may not properly be raised at this time because it was not raised before the circuit court. A party may not raise on appeal a question of law which it failed to raise before the trial court. Commonwealth, Transp. Cabinet, Bureau of Highways v. Roof, Ky., 913 S.W.2d 322, 325 (1996). As stated in Hopewell v. Commonwealth, Ky. 641 S.W.2d 744 (1982), a party "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Id. at 745, quoting Kennedy v. Commonwealth, Ky., 544 S.W.2d 219 (1977). Because Corrections did not raise this argument before the trial court, it may not raise it before this court.⁵

⁵ We have reviewed the record before the Board and have concluded that compliance with Corrections' policies was also an issue at that level. Therefore, Corrections' argument is without merit at any rate.

Second, having reviewed the entire record before both the Board and the circuit court, we conclude that the Board erred in dismissing Husband's claim without determining whether or not he had received written notice concerning his unauthorized property at least forty-five days before its destruction. Before both the Board and the circuit court, Corrections argued that it gave Husband written notice by way of the "DISPOSITION OF UNAUTHORIZED PROPERTY" form dated November 17, 1998. However, that form was not signed and dated by Husband in the space provided. There was simply no evidence in the record before the Board to support a finding that Husband actually had notice before December 26, 1998, that prison authorities were holding unauthorized property belonging to him.

Finally, we note that we may not disturb the findings of the Board of Claims if they are supported by substantial evidence. Commonwealth, Transp. Cabinet, Dep't of Highways v. Shadrick, Ky., 956 S.W.2d 898, 901 (1997). In the case sub judice, however, the Board made no findings. Rather, it simply dismissed Husband's claim.

Corrections argued to the Board in its motion to dismiss that the Board had no authority to compensate Husband because Marion employees were not employees of the state and that, at any rate, Husband's property was disposed of in accordance with CPP 17.01. Corrections' first argument was without merit because the property was destroyed by Northpoint employees who were clearly state employees. Having determined that the Board erred in accepting Corrections' second argument,

we conclude that the Board erred in dismissing Husband's claim and that the circuit court erred in affirming the Board.

Therefore, the order of the Franklin Circuit Court is reversed, and this case is remanded to the circuit court with instructions to remand the case to the Board of Claims for further proceedings, including a determination as to whether Husband received written notice at least forty-five days before his unauthorized property was destroyed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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