RENDERED: August 13, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1998-CA-001509-MR

KENNETH SEWELL — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
CIVIL ACTION NO. 1997-CI-01681

LINDA FRANK, Chairperson,
KENTUCKY PAROLE BOARD — APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** **

BEFORE: BUCKINGHAM, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge. Kenneth Sewell appeals from Franklin Circuit Court orders that directed the Kentucky Parole Board to pay $30.26 as reimbursement for court costs incurred by Sewell in an open records lawsuit and denied other relief he sought, including the imposition of sanctions for failure of the board to produce records reflecting action taken at one of its meetings.

Sewell made a request for certain records to the Kentucky Parole Board pursuant to the Open Records Act, Ky. Rev. Stat. (KRS) 61.870-884. The request was directed to Linda Frank, chairperson of the board. Sometime prior to requesting the records, Sewell was granted an early parole hearing where he was considered for parole

under the intensive supervision program. In January 1997, Sewell was recommended for parole under the program, but in February of that year the board deferred Sewell's parole for seventy-two months because further information regarding the extent of his criminal activity had been brought to the board's attention. The minutes or tape recording of the second board meeting was the subject of Sewell's open records request.

After the board failed to respond to Sewell's request within three days as required by KRS 61.880(1), Sewell appealed to the Attorney General, who issued an opinion stating that if the records requested by Sewell exist, the board had violated KRS 61.880(1) by not producing them. The Attorney General also noted that if no records exist, the board was obligated to inform Sewell of that fact. When the board failed to appeal the Attorney General's opinion within the thirty-day period specified in KRS 61.880(5), the opinion had the "force and effect of law" and became enforceable in the circuit court of the county where the board maintains its office. KRS 61.880(5)(b).

Sewell filed suit in Franklin Circuit Court seeking to enforce the Attorney General's ruling. He also sought sanctions of $25.00 a day for each day that he was denied inspection of the requested records pursuant to KRS 61.882(5). The board moved for summary judgment supported by Frank's affidavit in which she said that the requested records did not exist and, thus, cannot be provided. The circuit court granted the motion, but directed the board to reimburse Sewell for the $5.00 filing fee he had paid.

Sewell's motion to reconsider was denied, but his cost recovery was increased to $30.26.

Sewell contends on appeal that summary judgment was premature because he was denied the opportunity to depose the former chairperson of the board to determine whether the requested records actually exist, contrary to the representation made by Frank in her affidavit. Sewell also faults the circuit court for declining to impose the maximum $25.00 a day sanction for non-production of the records.

Frank responds that Sewell did not preserve the discovery argument for appeal because his notice of appeal recites that he is appealing the order entered April 30, 1998, which required the board to pay Sewell $5.00 as reimbursement for the filing fee required of inmates. However, in his brief to this Court, Sewell states that he is appealing from the May 29, 1998, order denying his motion to supplement, amend, alter or vacate the judgment. The designation of the wrong order in the notice of appeal, if, in fact, the wrong order was designated, is not fatal to Sewell's appeal of the discovery and sanction issues. Ky. R. Civ. Proc. (CR) 73.02(2) establishes this state's policy of permitting substantial compliance with the Rules of Civil Procedure.

> The failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial. Failure to comply with other rules relating to appeals or motions for discretionary review does not affect the validity of the

> appeal or motion, but is ground for such action as the appellate court deems appropriate . . . .

CR 73.02(2); see Ready v. Jamison, Ky., 705 S.W.2d 479, 481 (1986). If the defect is not jurisdictional in nature, substantial compliance with the rule is acceptable as long as "no substantial harm or prejudice has resulted to the opponent." Ready, 705 S.W.2d at 482; see also City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990). The board and Frank were not prejudiced by Sewell's misidentification in his notice of appeal of the order from which he appeals. The board and Frank were aware of Sewell's motion to supplement, amend, alter or vacate, filed May 28, 1998, in which Sewell raised the issue of re-opening the case to enable him to depose Helen Howard-Hughes, the board's chairperson when it deferred consideration of parole for Sewell, and it cannot have surprised them that he intended to address the issue on appeal. Hence, Sewell is not precluded from raising the discovery and sanction issues on appeal.

Sewell, however, makes no viable argument that additional discovery might have revealed that the requested records actually exist. Sewell merely speculates that Howard-Hughes would testify that the records exist if she were deposed, and he did not file a counter-affidavit in the circuit court when confronted with Frank's affidavit supporting the motion for summary judgment. As a result, there was no countervailing evidence to challenge the statement by Frank that the requested records do not exist, nor is there any reason to believe that Sewell could produce such evidence at trial.

Summary judgment was, therefore, appropriate. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

Sewell's second argument is that the board's refusal to supply the requested records was willful and intentional and thus warrants imposition of the maximum $25.00 a day sanction for non-production. Because the only evidence of record (Frank's affidavit) establishes that the records do not exist, it would hardly have been appropriate for the circuit court to sanction the board for failing to do the impossible. In any event, the imposition of sanctions is discretionary with the circuit court, KRS 61.882(5), and there clearly was no abuse of discretion in these circumstances.

The orders from which this appeal is prosecuted are affirmed.

ALL CONCUR.

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