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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001566-MR

SAMUEL EDWARDS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY BUNNELL, JUDGE
ACTION NO. 15-CI-02943

JOSEPH MEKO, WARDEN; REBECCA LEWIS,
ADJUSTMENT OFFICER; AND KENTUCKY
DEPARTMENT OF CORRECTIONS

APPELLEES

OPINION
VACATING AND
REMANDING

** ** * ** * ** *

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

COMBS, JUDGE: Samuel Edwards, *pro se*, appeals an order of the Fayette Circuit Court dismissing his petition for a declaration of rights. After our review, we vacate and remand.

Edwards is an inmate incarcerated in the Blackburn Correctional Complex. Sergeant Roger Kilgore claimed that he witnessed Edwards smoking a tobacco cigarette and passing it to other inmates. When questioned concerning the matter, Edwards denied smoking and requested a urinalysis. Edwards was charged with “possession or promoting of dangerous contraband” pursuant to CPP¹ 15.2(II)(C)(VI)(3) and “smuggling of contraband into, out of or within the institution” pursuant to CPP 15.2(II)(C)(IV)(5).

On November 6, 2014, a prison disciplinary hearing was held. Edwards was found guilty, and the warden denied his appeal. Edwards then filed a petition for a declaration of rights in Fayette Circuit Court. The circuit court remanded the case for a new hearing based on a factual error in the written report: Sergeant Kilgore’s statement that he saw Edwards smoking in Dorm 3 when Edwards was actually in Dorm 1. The court found that this mistake rendered Edwards’s notice defective.

The new hearing took place on May 21, 2015, and Adjustment Officer (AO) Rebecca Lewis found Edwards guilty based on Sergeant Kilgore’s identification. The penalty imposed against Edwards was 90 days of disciplinary segregation, 180 days of lost good time, and 180 days of restricted visitation (behind glass only).

Edwards then filed a petition for declaration of rights in Fayette Circuit Court on August 10, 2015. On September 24, 2015, the Department of

¹ Kentucky Corrections Policies and Procedures.

Corrections (DOC) filed a motion to dismiss, attaching documents that had not previously been included in the record of that disciplinary action. On September 28, 2015, the circuit court dismissed Edwards's petition on the grounds that he failed to state a claim. This appeal follows.

Edwards makes the following arguments² on appeal: 1) that he was denied an opportunity to be heard when the circuit court dismissed his case without holding a hearing; 2) that he was denied an opportunity to be heard when the circuit court dismissed his petition before the running of the response time for the motion; 3) that insufficient evidence existed to support his convictions; 4) that tobacco does not constitute "dangerous contraband" under the Kentucky Correctional Policies and Procedures (CPP); and 5) that he was denied the right to present a defense when prison officials did not allow him to take a urine test to demonstrate that he had not been smoking tobacco.

Although it is more restricted with regard to prison disciplinary actions, procedural due process in that context nonetheless requires:

- (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.

² Edwards states several times that he requested security camera footage, but the AO's report stated that a search for security camera footage surrounding this incident revealed that none was available. Because we are remanding, we cite the circuit court to *Rameriz v. Nietzel*, 424 S.W.3d 911 (Ky. 2014), in which our Supreme Court held that refusal of an AO to review similar security footage constituted a violation of the due process right of an inmate to present a meaningful defense.

Superintendent, Mass. Correctional Institution, Walpole v. Hill, 472 U.S. 445, 454, 105 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985). These due process requirements are generally deemed to be met “if some evidence supports the decision by the prison disciplinary board.” *Id.*, 472 U.S. at 455, 105 S. Ct. at 2769.

Edwards argues that the trial court erred when it granted the motion of the Department of Corrections (DOC) to dismiss. In the second appeal to the circuit court, the DOC attached to its motion to dismiss part of the administrative record and the order from the circuit court reversing for a new hearing resulting from Edwards’s first appeal. CR³ 12.03 provides as follows:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on such motion, matters outside the pleading are presented to and not excluded by the court, the motion **shall** be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties **shall** be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56. (Emphases added.)

Thus, regardless of its designation, a motion to dismiss **must** be treated as a motion for summary judgment if documents or matters outside the pleadings themselves are considered. CR 12.03. *Cabinet for Human Res. v. Women’s Health Servs., Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994). Because the DOC attached matters outside the record to its motion to dismiss, the circuit court was required to treat it as one for summary judgment. *See Craft v. Simmons*, 777 S.W.2d 618, 620 (Ky. App. 1989) (purported motion to dismiss with copy of an

³ Kentucky Rules of Civil Procedure.

ordinance attached treated on appeal was treated as a motion for summary judgment).

In the case before us, the circuit court entered an order three days after the time that the DOC filed its motion for summary judgment. CR 56.03 provides that “[t]he [summary judgment] motion shall be served at least 10 days before the time fixed for the hearing.” Kentucky courts have also treated this provision as one relating to response time to a summary judgment motion. Kentucky courts have applied the summary judgment standard to prison disciplinary hearings. *See, e.g., Mobley v. Payne*, 484 S.W.3d 746 (Ky. App. 2016). This Court discussed at some length the application of the summary judgment standard to prison disciplinary actions in *Smith v. O’Dea*, 939 S.W.2d 353, 356 (Ky. App. 1997). This Court has previously stated: “CR 56.03 provides that one will have a minimum of ten days to respond to [a summary judgment] motion. This requirement is mandatory unless waived.” *Storer Commc’ns of Jefferson Cty., Inc. v. Oldham Cty. Bd. of Educ.*, 850 S.W.2d 340, 342 (Ky. App. 1993) (citing *Equitable Coal Sales, Inc. v. Duncan Machinery Movers, Inc.*, 649 S.W.2d 415 (Ky. App. 1983)). “[M]otions under CR 56 must be served on non-moving parties, who are given time to respond, and a hearing is required.” *Id.* However, this Court has also held that this rule is subject to waiver:

We would be inclined to agree with Brock that he was given insufficient notice of Pilot’s motion [for summary judgment] filed just three days before the hearing if there was a proper objection made to the trial court. The requirement that a party be given ten days to respond to a

motion for summary judgment is mandatory, unless waived. Brock has failed to cite any place in the record where he objected to the court's consideration of Pilot's motion. Our review of the record did not reveal any such objection, and therefore, we deem it waived.

Brock v. Pilot Corp., 234 S.W.3d 381, 383 (Ky. App. 2007) (citations and internal quotation marks omitted). Edward apparently mailed a letter to the trial judge protesting the dismissal of his case. Although his letter was not styled as a formal motion, it clearly indicates that he did not waive the non-compliance with CR 56.

KRS⁴ 454.405(1) addresses this issue in the particular context of prison disciplinary actions. That statute states “[a]t any time, and upon its own motion or on motion of a party, a court may dismiss a civil action brought by an inmate or on behalf of an inmate if satisfied that the action is . . . legally without merit or factually frivolous.”

The phrase “at any time” contained in the statute in the specific context of prison disciplinary cases would appear to permit the dismissal of Edwards's case despite the obvious conflict with the ten-day period required by CR 56. However, the statute also requires that the trial court issue **specific findings of fact**. KRS 454.405(3).

In this case, the trial court summarily dismissed Edwards's case without the requisite findings as to whether it was “legally without merit or factually frivolous.” KRS 454.405(1). Therefore, we must vacate and remand.

⁴ Kentucky Revised Statutes.

Because we are remanding on this procedural ground, we need not address Edwards's arguments as to whether tobacco is dangerous contraband or whether he was entitled to a urinalysis. Those issues remain within the province of the trial court to address.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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