

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001159-MR

DENNIS BURKS

APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 04-CI-00006

JOHN MOTLEY, WARDEN

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

BUCKINGHAM, JUDGE: Dennis Burks, a prison inmate, appeals from an order of the Morgan Circuit Court dismissing his petition for declaration of rights. The case involves two prison disciplinary actions. We affirm.

A Kentucky prison regulation prohibits "[p]ossession, creating, or distributing any writing or photography of which child pornography, including violence, bondage and the like, is the subject, whether factual or fictitious." CPP¹ 15.2, category

¹ Kentucky Corrections Policies and Procedures.

VI-17. This policy apparently became effective on January 16, 2003. While housed at the Eastern Kentucky Correctional Complex, Burks wrote several letters explicitly depicting sexual misconduct with children. The first letter was written in June 2003, and was sent by Burks to an inmate at Ware State Prison in Georgia. The letter was returned to the Kentucky prison authorities by the Georgia prison authorities, and Burks was disciplined and received punishment of 90 days in segregation and forfeiture of 180 days of good time credit for violating the regulation.

In August 2003, Burks sent two other letters to inmates at a Massachusetts prison. These letters likewise contained depictions of sexual misconduct with children. The letters were intercepted by prison authorities, and Burks was again punished for violating the prison regulation. He received another 90 days in segregation and forfeiture of another 180 days of good time credit.

Burks filed a petition for declaration of rights in the Morgan Circuit Court in January 2004, arguing that the prison authorities violated his civil rights under the First and Fourteenth Amendments to the U.S. Constitution. The court rejected his arguments and dismissed his petition. This appeal followed.

Burks's first argument on appeal is that his due process rights were violated in connection with the first disciplinary action because he had not received any notification of changes in the prison regulations. He argues that due process required the prison authorities to prove that he was duly notified of the changes that became effective on January 16, 2003.² The record contains a number of affidavits from inmates who state that the new regulations were not posted in Burks's unit so as to give them notice of the changes. However, it was administratively determined that all changes in procedure had, in fact, been so posted. We conclude that the evidence constituted "some evidence" to support the finding.³

Burks's second argument on appeal relates to the second disciplinary action. He contends that neither letter was explicit or sexual in nature and that those conclusions were speculative and were personal assumptions and opinions by the staff. We have reviewed the letters and conclude that they clearly fall within the meaning of the regulation and are clearly in violation thereof.

Burks's third argument is that the prison warden's attorney had offered to reach a compromise with him in an effort

² In support of this argument, Burks cites Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). From our review of the case, however, we fail to see where this issue was addressed.

³ See Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 358 (1997).

to settle the violation charges. Burks attached an exhibit to his brief that indicates the attorney did offer a compromise. However, as the exhibit indicates, the settlement offer was withdrawn. Any unsuccessful settlement negotiation is irrelevant. Thus, this argument lacks merit.

Finally, Burks argues that the court dismissed his petition before he had an opportunity to file his memorandum addressing the issues raised by the opposing party. He notes that the record indicates the court dismissed his petition by an order entered on April 7, 2004, and that his memorandum was not received by the clerk and filed in the record until April 8, 2004. Having reviewed his memorandum, we conclude that the result would not have been different and that Burks suffered no prejudice by the court's failure to review his memorandum prior to the entry of the order.

The order of the Morgan Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Dennis Burks, *Pro Se*
Eddyville, Kentucky