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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000941-MR

DAVID H. DIXON — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE GARY PAYNE, SPECIAL JUDGE
ACTION NO. 05-CI-00774

BOARD OF EDUCATION OF
HARLAN COUNTY, KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,[1] SENIOR JUDGE.

KELLER, JUDGE: David H. Dixon (Dixon) appeals from the trial court's dismissal of his complaint and imposition of a restraining order. On appeal, Dixon argues that he was not required to issue summons and the trial court erred when it

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

dismissed his complaint for failure to timely do so. He also argues that the trial court erred when it ordered him to remove certain photographs from his website, since those photographs were already part of the public record. Finally, Dixon sets forth what he believes should take place on remand. The Board of Education of Harlan County, Kentucky (the Board), argues to the contrary. Having reviewed the parties' briefs, the record, and relevant law, we affirm.

FACTS

The dispute between Dixon and the Board has been pending, in one form or another, and in both state and federal courts, since 1996. However, the record we have before us begins on October 26, 2005, with Dixon's complaint and appeal of an order entered by a three-member tribunal.[2] Although what occurred before then is not necessarily pertinent to this Opinion, we believe it is helpful to an understanding of what brought the parties before us.

In 1996, the Board dismissed Dixon as a teacher. We take our recitation of what else occurred prior to 2005 from the Sixth Circuit Court of Appeals Opinion in *Dixon v. Clem*, 492 F.3d 665 (6th Cir. 2007).

> At the time Dixon lost his job, he was in his 26th year of teaching carpentry at Cumberland High School. He also maintained a studio in downtown Cumberland that

[2] We note that there apparently are two circuit court files, one with a 1996 case number, which has not been provided to us on appeal, and one with a 2005 case number, which has been provided to us on appeal. Some pleadings and orders from the 1996 case file are in the record before us as attachments to pleadings filed in the 2005 case file. Furthermore, it appears that some pleadings and orders entered after 2005 that are referred to by the parties in their pleadings must have been placed in the 1996 case file because they are not contained in the 2005 case file. Because some documents are missing, the procedural history is somewhat vague and we have made some assumptions from what we have before us. However, the documents that apparently were not filed in the 2005 case file are not necessary to our decision.

allowed him to satisfy his lifelong passion for photography. Dixon is considerably accomplished in the field, having received several awards for his work. He was allowed to pursue his alternative career as a professional photographer with the official permission of the school.

At least in the beginning, the photo shoot at issue in the present case was completely innocent. Dixon, operating with school approval, had offered students the opportunity to come to his studio on October 24, 1995 to retake their senior yearbook pictures. S.C. was one of the students who took Dixon up on his offer. She and another female student arrived at the studio around 6:00 p.m. that evening. Ultimately, the other girl left, and S.C. and Dixon found themselves alone together. In at least some of the pictures that Dixon then took of her, S.C. was wearing no clothing from the waist up, although her nipples were covered either by her hair or a "fishnet."

Dixon received a letter almost five months later informing him that he had been suspended by the school pending termination of his contract. The letter, authored by then-Superintendent of the Harlan County School System Grace Ann Tolliver, cited Dixon's having taken "topless" photographs of a student. This was deemed to be "conduct unbecoming a teacher" within the meaning of Ky.Rev.Stat. Ann. (KRS) § 161.790(1)(b). . . .

A long and complex road of hearings, appeals, remands, and lawsuits ensued. Because Dixon's claims stem principally from alleged due process violations during his state proceedings, this procedural history is far more relevant than the factual background to the issues involved in this appeal. The district court's concise summary of the relevant state proceedings reads as follows:

> To terminate Dixon's contract, a tribunal was convened by the Harlan County School Board to hear the charges against Dixon. Susan Lawson, the school board's attorney, presented evidence against Dixon, including several groups of photographs which

showed S.C. without any clothing above the waist. Dixon admitted to taking some of the photographs, arguing they were not "nude" because the student's nipples and part of her breast were covered with either hair or a fishnet. Dixon adamantly denied taking other photographs which were more revealing, stating that the photographs were not his.

The tribunal unanimously found Dixon guilty of conduct unbecoming a teacher and, by a 2-1 vote, upheld Tolliver's recommendation that Dixon be terminated. The tribunal based this decision on unanimous findings that Dixon participated in guiding S.C. in the poses in which she has no clothes above the waist, that S.C. never told Dixon she was 18, and that Dixon took all of the photographs and those photographs were unaltered. Dixon's own counsel at the hearing, JoEllen McComb, admitted that Dixon took photographs of S.C. without any clothing above the waist.

Dixon appealed the decision to the Harlan Circuit Court. However, after an approximate eight year delay (the reasons for which are unclear), Judge R. Cletus Maricle ordered a re-sentencing of Dixon, finding that the instructions given by the hearing officer were erroneous and that additional mitigating factors should be considered. Judge Maricle determined that, under Kentucky law, the tribunal should have been explicitly informed that in addition to upholding or vacating Dixon's termination, the tribunal could have imposed a lesser punishment even with its finding of conduct unbecoming a teacher. The Kentucky Court of Appeals agreed, and clarified that "[t]he trial court upheld the finding of conduct unbecoming a teacher but

> remanded for additional findings that may or may not result in the imposition of a lesser sentence." The state appeals court further noted that no additional proof was to be taken.
>
> On September 26-28, 2005, the re-sentencing was held with Michael Head serving as the hearing officer. The evidence from the previous hearing held eight [years] earlier . . . was put into the record over the objections of Dixon's counsel. Head then instructed the new tribunal to make findings of fact as to S.C.'s age representation to Dixon and as to who suggested the poses, as per Judge Maricle's August 15th Order. The tribunal was then given the correct instructions, and upheld Dixon's termination.

Id. at 668-70 (*citing Dixon v. Clem*, 404 F. Supp. 2d 961, 963-64 (E.D. Ky. 2005)).

Specifically, the second tribunal stated in its final order that the only issue before it was the "sentence" to be imposed on Dixon. The tribunal also stated that, pursuant to pre-hearing orders, it could only consider the evidence that had been presented to the first tribunal. Based on its review of that evidence, the second tribunal concluded that Dixon "admitted he took pictures of [S.C.], a student of his, with no clothes on above her waist." Furthermore, the second tribunal found that, whether S.C. suggested the poses or agreed to them, Dixon should not have permitted the situation to arise, and had engaged in "conduct unbecoming a teacher." A majority of the second tribunal then agreed that the Board's termination of Dixon's contract was appropriate. However, one of the members

thought that Dixon should have been permitted to take leave sufficient to permit him to retire with full benefits.

As noted above, Dixon appealed the second tribunal's order by filing a complaint in circuit court. In his complaint, Dixon argued, among other things, that the hearing officer at the tribunal impermissibly refused to permit Dixon to present evidence that had not been presented to the first tribunal; that the tribunal reviewed photographs that had been fraudulently altered; that the hearing officer impermissibly participated in the tribunal's deliberations; that the hearing officer incorrectly instructed the tribunal with regard to what findings of fact it was required to make; and that the tribunal failed to connect Dixon's photographic work with his work as a teacher. Although Dixon argued at great length before the circuit court and argues at great length before us that the photographs were altered, "fake," and/or fraudulent, he did not raise any issue with regard to the authenticity of the photographs when he appealed from the first tribunal's order. He did, however, testify before the first tribunal that he did not believe all of the photographs were his.

On December 1, 2005, the circuit court affirmed the second tribunal's order. In doing so, the circuit court noted that, when it remanded the matter after the first tribunal's order, it ordered the tribunal to "make specific findings of fact . . . and to consider all mitigating circumstances in imposing the same or a lesser permissible penalty based upon a determination of conduct unbecoming a teacher."

Furthermore, the court noted that it "did not grant leave for either party to take additional proof."

It appears that Dixon then filed a motion to alter, amend, or vacate and the Board filed a motion to confirm the second tribunal's final order. On May 27, 2006, the court granted Dixon's motion to vacate and the Board's motion to confirm, and the court adopted the second tribunal's final order. It is unclear why Dixon did not appeal from that order or what occurred to keep that order from becoming final and appealable. What is clear is that the Board filed a motion to dismiss and, because Dixon threatened to post the photographs on a website, the Board filed a motion seeking a restraining order. Judge Payne, sitting as a special judge, ultimately granted the Board's motion to dismiss and ordered Dixon to remove any photos of S.C. from his website. Judge Payne also ordered Dixon to "cease and desist from dissemination of the evidentiary materials that were placed under seal." This appeal followed.

We set forth additional facts below as necessary in our analysis of the issues raised by Dixon on appeal.

STANDARD OF REVIEW

Because Dixon raises primarily issues of law on appeal, our review is *de novo. Carroll v. Meredith,* 59 S.W.3d 484, 489 (Ky. App. 2001). With this standard in mind, we address the issues raised by Dixon below.

ANALYSIS

1. Prohibition from Dissemination of Photographs

We first address whether the trial court erred in ordering Dixon to remove photographs of S.C. from his website. In support of his argument, Dixon states that, although previously sealed, Judge Maricle removed that seal, making the photographs part of the public record. However, Dixon mischaracterizes Judge Maricle's order.

In his December 21, 2004, order, Judge Maricle stated "that all parties and their counsel shall have access to all exhibits filed in the instant case in the Harlan Circuit Court Clerk's office. Parties and counsel may inspect exhibits and have copies and prints made from the exhibits at a nearby location provided they are accompanied by a person from the Harlan Circuit Court Clerk's office while these copies or prints are being made." This order permits **the parties and their counsel** to have access to and to copy the photographs, but only under extremely limited circumstances. It does not make those photographs part of the public record, nor does it permit the public to have access to or copy the photographs. Dixon's argument to the contrary is without merit.

We note Dixon's argument that the court's order violates his First Amendment rights. However, that argument could and should have been made at the time the photographs were placed under seal. Because Dixon has not argued that placing the photographs under seal was constitutionally inappropriate, we will not address his First Amendment argument.

Based on the preceding, we hold that the circuit court did not err in ordering Dixon to cease and desist from disseminating the photographs through his website.

2. Issuance of Summons

We next address whether Dixon was required to issue summons in order to timely perfect his appeal of the second tribunal's final order. KRS 13B140(1) provides that

> All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Dixon filed his petition within thirty days of the second tribunal's final order and served copies on counsel for the opposing parties. However, he did not serve copies on the parties, and he did not cause summons to issue until nearly four months after he filed his complaint. Because Dixon did not cause summons to issue within thirty days of the second tribunal's final order, the circuit court dismissed his complaint. Dixon argues that the circuit court erred because he was not required to obtain issuance of summons to initiate his appeal. The Board argues that Dixon's appeal of the second tribunal's final order was an original

action and is therefore governed by the Kentucky Rules of Civil Procedure (CR), which require issuance of summons to initiate an action.

Having reviewed the record, we agree that the circuit court properly dismissed Dixon's action for four reasons. First, we note that "[w]here a statute prescribes the method for taking an appeal from an administrative action and the time in which the appeal must be taken, these requirements are mandatory and must be met in order for the circuit court to obtain jurisdiction to hear the case." *Frisby v. Board of Educ. of Boyle County*, 707 S.W.2d 359, 361 (Ky. App. 1986). As set forth above, KRS 13B.140(1) requires an appealing party to serve "all parties of record." It does not state that an appealing party shall serve the parties or their attorneys. By serving only the parties' attorneys, Dixon did not strictly comply with the mandatory requirements of KRS 13B.140(1). Therefore, even if service on the parties was the only requirement to initiate an appeal in circuit court, Dixon did not meet that requirement.

We recognize Dixon's argument that the appellate rules indicate that a notice of appeal may be served on a party's counsel rather than on the party. CR 76.03(1). However, that rule applies only to appeals to the Court of Appeals and the Supreme Court of Kentucky. It does not apply to petitions for review from administrative agencies to circuit courts. Furthermore, the rule specifically provides for alternative service, a provision not contained in KRS 13B.140(1).

Second, KRS 23A.010 grants jurisdiction to circuit courts to review administrative actions in certain circumstances; however, the statute provides that

"[s]uch review shall not constitute an appeal but an original action." KRS 23A.010(4). Pursuant to CR 3.01, actions are commenced in circuit court "by the filing of a complaint with the court and the issuance of a summons . . . ." CR 3.01. Because an appeal of an agency's final order is an original action, the civil rules apply. Pursuant to the civil rules, Dixon was required to file his complaint and cause summons to be issued to commence his action. He did not timely do so; therefore, the circuit court did not have jurisdiction.

Third, we agree with Dixon that other administrative appeal statutes contain language requiring issuance of summons to initiate an appeal while KRS 13B.140(1) does not. *See* KRS 151.186(1) and KRS 216B.115(2). However, Dixon is over-reading KRS 13B.140(1)'s silence. CR 1(2) states that the Kentucky Rules of Civil Procedure govern "procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules." As noted above, KRS 13B.140(1) states that a petitioner shall serve all parties with a copy of the petition. CR 3.01 requires issuance of summons to commence an action. These are not inconsistent provisions. In fact, they address two different procedural issues. One, KRS 13B.140(1), addresses who must be served, and the other, CR 3.01, addresses how an action is commenced. Because these provisions are not inconsistent, a party who wants to appeal from an agency order under KRS 13B.140(1) must file a complaint and cause summons to be issued to all parties within 30 days after the

agency's final order. Dixon failed to do this; therefore, the circuit court properly dismissed his complaint.

Fourth, we acknowledge that the wording in KRS 13B.140(1) could lead an appellant to believe that all he need do to initiate an appeal is file a petition and serve the parties. However, the second tribunal's final order specifically addressed any potential confusion by warning the parties that "[s]ome courts have interpreted [KRS 23A.010(4)] to mean that a summons must be served upon filing an appeal in circuit court." Therefore, Dixon was on notice that prudence dictated issuance of summons. For the foregoing reasons, we discern no error in Judge Payne's dismissal of Dixon's complaint.

3. Disqualification of Judge Payne

Dixon argues that Judge Payne "dismissed the case for legally frivolous reasons and imposed a patently unconstitutional restraining order – all within the space of twenty-four hours" which justifies his removal. Because we have affirmed Judge Payne's order, this issue is moot and we need not address it. However, as set forth above, we note that Judge Payne's reasons for dismissing Dixon's case were not frivolous. Furthermore, the restraining order was not patently unconstitutional but merely enforced an already existing order sealing the photographs. We also note that, while Judge Payne's involvement in this case may not have been lengthy, it does not take a significant period of time to determine whether a summons has been timely issued or a court order has been violated.

Finally, Dixon's statements that Judge Payne's order was based on frivolity, that he is oblivious, and that he did not take "seriously the restriction of staying within the bounds of the law" are neither appropriate nor beneficial. We note that the Federal District Court sanctioned Dixon's counsel because of his behavior before it and that counsel's lack of decorum with regard to Dixon's state and federal cases are not isolated events. *See Dixon v. Clem,* 492 F.3d at 676-79. The federal sanctions apparently had no impact on counsel's conduct. We take vehement exception to counsel's comments and remind him that, regardless of his personal feelings, he is bound by the rules of professional ethics which require him to treat the judiciary of the Commonwealth respectfully.

CONCLUSION

Having reviewed the record, we hold that the circuit court properly ordered Dixon to cease and desist from disseminating photographs that had been placed under seal. Furthermore, we hold that Dixon did not timely initiate his action in circuit court; therefore, the court properly dismissed his complaint.

ALL CONCUR.

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