RENDERED: March 3, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002161-MR

KIRBY CONN COLLETT — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY WINCHESTER, JUDGE
ACTION NO. 99-CI-00254

GARY W. BARTON AND
SHARON FAULKNER — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND MILLER, JUDGES.

MILLER, JUDGE: Kirby Conn Collett brings this *pro se* appeal from an August 13, 1999 Summary Judgment of the Whitley Circuit Court. We affirm.

Collett was convicted of second-degree arson in the Whitley Circuit Court on June 9, 1995. He undertook a direct appeal to this Court and same was affirmed in Appeal No. 1995-CA-001712-MR. The Supreme Court denied Collett's belated motion for discretionary review on November 14, 1997. He then filed a motion for Ky. R. Crim. P. (RCr) 11.42 relief in the Whitley Circuit Court. That motion was denied on December 4, 1998. On December 10, 1998, Collett sought to appeal the December 4 Order

by filing a notice of appeal and a motion to proceed *in forma pauperis*. On March 2, 1999, the circuit court denied Collett's motion to proceed *in forma pauperis*. Collett then tendered a notice of appeal to the Whitley Circuit Court Clerk. He sought to appeal the denial of his motion to proceed *in forma pauperis*. Collett, however, failed to include either payment of filing fee or motion to proceed *in forma pauperis* with the notice of appeal. As such, the Deputy Circuit Court Clerk Sharon Faulkner returned Collett's notice of appeal with an explanatory letter.

In April 1999, Collett filed a writ of mandamus with this Court seeking to compel Faulkner and Gary Barton (a clerk of the Whitley Circuit Court) to file his notice of appeal. On May 12, 1999, Collett filed a civil action against Barton and Faulkner, both in their individual and official capacities. Therein, he alleged that Barton and Faulkner committed "nonfeasance of office" by failing to file his notice of appeal and sought compensatory and punitive damages. In Action No. 1999-CA-000769-OA, the Court of Appeals denied Collett's writ of mandamus on June 7, 1999. On July 1, 1999, Barton and Faulkner filed a motion for dismissal or, in the alternative, for summary judgment. Therein, they claimed to be entitled to sovereign immunity, judicial immunity, and qualified immunity. On August 8, 1999, the circuit court granted Barton and Faulkner's motion for summary judgment. The appeal follows.

Collett contends that the circuit court committed error by entering summary judgment. We disagree. Summary judgment is

proper when there exists no material issue of fact and movant is entitled to judgment as a matter of law. CR 56; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). In the case at hand, we believe that the relevant facts are uncontroverted and that resolution of this appeal involves but a single issue of law, that of sovereign immunity.

Collett attempted to bring a civil action against Barton and Faulkner for failure to carry out their official duties as deputy clerks of the Whitley Circuit Court. He claims that they improperly failed to file his notice of appeal from the denial of motion to proceed *in forma pauperis*. In Franklin County, Kentucky v. Malone, Ky., 957 S.W.2d 195, 202 (1997), the court observed the following:

> In 1986, the legislature extended sovereign immunity to state officers and employees acting within the scope of their duties. KRS 44.070 et seq. Prior to the enactment of the amendments to the Board of Claims Act in 1986, Kentucky law imposed individual liability on public officials for ministerial acts negligently performed in the course of duty. [Citations omitted.] However, following the 1986 amendments to the Board of Claims Act, this Court held that parts of KRS 44.070 which extended immunity to certain employees may violate the constitution. University of Louisville v. O'Bannon, Ky., 770 S.W.2d 215 (1989). This case determined that the legislature cannot constitutionally extend sovereign immunity to state officers or employees who engage in activities outside the traditional role of government.

We are of the opinion that Barton and Faulkner were public employees acting within the scope of their duty as deputy circuit court clerks when they refused to file Collett's notice of appeal. Id. We also believe that as deputy circuit court clerks

they were performing a traditional role of government. As such, we are compelled to conclude, under the precepts of Malone, that Barton and Faulkner are entitled to the shield of sovereign immunity, thus, mandating dismissal of the instant civil action. Steelvest, Inc., 807 S.W.2d 476.

For the foregoing reasons, the Summary Judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

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