

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000779-MR

ERIC MURRELL

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 00-CI-00156

DEPARTMENT OF CORRECTIONS

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \*\*

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

KNOPF, JUDGE. Eric Murrell appeals from an order of the Franklin Circuit Court that dismissed his action seeking a copy of a section of the Department of Corrections Policies and Procedures (CPP). He had earlier received an opinion from the Office of the Attorney General supporting the Corrections Department's denial of his request for the documents under the Kentucky Open Records Act.<sup>1</sup> Finding that the trial court properly dismissed Murrell's appeal as moot, we affirm.

---

<sup>1</sup>Kentucky Revised Statutes (KRS) 61.870 - 884.

In November 1999, Murrell requested a copy of the Corrections Department's policies and procedures for the award of meritorious good time<sup>2</sup> (CPP 15.3), for the years 1987, 1989, and 1991.<sup>3</sup> The Corrections Department denied the request based on KRS 197.025(2), which states that "the department shall not be required to comply with a request for any record from any inmate confined in a jail or any facility or any individual on active supervision under the jurisdiction of the department, unless the request is for a record which pertains to that individual." Pursuant to KRS 197.025(3), Murrell sought review of the denial by the Attorney General's Office.<sup>4</sup> In January 2000, the Attorney General issued an opinion indicating that the Corrections Department properly denied Murrell's request in reliance on KRS 197.025(2).<sup>5</sup> In the opinion, the Attorney General referred to and relied upon a prior open records opinion<sup>6</sup> that approved denial of a request by an inmate for prison work orders.

---

<sup>2</sup>Pursuant to KRS 197.045(3), meritorious good time is available to inmates for performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations and programs. An award of meritorious good time is discretionary with the Commissioner of the Corrections Department. See, e.g., Anderson v. Parker, Ky. App., 964 S.W.2d 809 (1997).

<sup>3</sup>Many of the facts discussed in this opinion are taken from the parties' briefs because the record on appeal does not contain the documents on which the issues are based such as the original open records request, the Corrections Department's response, and the Attorney General's opinion.

<sup>4</sup>See also KRS 61.880(2).

<sup>5</sup>See Attorney General Open Records Decisions 00-ORD-2 (January 7, 2000) (unpublished opinion).

<sup>6</sup>98-ORD-150 (September 9, 1998) (unpublished opinion).

On February 8, 2000, Murrell filed an action in circuit court appealing the Attorney General's opinion<sup>7</sup> and seeking access to the prior versions of CPP 15.3 under the Open Records Act. In his petition, Murrell claimed access and review of the historical versions of CPP 15.3 were necessary to determine if he was possibly eligible for an award of meritorious good time during the earlier periods of his incarceration. He also challenged the Attorney General's interpretation of KRS 197.025(2). Murrell requested a finding that the Corrections Department had violated the Open Records Act, injunctive relief, and a monetary award of \$25.00 for each day he was denied the right to inspect the records. On February 23, 2000, the Corrections Department filed a motion to dismiss the action as moot stating that while it did not concede to Murrell's argument on the applicability of KRS 197.025(2), the Department had provided him with copies of the historical versions of CPP 15.3 and had provided these documents to each prison institution for filing in the inmate legal aide office and the inmate library.<sup>8</sup>

In an order dated February 25, 2000, but entered on February 28, 2000, the circuit court granted the motion and summarily dismissed the action. In a document entitled "Response to Motion to Dismiss" dated February 27, 2000, and filed on March 1, 2000, Murrell asked the court to deny the motion to dismiss or

---

<sup>7</sup>See KRS 197.025(3); 61.880(5); 61.882.

<sup>8</sup>Attached to the motion were copies of the prior versions of the prison policies on meritorious good time effective June 1974, April 1985, June 1985, March 1987, March 1990, August 1990, June 1993, February 1994, June 1996, July 1998, and December 1998.

in the alternative to order the Attorney General to withdraw its opinion because of the precedential effect of that opinion. The circuit court's order did not address the issues which Murrell raised in his response.<sup>9</sup> On March 13, 2000, Murrell filed his notice of appeal from the order dismissing the action.

On appeal, Murrell asserts that the Corrections Department and the Attorney General erroneously concluded that he was not entitled to the historical versions of CPP 15.3. He contends that they misconstrued KRS 197.025(2) to authorize denial of his open records request. He maintains that the circuit court's summary dismissal without addressing the merits of the case constitutes a denial of access to the courts because he was not allowed to prove that the Corrections Department violated its own regulations.

Murrell's argument involving denial of access to the court's is difficult to understand. He was provided with the documents he requested and has not been prevented from pursuing a request for an award of meritorious good time for the past period of his incarceration. Should his request be denied, he can challenge the decision through the courts.<sup>10</sup> The Attorney General is statutorily authorized to render opinions. Indeed, he

---

<sup>9</sup>It appears that the circuit court's order granting the motion to dismiss and Murrell's response to the motion crossed in the mail.

<sup>10</sup>However, given the discretionary nature of entitlement to meritorious good time, judicial review of decisions by prison authorities in this area is extremely limited. See Anderson v. Parker, Ky. App., 964 S.W.2d 809 (1997).

is required to do so for inmates.<sup>11</sup> The opinion in this case in no way inhibited Murrell's access to the courts. By providing Murrell with the documents he requested, moreover, the Corrections Department rendered his complaint moot because he received the relief that he sought. An action becomes moot when there is "a change in circumstance in the underlying controversy which vitiates the vitality of the action."<sup>12</sup> There no longer was a case or controversy requiring the circuit court to resolve the merits and the courts do not give advisory opinions.<sup>13</sup> Thus, Murrell's complaint that he was denied access to the courts is without merit.

Murrell's main issue on appeal is his request that the Attorney General be sanctioned and required to withdraw its opinion on his open documents request. Basing his argument on an underlying assumption that the opinion was erroneous, Murrell contends that the opinion has binding legal effect and could be used to support the wrongful denial of prison documents to inmates in the future.

Murrell is not entitled to the relief he seeks for several reasons. First, he misunderstands the legal effect of the Attorney General's opinion. KRS 61.880(5)(b) states that "[i]f an appeal is not filed within the thirty (30) day time limit, the Attorney General's decision shall have the force and effect of law and shall be enforceable in the circuit court of

---

<sup>11</sup>See KRS 197.025.

<sup>12</sup>Commonwealth v. Hughes, Ky., 873 S.W.2d 828, 830 (1994).

<sup>13</sup>Philpot v. Patton, Ky., 837 S.W.2d 491, 493 (1992).

the county where the public agency has its principal place of business or the circuit court of the county where the public record is maintained.” As this statute indicates, it only applies to unappealed opinions for purposes of resolving the rights of the parties in a particular dispute. While the Attorney General may rely on prior opinions, as it did in this case, an Attorney General’s opinion is not binding on the courts when challenged on appeal. KRS 61.882(3) explicitly provides for de novo review of issues under the Open Records Act. Application of the Open Records Act is necessarily fact specific and must be decided on a case-by-case basis.<sup>14</sup> Although a court may utilize Attorney General opinions as persuasive authority, they are not binding on the court.<sup>15</sup> Murrell exaggerates the potential effect of the Attorney General’s unpublished opinion and has not otherwise justified his claim that the opinion should be withdrawn.<sup>16</sup> In addition, because the Attorney General’s Office was not made a party to the action<sup>17</sup> in circuit court, it could

---

<sup>14</sup>See Kentucky Bd. of Examiners of Psychologists v. Courier-Journal and Louisville Times, Ky., 826 S.W.2d 324, 328 (1992) (stating the Open Records Act contemplates a case-specific approach by providing for de novo judicial review of agency action).

<sup>15</sup>See, e.g., York v. Commonwealth, Ky. App., 815 S.W.2d 415, 417 (1991).

<sup>16</sup>We note that the Corrections Department provided each prison institution with the historical versions of CPP 15.3 for access by all inmates.

<sup>17</sup>KRS 61.880(3) provides that the Attorney General shall not be named as a party in circuit court actions to enforce the Open Records Act.

not have been made subject to an order requiring it to withdraw its opinion.<sup>18</sup>

Murrell also asks this Court to remand the case to the circuit court for an award of fees and costs under KRS 61.882(5). As he notes, the circuit court did not address his request for costs and monetary sanctions in its order of dismissal. KRS 61.882 authorizes an award for costs, including reasonable attorney's fees, upon a finding by the court of a willful violation of the Open Records Act. It further allows an additional award of \$25.00 per day for each day a claimant was denied the right to inspect a public record. This additional award is within the discretion of the circuit court. Although he sought an award of costs and monetary sanctions in his petition, Murrell failed to request a written finding on this issue by the circuit court. Because Murrell did not bring the court's failure to address this issue to its attention by way of a written motion under CR 52.02 or CR 59.05, he is deemed to have waived the issue on appeal.<sup>19</sup>

For the foregoing reasons, we affirm the order of the Franklin Circuit Court.

ALL CONCUR.

---

<sup>18</sup>There also is some question whether a court has authority to order the Attorney General to withdraw an opinion given the separation of powers doctrine and the obligation of that office to render opinions under the Open Records Act.

<sup>19</sup>See Department of Corrections v. Courier-Journal and Louisville Times, Ky. App., 914 S.W.2d 349, 352 (1996); CR 52.04.

BRIEF FOR APPELLANT:

Eric Murrell - Pro Se  
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Tamela Biggs  
Office of General Counsel  
Frankfort, Kentucky