

RENDERED: JANUARY 9, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000031-MR

JAMES W. BAILEY

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 13-CI-00407

DON BOTTOM, WARDEN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: James W. Bailey, *pro se*, appeals from an order entered by the Boyle Circuit Court on November 27, 2013, denying a petition for a declaration of rights. We affirm.

Bailey was a prisoner housed in Northpoint Training Center. On June 26, 2013, he was assigned to a work detail picking up roadside trash in Marion

County, Kentucky. This was Bailey's first day on the road crew, and he consistently fell behind the other prisoners—even though he gave assurances he could keep up—requiring Deputy Gene Mudd to backtrack to check on him several times. When Deputy Mudd lost all sight of Bailey and Bailey did not respond to repeated yells to him, Deputy Mudd notified the Marion County Detention Center Bailey was no longer in “visual view of the designated work area[.]”

After a thirty-minute search, Officers located Bailey more than twelve miles¹ away from the other prisoners. However, the “gripper” and trash bag Bailey had been using were found just 100-150 feet from the rest of the road crew. Bailey was charged with second-degree escape.²

On August 2, 2013, a disciplinary hearing was held on an amended charge of unauthorized absence from the institution. Bailey maintained he never left the work area. He stated he lost his glasses and was merely looking for them when he became separated from the other prisoners due to limited physical capability. The hearing officer found Bailey guilty because:

Inmate Bailey had the opportunity to let Deputy Mudd [know] that he lost his glasses and wanted to look for them. During the hearing Mr. Mudd stated that this was not stated till after inmate Bailey was picked up by the Sheriff Deputies. . . . I find inmate guilty of an amended charge of a 4-09 unauthorized absence from the institution based on everything that was stated in at (sic) the hearing and based on the fact that on June 26, 2013 at

¹ Bailey claims this is a typographical error as he was taken into custody only ½ mile away from the other prisoners.

² Kentucky Revised Statutes (KRS) 520.030, a Class D felony.

1245 hours Community Service Deputy Gene Mudd notified Captain D. Gribbins at the detention center that Inmate James Bailey was no longer [within] a visual view of the designated work area, . . . Deputy Mudd stated that he had yelled for Inmate Bailey multiple times, and received no response.

Bailey’s punishment was loss of thirty days of good time credit and forty-five days in disciplinary segregation—suspended for ninety days.

Bailey petitioned the Boyle Circuit Court for a declaration of rights. His written *pro se* petition alleged denial of due process and a fair disciplinary hearing. He argued the hearing officer failed to follow applicable procedures in reaching her decision which he believed was unsupported by the proof.

The Justice & Public Safety Cabinet moved to dismiss the petition because an institutional finding of guilt is sufficient if based on “some evidence.” *Superintendent, Mass. Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 455 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985). Specifically, the Cabinet argued a conclusion reached by the disciplinary board that is supported by “any evidence” must be upheld. *Id.* at 455-56.

The trial court agreed and issued an order denying the petition on November 27, 2013. The order recognized incarcerated felons enjoy lesser due process rights than free citizens, *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed. 2d 935 (1974), but the three procedural due process rights required for a prison disciplinary hearing—“notice of the charges, a reasonable opportunity to be heard, and a brief written finding suitable for judicial review”—were all provided

in the case at bar. *Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997). The trial court further found the hearing officer's finding of guilt was supported by "some evidence" as required by *Walpole*. It is from this order Bailey now appeals.

ANALYSIS

Our review will be brief. As a *pro se* litigant, Bailey has chosen to stray from the usual format for appellate briefs. Saying it better than we can, he wrote:

What this appellant is going to do here is instead of giving a bunch of arguments he is going to send this Court enough proof to prove that there was no attempt to escape nor was he absence (sic) without authority and asks this Court to review the evidence and see if they can agree with the decision to indict by Marion County Grand Jury, or Boyle County Circuit Court and Northpoint Training Center. Don (sic) Bottom (Warden).

By straying from recognized appellate process, Bailey has committed a fatal flaw. We are a court of review. Unless a trial court has had the opportunity to review a claim, we have nothing to review. *Commonwealth, Dept. of Highways v. Taylor County Bank*, 394 S.W.2d 581, 583 (Ky. 1965) (internal citation omitted).

On appeal, Bailey asserts—for the first time—that it was not his responsibility as a prisoner to keep up with his fellow prisoners, but that it was Deputy Mudd's responsibility to keep up with him and that it is Deputy Mudd's fault that Bailey is now in "this mess." Because Deputy Mudd's alleged negligence—failing to ensure Bailey was healthy enough to work on the road crew—was never raised in the circuit court, it is not properly before us, and therefore,

there is nothing for us to review. Bailey may not “feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010) (internal citations omitted).

For the foregoing reasons, the order of the Boyle Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Bailey, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Charles D. Aaron, Jr.
Justice & Public Safety Cabinet
Frankfort, Kentucky