

RENDERED: August 22, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

97-CA-0445-MR

ERNEST CARTWRIGHT

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL LONG, JUDGE
ACTION NO. 96-CI-0259

DAVID VANCE

APPELLEE

OPINION REVERSING
AND REMANDING

* * * * *

BEFORE: WILHOIT, Chief Judge; ABRAMSON and DYCHE, Judges.

WILHOIT, CHIEF JUDGE: This is an appeal from a Morgan Circuit Court order denying the appellant's motion to reopen.

On December 21, 1995, the appellant and another inmate engaged in an altercation which resulted in injuries to the inmate. The Department of Corrections conducted an investigation of the incident and found that the appellant was guilty of assault resulting in the serious injury of another inmate. The appellant was then sentenced to 180 days' disciplinary segregation, 720 days' forfeiture of non-restorable good-time credit, and \$535 restitution for medical expenses. The appellant's appeal to the warden was denied.

The appellant filed a petition for declaratory judgment in Morgan Circuit Court seeking to have his punishment modified

or be granted a new hearing on the grounds that his due process rights were violated. The appellee filed a motion to hold the case in abeyance on November 21, 1996. The appellee's motion was granted, and the Department of Corrections agreed to vacate the original sentence and hold another hearing on the disciplinary charge against the appellant. On January 9, 1997, the appellant was found guilty of the lesser offense of physical action resulting in an injury to another inmate and was sentenced to 45 days' disciplinary segregation. The appellant chose not to appeal this sentence to the warden.

On January 15, 1997, the appellant filed a motion in the circuit court requesting that the previously forfeited good-time credit be re-credited and the restitution be returned because his new sentence did not include these penalties. The appellee responded with a motion to dismiss, which motion was granted by the circuit court. The court held that the issues presented by the appellant were moot and no actual controversy was stated.

On January 17, 1997, one day after the circuit court dismissed the case, the warden "remanded" the decision of the disciplinary committee to it for a determination on the issue of restitution. On January 23, the committee reinstated the \$535 restitution for medical expenses that had been imposed originally. The appellant filed a motion to reopen in the circuit court. The circuit court thereafter denied all of appellant's pending motions. This appeal followed.

The appellant makes two arguments in support of his claim that his due process rights were violated. First, he contends that there is insufficient factual support in the record to justify imposing \$535 restitution for the medical expenses of the injured inmate. Second, he asserts that the warden lacked the authority under 501 KAR 6:020 and Corrections Policy and Procedure 15.6 to remand the case for a determination on restitution. This court will not review the merits of appellant's claim at this time. The current appeal is from the circuit court's denial of the appellant's motion to reopen.¹ Therefore, the only issue before the court is whether the circuit court erred in refusing to reopen the final judgment dismissing the case.

The appellant contends that this case should be reopened because subsequent action by the warden shows that a controversy between the parties does exist and the issues raised by appellant are not moot. The appellant has not specified whether his motion to reopen is pursuant to CR 59.05 or CR 60.02. We believe the motion should properly be viewed as a motion pursuant to CR 60.02.²

¹The circuit court's order of February 12, 1997, does not specify which motions are denied. However, it appears that the court was denying the appellant's motion to reopen and did not address the merits of his claim.

²A motion to alter, amend, or vacate a judgment under CR 59.05 must be served within ten days of the final judgment. The appellant's motion to reopen was not filed within ten days of the final judgment and, therefore, could be summarily denied if viewed as a CR 59.05 motion. However, there is no evidence in the record to support viewing this motion as a CR 59.05 motion.

At the time the action for a declaration of rights was dismissed, the parties believed that the action was moot because the only punishment to be given the appellant was 45 days in segregation. The court was so notified by counsel for the Department of Corrections. It now appears that the parties were proceeding under a mutual mistake as to the factual predicate for dismissing the action. The appellant's motion was made within a reasonable time of the entry of the order of dismissal. Under the circumstances, we believe the trial court abused its discretion in not vacating the order of dismissal and reopening the case.

The circuit order of February 12, 1997, denying all pending motions is reversed in so far as the order was a denial of appellant's motion to reopen. Upon remand, the circuit court should make a determination on the appellant's claim that his due process rights were violated when restitution was reinstated against him.

ALL CONCUR.

BRIEF FOR APPELLANT:

No brief for appellee

Ernest Cartwright, Pro Se
Eddyville, KY

Furthermore, neither the appellee nor the circuit court have viewed appellant's motion as such.