

RENDERED: MAY 27, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF FEBRUARY 11, 2011, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001071-MR

LESLIE SMITH

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 10-CI-00190

NANCY DOOM, WARDEN,
GREEN RIVER CORRECTIONAL
COMPLEX; SGT. BILLY HERRIN,
ADJUSTMENT OFFICER; AND DEBRA
BANKS, INTERNAL AFFAIRS,
GREEN RIVER CORRECTIONAL
COMPLEX

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL AND VANMETER, JUDGES; SHAKE,¹ SENIOR JUDGE.

¹ Senior Judge Ann O'Malley Shake 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.

VANMETER, JUDGE: Leslie Smith appeals *pro se* from an order of the Muhlenberg Circuit Court dismissing his action for failure to comply with KRS 454.410. For the following reasons, we affirm.

Smith is an inmate at Green River Correctional Complex. On March 18, 2010, he filed a petition with the Muhlenberg Circuit Court seeking a declaration of rights relating to a prison disciplinary action and to proceed *in forma pauperis*. By order dated March 19, 2010, the trial court found that Smith had failed to comply with KRS 454.410(1) and (2); Smith failed to include a copy of his prison account statement and failed to pay requisite court costs. The court redocketed the matter for May 10, 2010, noting that his petition would be dismissed at that time if Smith failed to comply with KRS 454.410.

Smith filed another motion to proceed *in forma pauperis* on April 13, 2010, this time attaching to his motion a certified copy of his prison account statement, as required under KRS 454.410(1). The account statement showed a balance of \$13.45. By order entered May 11, 2010, the trial court dismissed Smith's petition for failure to comply with KRS 454.410(1) and (2). Smith moved for reconsideration, which the court denied.

On May 20, 2010, Smith filed a third motion to proceed *in forma pauperis*, attaching to his motion the same prison account statement showing a balance of \$13.45. By amended order dated May 26, 2010, the trial court noted that Smith did in fact comply with KRS 454.410(1), but that its previous order dismissing the

action remained in full force and effect since Smith failed to pay the requisite filing fee under KRS 454.410(2). Smith appealed that order, and this court affirmed on the basis that the record did not show that Smith had exhausted his administrative remedies pursuant to KRS 454.415. Smith filed a petition for reconsideration, submitting evidence that he did in fact exhaust his administrative remedies. This court granted his petition for reconsideration.

On appeal, Smith claims that during his prison disciplinary action, he was denied his due process rights, the evidence was unreliable and insufficient to support a conviction, and prison authorities failed to establish a proper chain of custody for the evidence. He requests that his disciplinary report be dismissed and removed from his institutional file.

However, our review of the record reveals that Smith never paid the requisite filing fee pursuant to KRS 454.410(2), which provides, in part:

When an inmate commences . . . an action . . . , the inmate shall pay at least partial court fees and costs. At a minimum, the inmate shall pay a five dollar (\$5) filing fee unless the court determines the inmate is unable to pay a fee and waives all fees and costs.

Smith's prison account statement submitted to the trial court showed a balance of \$13.45, enough to satisfy the minimum \$5 filing fee under KRS 454.410(2). Further, the record does not show that the trial court at any time waived the filing fee under KRS 454.410(2). As a result, this action was properly dismissed.

The order of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leslie Smith, *Pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

No appellee brief filed.