

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001320-MR

WASIM JIHAD

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 06-CI-00067

THOMAS L. SIMPSON, WARDEN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Wasim Jihad, *pro se*, appeals the Lyon Circuit Court's dismissal of his declaratory judgment action based on its determination that Jihad failed to exhaust his administrative remedies as required under KRS 454.415. Finding that the circuit court did not err, we affirm.

On January 31, 2004, Jihad allegedly head-butted a prison officer, who was attempting to restrain him resulting in minor swelling and abrasions on the officer's face.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Subsequently, Jihad refused to cooperate with prison authorities in the investigation of the alleged incident. However, as evidenced by part one of the disciplinary report, he did not waive his rights to be provided notice of the disciplinary hearing, to be present at the disciplinary hearing, or to plead not guilty. The disciplinary report, which contained the charged offense and the facts supporting the offense, was forwarded to the adjustment committee.

On February 9, 2004, despite previously reserving his right to appear, Jihad elected not to attend the disciplinary hearing. The adjustment committee found him guilty of physical action resulting in the injury of an employee. Jihad was penalized with the forfeiture of sixteen (16) months of non-restorable “good-time” credit and assigned to administrative segregation for one year. Following his conviction, Jihad did not appeal the decision of the adjustment committee to the institution’s warden.

On February 12, 2004, Jihad was transferred to the Kentucky State Reformatory (KSR) for treatment for a mental illness and was returned to the Kentucky State Penitentiary (KSP) on May 2, 2005. On August 1, 2005, he was indicted by a Lyon County Grand Jury for third-degree assault arising from the same incident that gave rise to this appeal. Subsequently, concluding that Jihad was suffering from a mental illness at the time of the assault, the Commonwealth dismissed the indictment.

On March 16, 2006, over two years after the adjustment committee’s decision, Jihad filed an appeal to the warden arguing that the disciplinary proceeding had violated his due process rights. But, the warden dismissed his appeal as untimely. On March 29,

2006, Jihad filed a declaratory judgment action challenging the constitutionality of his disciplinary proceeding upon due process grounds. He alleged that he was mentally unstable at the time of the hearing; thus, he alleged that he was incompetent to make decisions for his defense. He further alleged that his legal aide was prohibited from representing him at the disciplinary hearing. Finally, Jihad argued that his failure to timely file his appeal should have been excused because of his mental illness and for his then-pending criminal charges related to the same incident. Upon the Department's motion, the circuit court dismissed Jihad's action. This appeal followed.

As our standard of review, as set forth in *Wolff v. McDonnell*, 418 U.S. 539, 564-566, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), an inmate facing the potential forfeiture of good-time credit must be afforded procedural due process rights. In *Wolff*, the U.S. Supreme Court set forth the basic procedural due process requirements for a prison disciplinary hearing. First, the inmate must be provided with a written notice of the charges pending against him at least 24 hours before the disciplinary hearing. *Id.* Second, there must be a written statement by the factfinders about the evidence relied on and the reason for the disciplinary action. *Id.* Third, the inmate facing disciplinary proceedings should be allowed to call witnesses and present other evidence in his defense when allowing him to do so will not be unduly hazardous to prison safety or correctional goals. *Id.*

Additionally, several other general constitutional principles guide our resolution of this appeal. First, an inmate's incarceration causes the necessary denial of

many privileges and rights, which is justified by the considerations underlying our penal system. *Sandin v. Conner*, 515 U.S. 472, 485, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1985). Second, when determining the appropriate balance between an inmate's constitutional rights and the legitimate interests of the penal system, deference should be afforded to prison officials "who are actually charged with and trained in the running of the particular institution under examination." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (quoting *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). Finally, the Court has held that the proper standard of review is that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). This standard permits prison authorities to provide for security problems and to formulate solutions for "intractable problems of prison administration." *Id.*

From a review of the record, when Jihad filed his declaratory judgment action, KRS 454 .415(1)² provided that:

(a) No action shall be brought by an inmate, with respect to a prison disciplinary proceeding or challenges to a sentence calculation or challenges to custody credit, until administrative remedies as set forth in Department of Corrections policies and procedures are exhausted.

Corrections Policy and Procedure (CPP) 15.6(F) requires that an inmate file his appeal to the warden within 15 days from the administrative committee's decision. The circuit court dismissed Jihad's petition because he had not exhausted his administrative remedies

² In 2006, the legislature revised KRS 454 .415, but the revisions do not affect the outcome of this appeal.

and did not file his action in circuit court within the one-year statute of limitations.

While he concedes that his appeal to the warden was untimely (failed to exhaust his administrative remedies), Jihad argues that the 15-day filing limitation should have been tolled due to his incompetence and his failure to discover the committee's action.

Essentially, he argues that he was incompetent, as evidenced by his treatment and hospitalization, from January 31, 2004, to beyond his return to KSP on May 2, 2005.

Jihad further alleges that he did not learn of the adjustment committee's action until April 16, 2005, which was over a year after that decision.

Despite Jihad's argument, we agree with the conclusion of the circuit court.

The circuit court concluded that Jihad was mentally incompetent on February 9, 2004, the date of the disciplinary hearing, until his return from KSR on May 2, 2005. However, the circuit court concluded that his mental disability was removed when he was released from KSP on May 2, 2005. Accordingly, the circuit court concluded that the 15-day limitation to appeal the adjustment committee's decision began to run on May 2, 2005, and expired 15 days later. Since Jihad did not appeal to the warden until March 2006, the circuit court dismissed Jihad's declaratory action based on his failure to exhaust his administrative remedies as required in 454 .415(1) and CPP 15.6(F).

We conclude that the record supports the circuit court's conclusions. Jihad was hospitalized for a mental illness on February 12, 2004, and was not released from treatment until May 2, 2005. Upon returning to KSP, Jihad worked as a grievance clerk and held other jobs inside the prison. Finally, after his return from KSR, Jihad was

indicted by a Lyon County Grand Jury, and the circuit court became very familiar with him throughout those proceedings. Consequently, the record supports the circuit court's conclusion that Jihad was mentally competent after he returned from KSR but failed to file his appeal within the 15-day limitation. *Southeastern Kentucky Baptist Hosp., Inc. v. Gaylor*, 756 S.W.2d 467, 469 (Ky. 1988) (no proof that plaintiff was of such unsound mind as to render her incapable of managing her own affairs as to toll the statute of limitations).

Jihad next argues that the circuit court erred when it failed to conduct a competency hearing to determine whether he was competent prior to filing his appeal to the warden. In *Lear v. Commonwealth*, 884 S.W.2d 657, 659 (Ky. 1994), the court held that a trial court does not have to hold a competency hearing unless it is presented with sufficient evidence to establish a reasonable doubt as to the defendant's competency. The trial court is in the best position to observe a defendant for signs of incompetency. *Dunn v. Commonwealth*, 573 S.W.2d 651, 655 (Ky. 1978). Since the court observed him during a related criminal proceeding and Jihad held several prison jobs, the circuit court did not err by not conducting a competency hearing.

Jihad next argues that his due process rights were violated because he was denied the right to be present at the disciplinary hearing and his legal aide was denied the right to be present at the hearing. However, the "Disciplinary Report Form Part II- Hearing/Appeal" notes that Jihad refused to attend the hearing and waived legal aid. Under these facts, his procedural due process rights were not violated. He was presented

with the required documentation and given a chance to participate at the hearing. While he was subsequently deemed mentally incompetent at the time, Jihad was accused of assaulting a prison employee, which is a crime that strikes at the heart of the internal security of a prison. A prison must be allowed to take disciplinary action when an inmate attacks a prison employee. While an incompetent defendant should not be subjected to a criminal trial, a prison disciplinary proceeding is not a criminal prosecution. *Stanford v. Parker*, 949 S.W.2d 616, 617 (Ky. 1996). Most importantly, permitting prisons to conduct disciplinary hearings against a prisoner who assaults a prison official is valid because it is reasonably related to legitimate penological interests. *Turner*, supra.

Since we agree that Jihad failed to exhaust his administrative remedies, we do not address the circuit court's conclusion that Jihad failed to file his declaratory action within the one-year statute of limitations period required by KRS 413.140.

For the forgoing reasons, the order of the Lyon Circuit Court dismissing Jihad's petition for a declaration of rights is affirmed.

ALL CONCUR.

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