

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000850-MR

JAMES ROSS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 98-CI-01521

DOUG SAPP, COMMISSIONER,
KENTUCKY DEPARTMENT OF CORRECTIONS;
GEORGE MILLION, WARDEN, EASTERN KENTUCKY
CORRECTIONAL COMPLEX; DON BATTLES,
DEPUTY WARDEN, EASTERN KENTUCKY CORRECTIONAL
COMPLEX; AND VICKI SMITH, UNIT COORDINATOR,
EASTERN KENTUCKY CORRECTIONAL COMPLEX

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, EMBERTON AND GUIDUGLI, JUDGES.

BARBER, JUDGE: This is an appeal by James Ross from an order of the Franklin Circuit Court denying his petition for a declaratory judgment that the appellees improperly denied him an opportunity to be considered for a transfer from Eastern Kentucky Correctional Complex to another penal institution.

At some point not disclosed in the record, Ross was incarcerated as an inmate at the Eastern Kentucky Correctional

Complex (EKCC) in West Liberty, Kentucky. According to Ross, on June 6, 1998, while attending a scheduled reclassification meeting, he requested a transfer to another Kentucky Department of Corrections (DOC) institution pursuant to DOC Corrections Policy and Procedures (CPP) policy 18.7, which applies to the subject of transfers. CPP 18.7(0) provides that "In general, inmates shall be required to complete a six month placement at an institution before transfer to another institution shall be considered." Ross contends that he sought the transfer to be closer to his family. Ross was subsequently notified that, pursuant to EKCC policy, before any request for transfer would be considered, an inmate must remain incarcerated at EKCC for one year and, in addition, must maintain one year clear conduct.

On July 15, 1998, Ross filed a prison grievance contesting EKCC's transfer request policy. On July 20, 1998, appellee Vicki Smith, Unit Coordinator, responded to Ross's grievance, stating that EKCC's transfer request guidelines concerning CPP 18.7(0) had been approved by the Department of Corrections Central Office, and would be included in subsequent revisions of the CPPs. Ross appealed the grievance to the EKCC Grievance Committee, then to EKCC Warden George Million, and finally to DOC Commissioner Doug Sapp, all of which denied Ross's requested action on his grievance.

On December 15, 1998, Ross filed a petition for declaratory judgment in the Franklin Circuit Court. See Kentucky Revised Statutes (KRS) 418.040. The petition sought an order directing the appellees to comply with CCP 18.7(0); a declaration

that the EKCC policy requiring one year residency and one year clear conduct was null, void, and unenforceable; and a declaration that any prisoner housed at EKCC could, in the future, be considered for transfer if he met the criteria of CPP 18.7(0).

On January 29, 1999, the appellees filed a motion to dismiss. On February 5, 1999, the trial court entered an order denying Ross's petition. Ross thereafter filed a motion to alter, amend, or vacate, which was denied by order entered March 12, 1999. Ross then filed a motion for findings of fact and conclusions of law, which was denied by order entered March 19, 1999. This appeal followed.

Ross contends that the trial court erred in granting the appellees' motion to dismiss. Summary dismissal of an inmate action against the Department of Corrections "is proper if and only if the inmate's petition and any supporting materials, construed in light of the entire agency record (including, if submitted, administrators' affidavits describing the context of their acts or decisions), does not raise specific, genuine issues of material fact sufficient to overcome the presumption of agency propriety, and the Department is entitled to judgment as a matter of law." Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 356 (1997). "The court must be sensitive to the possibility of prison abuses and not dismiss legitimate petitions merely because of unskilled presentations." Id. (Citing Jackson v. Cain, 864 F.2d 1235 (5th Cir. 1989)). "However, it must also be free to respond expeditiously to meritless petitions." Id.

There are no factual disputes in this case. Consequently, the only issue is whether the appellees were entitled to a judgment as a matter of law. We review questions of law de novo without deference to the interpretation afforded by the circuit court. Cinelli v. Ward, Ky. App., 997 S.W.2d 474, 476 (1998).

At issue in this case is the applicability and significance of Department of Corrections Policy 18.7(O), which provides, "In general, inmates shall be required to complete a six month placement at an institution before transfer to another institution shall be considered." In what Ross apparently interprets as a contradiction of CPP 18.7(O), on January 23, 1997, Vicki Smith, Unit Coordinator at EKCC, issued a memo which stated as follows:

As a matter of practice inmates will be required to spend a minimum of one year at this institution with one year clear conduct before a transfer recommendation is made at the inmate's request. This requirement may be waived by the Classification Committee if, in their opinion, the inmate needs to be moved to another institution. These decisions will be made based on institutional need and not to merely satisfy an inmate's desire to be housed elsewhere. The year/year requirement does not apply for transfers to a lower custody institution or for those inmates accepted into a program not offered here.

Inmates who meet the requirements are not guaranteed a transfer. The Classification Committee will decide if the inmates request should be honored.

Ross alleges that by extending the six month placement requirement of CPP 18.7(O) and creating a one year clear conduct

requirement before an inmate will be considered for transfer, the appellees have violated KRS Chapter 13A and KRS 196.035, and therefore have violated his right to due process. We disagree.

Prison officials have discretion in the management of prisons and the placement of prisoners. See e.g., KRS 197.065. An inmate has no constitutional right to be housed in a particular institution, and an inmate may be transferred for any reason, or no reason at all. Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed.2d 451; reh'g denied, 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976); Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983); Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995); Beard v. Livesay, 798 F.2d 874 (6th Cir. 1986); Archer v. Reno, 877 F.Supp. 372 (ED Ky 1995). The Kentucky Department of Corrections Policies and Procedure do not create a liberty interest giving an inmate a right to a particular security classification or to be housed in a particular prison facility. Mahoney v. Carter, Ky., 938 S.W.2d 575 (1997). Although inmates do not lose all their constitutional rights upon consignment to prison, the United States Supreme Court has repeatedly acknowledged the broad discretion afforded prison administrators to maintain order and security within their institutions. See Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). It has also warned courts against too readily inferring inmate rights from regulations designed to provide guidance to prison personnel and to maintain institutional consistency and flexibility. Sandin v. Connor, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

In Meachum v. Fano, 427 US at 224 - 225, 96 S.Ct. at 2538, the United States Supreme Court addressed this issue as follows:

The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons.

Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.

Ross does not contest the fact that EKCC adopted its transfer policy with the approval of the Department of Corrections and that the only reason that its policy is not reflected in the written Corrections Policies and Procedures is because a revised version of the polies has yet to be issued which would reflect the new policy. Moreover, CPP 18.7(O) does not, as contended by Ross, clearly establish that he is entitled to consideration of a transfer request after six months. Again, the policy states, "In general, inmates shall be required to complete a six month placement at an institution before transfer to another institution shall be considered." First, the policy speaks to transfers "in general" and hence we discern no

prohibition as to an individual institution being permitted to adopt more specific policies to address more specific situations. Further, we interpret the policy as imposing, if anything, a minimum time period below which an institution may not go before considering a transfer, rather than a ceiling prohibiting an institution from requiring a longer placement prior to considering a transfer.

Ross has no Due Process Clause right to a transfer, and CPP 18.7(O) does not impose the restrictions upon EKCC as alleged by Ross in his complaint. Contrary to Ross' contention, EKCC's policy was not contrary to the administrative law restrictions of KRS Chapter 13A and KRS 196.035. There was no due process violation associated with the adoption of the EKCC transfer policy.

Ross also argues that there was a due process violation in that there was a liberty interest associated with CPP 18.7(O). While, again, we disagree with Ross' interpretation of the restrictions CPP 18.7(O) placed upon EKCC, we note that

The types of interests that constitute "liberty" and "property" for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than "an abstract need or desire," Board of Regents v. Roth, 408 U.S. [564], at 577, 92 S.Ct. [2701] at 2709, [33 L.Ed.2d 548], and must be based on more than "a unilateral hope," Connecticut Board of Pardons v. Dumschat, 452 U. S. 458, 465, 101 S.Ct. 2460, 2464, 69 L.Ed.2d 158 (1981). Rather, an individual claiming a protected interest must have a legitimate claim of entitlement to it. Protected liberty interests "may arise from two sources -- the Due Process Clause itself and the laws of the States." Hewitt v. Helms, 459 U.S. [460] at 466, 103 S.Ct. [864] at 868, [74 L.Ed.2d 675] (1983).

Belcher v. Kentucky Parole Board, Ky. App., 917 S.W.2d 584, 585-586 (1996) (quoting Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 460, 109 S.Ct. 1904, 1908, 104 L.Ed.2d 506 (1989)).

As previously noted, Ross has no due process right to be placed in any particular prison, and hence no liberty interest in such placement. State laws or regulations create liberty interests when they place "substantive limitations on official discretion." Kentucky Department of Corrections, 490 U.S. at 462, 109 S.Ct. at 1909. "Such limitations exist where: (1) the law or regulation establishes "substantive predicates" to guide the state's decision makers; and (2) mandatory language is used to ensure that, if the substantive predicates are present, a prescribed result will necessarily follow." Belcher at 586 (citations omitted).

CPP 18.07(0) is not couched in mandatory language, and the administrative law statutes Ross has cited us to do not persuade us that EKCC acted improperly in adopting its present transfer request policy. Upon the whole, we view appellant's allegation as unsupported by the facts and by the law. As such, we are of the opinion that the circuit court did not commit reversible error in denying appellant's motion for declaratory judgment.

For the foregoing reasons, the order of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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