

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000619-MR

JACK VIGUE

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 02-CI-00295

LT. JOHN UNDERWOOD

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY , JUDGES.

KNOPF, JUDGE. Jack Vigue appeals pro se from an order of the Morgan Circuit Court dismissing his "Petition for Declaration of Rights" and his "Motion to Proceed on Appeal In Forma Pauperis" for failing to comply with prior orders setting filing fees of \$25.00 and \$5.00 respectively.

Vigue is currently incarcerated at the Eastern Kentucky Correctional Complex. In September 2002, following a prison disciplinary hearing, he was found guilty of fraudulently

using credit cards to pay for magazine subscriptions. Vigue was ordered to serve forty-five days in segregation and to pay \$335.55 in restitution. On November 27, 2002, he filed a petition for declaratory relief¹ in the Morgan Circuit Court, alleging that his conviction violated the Interstate Corrections Compact,² and seeking monetary damages for the time he had served in segregation as well as an expungement of the conviction from his file.

Vigue included with the petition a motion to proceed in forma pauperis and an affidavit of indigency. Also attached was a certification of funds in his institutional account, showing that during the preceding six months, a total of \$620.87 had been deposited into the account. The ending balance in October 2002, however, stood at \$.12.³

¹ The petition was made pursuant to KRS 418.040.

² See KRS 196.610.

³ These documents were submitted in accordance with KRS 454.410(1), which states:

When an inmate commences, intervenes, or becomes a party to an action or an appeal of a judgment in a civil action or proceeding without paying the fees and court costs imposed by law, the inmate shall prepare an affidavit with a certified copy of the inmate's prison account statement showing the total deposits for the six (6) months immediately preceding the inmate's commencement, intervention, or joining of the action, or an appeal of a judgment in a civil action or proceeding, if available.

On November 27, 2002, the circuit court entered an order stating that Vigue was to pay a filing fee of \$25.00 within forty-five days or his petition would be dismissed. On December 3, 2002, Vigue responded with a motion to reconsider, and an affidavit stating that he was unable to pay the fee because "[p]etitioner paid out \$170.16 Restitution in August 2002, and, now, has another \$335.55 Restitution to pay, which is part of this action." The motion to reconsider was denied. Vigue then filed a notice of appeal of the court's denial of his motion to proceed in forma pauperis. He attached an updated certification of the funds in his account, which showed that no deposits had been made in November 2002. The balance in the account remained at \$.12 for that month. Deposits totaling \$30.00 had been made in the month of December.

On January 27, 2003, the circuit court ordered Vigue to pay a fee of \$5.00 to file the notice of appeal. Vigue did not respond, and on February 14, 2003, the action was dismissed.

On March 21, 2003, Vigue filed another notice of appeal. The circuit court granted him leave to proceed with his appeal in forma pauperis.

The sole issue on appeal is whether the circuit court erred in dismissing Vigue's action for failure to pay the filing fees of \$25.00 and \$5.00.

The procedure for setting inmates' filing fees is governed by KRS 454.410(2), which states in relevant part:

When an inmate commences, intervenes, or joins an action or an appeal of a judgment in a civil action or proceeding, the inmate shall pay at least partial court fees and costs. At a minimum, the inmate shall pay a five dollar (\$5) filing fee unless the court determines the inmate is unable to pay a fee and waives all fees and costs. If the inmate has the ability to pay a higher amount, the court shall order the inmate to pay the higher amount. However, the fees and costs imposed shall not exceed the full amount otherwise imposed by law.

The record shows that deposits exceeding the amounts of the filing fees set by the circuit court were made regularly into Vigue's account. Deposits of \$54.67, \$246.20, \$35.00 and \$285.00 were made in June, July, and August 2002 respectively, and a further deposit of \$30.00 was made in December 2002. Admittedly, Vigue's account balance stood at \$.12 in October and November 2002, but the forty-five day time limit set by the court in its order of November 27, 2002, would have allowed Vigue to pay the filing fee in December when his account balance stood at \$30.12.

"The decision to grant or deny a motion to proceed in forma pauperis is within the discretion of the trial court and we may not reverse that decision in the absence of clear error.

CR 52.01; *Bush by Bush v. O'Daniel*, Ky., 700 S.W.2d 402 (1985)."⁴

Based on the evidence in the record regarding the amounts and frequency of the deposits made into Vigue's account, the circuit court did not abuse its discretion in dismissing the action for failure to pay the filing fees.

For the foregoing reasons, the order of the Morgan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE:

Jack Vigue, *pro se*
West Liberty, Kentucky

⁴ Palmer v. O'Dea, Ky. App., 8 S.W.3d 884, 885 (1999).