RENDERED: AUGUST 30, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001666-MR

JAMES NICK HARRISON — APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 96-CI-00187

DOUG SAPP; GARY BLACKBURN; B. BLACKWELL; DANNY BOTTOM; McELORY BURDENTTE; RAYMOND CANTERBERRY; BILL CASE; ANTHONY CLARK; JOHN DOE; GAYL DOLES; NANCY DOOM; KENNETH EHISHIDE; RON FLETCHER; CHARLES HOWELL; CARL JONES; LONNIE MATLOCK; JAMES MITCHELL; JAMES MORGAN; JUDITH MORRIS; PHILIP PARKER; DUKE PETTIT; JAMES POTTER; CHARLES RADER; CHARLIE RAMEY; ALAN SIMS; ROGER SOWDER; JOE STUART; CLARK TAYLOR; JULIE THOMAS; JOHN THOMPSON; PATTI TREAT; SERGEANT WESTERFIELD; CAROL T. WILLIAMS; AND ED WILLIAMS — APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: BARBER, COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: James Nick Harrison has appealed, pro se, from an order entered by the Lyon Circuit Court on August 14, 2000, which dismissed his civil complaint which alleged violations of

his federal and state constitutional rights in connection with a prison disciplinary action. Having concluded that a large portion of the claims contained in the amended complaint should have been transferred to the court with the proper venue based on KRS[1] 452.105, we affirm in part, vacate in part, and remand with directions.

Harrison was an inmate at the Kentucky State Penitentiary (KSP) in Eddyville, Lyon County, Kentucky, on October 26, 1996, when he failed to return to his prison cell at the time for lockup and was charged with violating the Corrections Policies and Procedures (CPP) 15.2, Category IV-7, for failing to comply with lockup procedures. Harrison admitted that he was not inside his cell when the doors were closed for final lockup, but he claimed that he did not have sufficient time to return from the prison yard. A disciplinary write-up report was prepared, the report was investigated, and a hearing was held before a three-member Adjustment Committee, at which several inmates provided testimony. The Adjustment Committee found him guilty of the offense and assessed a penalty of 45 days disciplinary segregation, suspended for 90 days.[2] Harrison challenged the disciplinary procedures in an appeal filed with the prison warden, Philip Parker. The warden concurred with the Adjustment Committee's decision and rejected Harrison's

[1]Kentucky Revised Statutes.

[2]Under prison policies, if an inmate is not found guilty of violating a rule during the period of suspension, the penalty is vacated but the violation remains on his record. See CPP 15.6.

procedural complaints. The record indicates that Harrison did not have to serve any time in disciplinary segregation.

In March 1998, Harrison was transferred to the Northpoint Training Center in Boyle County. Although the current record fails to identify the circumstances or nature of the charges, Harrison alleges that he was placed in segregation after being charged and found guilty of several disciplinary violations while at Northpoint. In February 1999, he was transferred from Northpoint back to the KSP.

On December 26, 1996, Harrison filed a civil complaint pursuant to KRS Chapter 418 and 42 U.S.C.[3] § 1983 against various Department of Corrections employees in connection with the October 1996 disciplinary action, alleging a violation of his constitutional rights to due process and equal protection. In addition to the KSP corrections officers directly involved in reporting and investigating the charges, the warden, and the members of the Adjustment Committee, Harrison named Doug Sapp, the Commissioner of the Department of Corrections, and Judith Morris, a classification branch manager, whose offices were in Frankfort. Harrison claimed Sapp and Morris denied him a meaningful appeal process by failing to update and/or correct the prison regulations to allow him an adequate appeal process beyond the level of warden and/or allowed him to be disciplined without due process of law. Attached to the complaint were the disciplinary report forms involving the write-up, the investigation, the Adjustment Committee hearing, Harrison's

[3]United States Code.

petition to the warden on appeal, and the Warden's appeal decision. Shortly thereafter, Harrison filed an amended complaint naming an additional 17 Corrections Department employees in connection with the disciplinary actions against him at Northpoint. He also raised additional claims against Sapp for failing to provide employment and preventing him from obtaining privately furnished clothing.

On February 3, 2000, the Department of Corrections, on behalf of the numerous defendants, filed an answer to the complaint and amended complaint in which it raised various defenses including, inter alia, improper venue and failure to state a claim upon which relief can be granted. On February 25, 2000, the Department filed a motion to dismiss four defendants[4] who were officials residing and working in Frankfort and 15 other defendants[5] who were employed at Northpoint. Harrison filed a response to the motion to dismiss these defendants. On July 24, 2000, the trial court entered an order dismissing the 19 defendants named in the motion based upon a finding that Lyon County was not the proper venue for a lawsuit against these defendants. On August 2, 2000, Harrison filed a motion to reconsider that included a request for additional findings of fact and conclusions of law on the venue issue. In the motion, he suggested transfer to another jurisdiction should the court reject his argument on reconsideration.

[4]Doug Sapp, Judith Morris, Clark Taylor, and Carol Williams.

[5]Danny Bottom, McElroy Burdette, Raymond Canterbury, Bill Case, Anthony Clark, Charles Howell, Carl Jones, Donnie Matlock, James Mitchell, James Morgan, Charles Rader, Alan Sims, Roger Sowder, John Thompson, and Sgt. Westerfield.

On August 14, 2000, the trial court entered an order dismissing the original complaint based on Sandin v. Conner.[6] It also found the action to be legally without merit or factually frivolous under KRS 454.405(1) and suggested the Department should take special note of KRS 197.045(5)(a), which authorizes the Department to establish rules reducing inmates' good-time credits when a court dismisses and finds a lawsuit to be malicious, harassing, or factually frivolous. On August 21, 2000, Harrison filed a motion to alter, amend, or vacate the order dismissing.[7] He maintained that the order failed to address any claims raised in the amended complaint and that the complaint and amended complaint were adequate to state a cause of action for arbitrary and retaliatory action by the Corrections officials. Harrison also filed a motion for additional findings of fact pursuant to CR 52.02 and a motion seeking recusal of the trial judge based on an appearance of possible bias.[8] The trial judge did not recuse himself and the Supreme Court of Kentucky entered an order denying Harrison's request to disqualify the trial judge. On June 28, 2001, the trial court denied the CR 59.05 motion to amend and the CR 52.02 motion for additional findings of fact. This appeal followed.

Harrison contends the trial court erred in dismissing the 19 defendants for improper venue. He states that although the actions involving these defendants occurred outside Lyon

---

[6]515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

[7]Kentucky Rules of Civil Procedure (CR) 59.05.

[8]See KRS 26A.015 and KRS 26A.020; SCR 4.300 Canon 2; and Nichols v. Commonwealth, Ky., 839 S.W.2d 263 (1992).

County, venue was proper in Franklin, Boyle and Lyon Counties because he alleged a single continuing process of harassment and retaliation.

KRS 452.405(2) provides that actions "[a]gainst a public officer for an act done by him in virtue or under color of his office, or for a neglect of official duty" shall be brought "in the county where the cause of action, or some part thereof, arose." In Fischer v. State Board of Elections,[9] the Supreme Court stated that for purposes of this statute, "a cause of action generally arises at the place where the act creating the right to bring an action occurred."[10] In Fischer, the Supreme Court held that the proper venue for the action in that case challenging the constitutionality of the 1991 Reapportionment Act was the county of residence of the plaintiff rather than Franklin County where the statute was enacted. The Supreme Court determined that any injury to the plaintiff did not occur until the statute was applied to him. The Supreme Court stated, "[a]ppreciable harm arises only when the statute directly affects the individual by denying him a right or imposing upon him an obligation."[11]

Despite Harrison's attempt to characterize much of his lawsuit as a single process by joining all of the actions of the defendants under an allegation of conspiracy and retaliation, we conclude that the trial court properly viewed the numerous claims

[9]Ky., 847 S.W.2d 718 (1993).

[10]Id. at 720.

[11]Id. at 721.

as containing discrete acts with the attendant harm occurring in different locales. Harrison has alleged no facts in his complaints to support his claim of a conspiracy by these numerous defendants. The complaints concerning the disciplinary actions and actions by the prison employees at the two prisons involved alleged harm to Harrison at those locations, so the proper venue for alleged civil rights violations occurring at Northpoint was in Boyle County. Similarly, venue for the claims against the four defendants residing and working in Franklin County is where the alleged harm caused by their actions or omissions occurred, that being either Lyon County or Boyle County. Contrary to the Department's position, the proper venue as to the claims against these defendants was not in Franklin County. As in Fischer,[12] any appreciable harm to Harrison did not arise until the actions taken by Sapp, Morris, Taylor and Williams in Franklin County denied him a right or imposed an obligation upon him at his place of residence.

While we agree with the trial court's ruling that Lyon County was the proper venue only for those claims arising in that county, we hold that the trial court erred by not transferring the claims that arose in Boyle County to the Boyle Circuit Court. In 2000, the General Assembly enacted KRS 452.105, which provides:

> In civil actions, when the judge of the court in which the case was filed determines that the court lacks venue to try the case due to an improper venue, the judge, upon motion of a party, shall transfer the case to the court with the proper venue.

[12] Supra at 721.

In the case sub judice, the trial court dismissed the 19 defendants it found were named in claims involving improper venue. Harrison specifically requested the trial court to transfer any claims it held could not be brought in Lyon County because of improper venue. The mandatory language[13] in this statute creates an obligation on the trial judge to transfer a case upon request when there is a defect because of venue.[14] Consequently, this case must be remanded to the Lyon Circuit Court for entry of an order transferring those claims that arose in Boyle County to the Boyle Circuit Court.

Harrison also claims the trial court erred by dismissing his complaint and amended complaint for failure to state a claim upon which relief can be granted. He asserts that he stated a cause of action for violations of the prison regulations affecting both his procedural and substantive due process rights. Much of Harrison's appellate brief deals with claims raised in his amended complaint. As discussed above, venue for most of those claims lies in Boyle County, so the Lyon Circuit Court properly did not consider them in its order dismissing the action. As to the claims in the original complaint involving the disciplinary action at KSP, Harrison's arguments are without merit.

---

[13]See KRS 446.010(29)(word "shall" in statute is mandatory); and Alexander v. S & M Motors, Inc., Ky., 28 S.W.3d 303 (2000)(noting word "shall" in statute is mandatory and "may" is permissive).

[14]The trial court's failure to apply this statute is perhaps understandable given the fact that it became effective (July 14, 2000) shortly before the court entered its order (July 24, 2000) dismissing the defendants.

Initially, we note that while the trial court dismissed the action for failure to state a claim, when parties file exhibits in support of their positions, as was done here, we are required to treat the request for dismissal and the circuit court order dismissing as a summary judgment.[15] As this Court indicated in Smith,[16] declaratory judgment suits involving inmate disciplinary actions invoke the circuit court's authority as a body reviewing an administrative agency action. Under these circumstances, the Smith Court recognized a modified standard for summary judgment. "[W]e believe summary judgment for the Corrections Department is proper if and only if the inmate's petition and any supporting materials, construed in light of the entire agency record . . . 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 matter of law."[17]

In Wolff v. McDonnell,[18] the Supreme Court held that prison inmates may not be deprived of earned statutory good-time without a meaningful opportunity to challenge the deprivation. The Supreme Court held that although inmates are not entitled to the full panoply of procedural safeguards, the due process clause protects an inmate's state-created liberty interest in good-time credits, and therefore an inmate is entitled to minimum

---

[15]See Smith v. O'Dea, Ky.App., 939 S.W.2d 353, 356 (1997); and CR 12.02.

[16]Id.

[17]Id. at 356.

[18]418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

requirements of procedural due process including: (1) advance written notice of disciplinary charges; (2) the opportunity to call witnesses and present documentary evidence consistent with institutional safety and correctional goals; (3) a written statement of the evidence relied upon and the reasons for the disciplinary action; and (4) an impartial decision-making tribunal.[19]

While Wolff outlines certain minimal procedures required by due process, in Superintendent v. Hill,[20] the Supreme Court set out the substantive quantum of evidence required to support a decision in a prison disciplinary proceeding. Given the deference that necessarily applies to judicial review of prison disciplinary situations, the Supreme Court held that in situations involving prison disciplinary proceedings, due process requires a somewhat lesser standard of proof and that a disciplinary committee's decision to impose sanctions for violations of prison rules must be supported by merely "some evidence in the record."[21] In applying this modicum of evidence, the Supreme Court indicated that courts should refrain from second-guessing the prison officials' administrative decision.

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead the relevant question is whether there is any evidence in the record that could support the conclusion reached by

[19]Id. at 563-67. See also Hewitt v. Helms, 459 U.S. 460, 465 n.3, 103 S.Ct. 864, 868 n.3, 74 L.Ed.2d 675 (1983).

[20]472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985).

[21]Id. at 454.

> the disciplinary board. . . . The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. Revocation of good time credits is not comparable to a criminal conviction, and neither the amount of evidence necessary to support such a conviction, nor any other standard greater than some evidence applies in this context[22] [citations omitted].

In the case sub judice, Harrison challenges the KSP disciplinary action based on several alleged procedural flaws including a failure of the corrections officer to verify the report, an inadequate statement of the evidence relied upon for the finding of guilt by the Adjustment Committee, a denial of an appeal process beyond the level of the warden, and an inadequate investigation of the report. A review of the disciplinary forms indicates that the charges were initiated by two corrections officers responsible for the lock-up, Harrison was interviewed as part of the investigation, he received a copy of the write-up report and the hearing report, he was provided a legal aide to assist him and accompany him at the hearing, and several witnesses testified at the disciplinary hearing. The hearing report stated the Adjustment Committee relied upon the evidence of the corrections officers. An inmate has no constitutional right to an internal appeal beyond the level of the warden. Thus, the procedural steps taken were adequate and we discern no internal policy issues that rose to the level of a constitutional violation.

[22]Id. at 455-56. See also Stanford v. Parker, Ky.App., 949 S.W.2d 616, 617 (1996).

Additionally, there was sufficient evidence to support the Adjustment Committee's finding. The two corrections officers responsible for the lock-up provided evidence of the violation. Moreover, Harrison admitted that he had failed to return to his cell when the doors were closed.

The trial court dismissed the complaint under Sandin based on the absence of a liberty interest. In Sandin, the Supreme Court adjusted the prior approach that focused exclusively on the language of prison regulations for determining whether state law or regulations created a due process liberty interest. The Supreme Court indicated that in order to establish a protected, state-created liberty interest, an inmate must demonstrate two elements: (1) the presence of state statutory or regulatory language creating "specific substantive predicates" intended to circumscribe the discretion of prison officials; and (2) the imposition of "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[23] Sandin dealt primarily with the latter element in relation to disciplinary segregation and the Supreme Court discussed three important factors in assessing atypical and significant hardship: (1) the effect of the segregation on the length of prison confinement under the original sentence; (2) the extent to which the conditions of the segregation differ from other routine

[23]Sandin, supra at 484. See also Rimmer-Bey v. Brown, 62 F.3d 789, 790-91 (6th Cir. 1995)(inmate must prove both existence of mandatory language in regulation and atypical and significant hardships).

prison conditions; and (3) the duration of the segregation imposed.[24]

In the case sub judice, Harrison was assessed a penalty of 45 days segregation, but he apparently did not actually serve any time in segregation because the penalty was suspended for 90 days and he did not commit any other rule violations during that period of suspension. Although the violation stayed on his prison record, there is no evidence it affected the length of his confinement under the original sentence. The trial court correctly held that Harrison has not shown the existence of a liberty interest with respect to the KSP disciplinary action.

However, Harrison contends that in addition to his due process claims, he alleged constitutional violations based on retaliation that were ignored by the trial court. In Thaddeus-X v. Blatter,[25] the Sixth Circuit Court of Appeals recognized two categories of retaliation claims where government action is motivated in substantial part by a desire to punish an individual for exercise of a constitutional right[26] — general retaliation claims brought under the substantive due process theory of the 14th Amendment and retaliation for the plaintiff's exercise of specific constitutional provisions. The basic elements of a retaliation claim are as follows: (1) a plaintiff engaged in conduct protected by the Constitution or statute; (2) adverse

---

[24]See, e.g. Sandin, supra at 486-87; Wright v. Coughlin, 132 F.3d 133, 136 (2d Cir. 1998); and Resnick v. Hayes, 213 F.3d 443, 448 (9th Cir. 2000).

[25]175 F.3d 378 (6th Cir. 1999).

[26]Id. at 386-87. See also Herron v. Harrison, 203 F.3d 410, 414 (6th Cir. 2000).

action taken by the government officer against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated, at least in part, because of the protected activity.[27] The third element involves a series of shifting burdens in order to establish a causal connection between the protected conduct and the adverse action. Once the plaintiff establishes that his protected conduct was a motivating factor behind any harm suffered by an adverse action, the defendant may prevail on summary judgment if he can show that he would have taken the same action in the absence of the protected activity.[28] A prisoner must set forth specific, non-conclusory facts of a causal connection sufficient to allow an inference of a causal connection between the protected conduct and the adverse action.[29] The government officials' adverse action itself need not violate the Constitution or involve a protected liberty interest.[30] However, some courts have held that a prisoner has

[27]Thaddeus-X, supra at 394; Smith v. Campbell, 250 F.3d 1032, 1037 (6th Cir. 2001). Otherwise protected activity, however, does not constitute "protected conduct" for a retaliation claim if it involves a frivolous claim or violates a legitimate prison regulation. See Herron, supra at 415; and Campbell, supra at 1037.

[28]Thaddeus-X, supra at 399; Campbell, supra; Rauser v. Horn, 241 F.3d 330, 334 (3d Cir. 2001).

[29]Dawes v. Walker, 239 F.3d 489, 492-93 (2d Cir. 2001); Thaddeus-X, supra at 399. Facts relevant to creating an inference of intent to retaliate include the temporal proximity of the events, disparate treatment, prior disciplinary record, and statements by the decisionmaker. Id.; Campbell, supra at 1038; Colon v. Coughlin, 58 F.3d 865, 872-73 (2d Cir. 1995).

[30]See Allah v. Seiverling, 229 F.3d 220 (3d Cir. 2000)(holding retaliation claim not precluded by failure to

(continued...)

no claim for retaliation based on disciplinary punishment for a rule violation that is supported by "some evidence."[31]

Harrison's complaint does not clearly state the protected conduct supporting his retaliation claim. He suggests the appellees have retaliated against him for raising grievances about his own treatment and assisting other inmates. While an inmate does have a First Amendment right to file grievances against prison officials on his own behalf, he does not have an independent right to help other prisoners with their legal claims.[32] With respect to the Lyon County defendants, the adverse action in Harrison's retaliation claim involves the 1996 disciplinary action. Given our earlier conclusion that this action was supported by "some evidence" including his admission of guilt, Harrison has not stated a cognizable claim for retaliation. Additionally, since Harrison did not actually serve any of the penalty time in segregation, he has not shown that the collateral ramifications from the existence of the violation on his prison record rose to the level of an "adverse action" such as to deter a person of ordinary firmness from exercising his First Amendment right. Finally, his complaint fails to set forth facts showing a retaliatory motivational intent. Therefore, the

---

[30](...continued)
satisfy requirements of Sandin); Pratt v. Rowland, 65 F.3d 802 (9th Cir 1995); and Bobcock v. White, 102 F.3d 267 (7th Cir. 1996).

[31]See Henderson v. Baird, 29 F.3d 464 (8th Cir. 1994); Earnest v. Courtney, 64 F.3d 365 (8th Cir. 1995); and Cowans v. Warren, 150 F.3d 910 (8th Cir. 1998).

[32]Campbell, supra at 1037 (citing Noble v. Schmitt, 87 F.3d 157, 162 (6th Cir. 1996)); Herron, supra at 415. See also Shaw v. Murphy, 532 U.S. 223, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001).

trial court was correct in granting summary judgment to the Lyon County appellees on Harrison's claim of retaliation based on the October 1996 disciplinary action.

Harrison also challenges the trial court's failure to enter additional findings of fact and conclusions of law and the trial judge's refusal to recuse himself from the case. Additional factual findings and conclusions of law were not necessary because this case has been decided based on issues of law, which this Court reviews de novo under the summary judgment standard.[33] Furthermore, we have carefully considered Harrison's arguments supporting his request for recusal of the trial judge and find them inadequate.[34]

Finally, Harrison erroneously asserts that the trial court directed prison officials to take disciplinary action against him for filing his lawsuit. The August 2000 order merely directed the parties' attention to KRS 197.045(5)(a), which authorizes prison authorities to assess penalties against inmates for filing civil lawsuits found to be frivolous by a court. The trial court did not order the authorities to penalize Harrison and it did not exceed its authority.

For the foregoing reasons, we affirm in part and vacate in part the order of the Lyon Circuit Court, and remand this matter to the Lyon Circuit Court with directions to enter an

---

[33]See CR 52.01 (findings of fact and conclusions of law not necessary on decisions under Rules 12 and 56).

[34]See Stopher v. Commonwealth, Ky., 57 S.W.3d 787, (2001)(burden of proof required for recusal of trial judge is an onerous one), cert. denied, ___U.S. ___, 122 S.Ct. 1921, 152 L.Ed.2d 829 (2002).

order transferring those claims arising outside Lyon County to the appropriate circuit court.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Nick Harrison, Pro Se
West Liberty, Kentucky

BRIEF FOR APPELLEES:

John T. Damron
Frankfort, Kentucky