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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002161-MR

THOMAS SANDERS

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 02-CI-00169

WARDEN, GEORGE MILLION

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: Thomas Sanders, an inmate at the Eastern Kentucky Correctional Complex (EKCC), appeals, pro se, from the order of the Morgan Circuit Court dismissing his motion to file an amended petition to his previously dismissed declaratory judgment action. The declaratory judgment action alleged that his due process and equal protection constitutional rights were violated during the disciplinary proceeding. Warden, George

Million, responded with a motion to dismiss that was granted and entered August 22, 2002. Sanders then filed a post-judgment motion to vacate the order for time to amend his original motion. This post-judgment motion was denied by order and entered September 19, 2002. Despite the order denying the amendment, on September 24, 2002, Sanders filed a supplemental motion for declaratory judgment and a motion for Joinder of Defendants/Respondents. These motions were denied on September 24, 2002. Sanders appeals claiming that he was denied due process because he was not allowed to file his amendments. In finding the Circuit Court did not abuse its discretion in denying Sanders an opportunity to amend after the original declaratory motion was dismissed and finding there was some evidence to support the prison adjustment hearing's decision, we affirm.

Sanders was charged with participating in a three-way telephone call and obtaining privileges under false pretenses. The charges stemmed from a three-way telephone call Sanders had with his mother and aunt discussing false information he placed in his furlough application. At his May 13, 2002 hearing, the taped telephone conversation was played, per Sanders request on the investigative report. Sanders was found guilty on both charges and was penalized with a thirty-day restriction of telephone privileges. He was also penalized thirty days of

disciplinary segregation, suspended for three months, and forfeiture of sixty days good time. Sanders was also deprived of his community custody status as a secondary result of the above penalties.

Sanders appealed the decision to the prison warden, who affirmed the disciplinary decision. The warden found that there were no due process violations in the reports or throughout the hearing. The warden also found that the taped conversation clearly identified Sanders as the caller. Sanders then sought judicial review by filing a motion for declaratory judgment in the Morgan Circuit Court, seeking (1) dismissal of the disciplinary charges, (2) expungement of his prison record, (3) an order that his community custody status be restored, and (4) \$5000.00 in punitive damages for the "willful and knowing disregard" of his rights. Sanders generally alleged the violation of his due process and equal protection rights. Sanders essentially claimed that the disciplinary report was not received by him in a timely fashion and was not clear and concise. The appellee responded with a motion to dismiss asserting that Sanders failed to demonstrate the violation of any established right. This motion to dismiss was granted by the circuit court and entered August 22, 2002.

On August 30, 2002, Sanders responded by filing a post-judgment motion requesting that the order be vacated so

that he could amend his original motion for declaratory judgment. Sanders argues in his appeal that this motion was granted, however, court records show that this motion to amend was denied by order entered September 19, 2002. The circuit court did not vacate its order dismissing the original declaratory motion and it did not grant Sanders leave to amend his initial declaratory judgment. Despite the court's denial, Sanders then filed an amended motion and a motion to join additional respondents on September 24, 2002. By order entered September 24, 2002, the circuit court denied Sanders' amended motion and motion for additional respondents as untimely and stating that the prior action had already been dismissed. This appeal followed.

Sanders raises many issues regarding whether or not his amended motion and request to add respondents was timely filed. He also raises issues regarding whether his due process rights were violated by the circuit court's denial of his motions because they were not timely filed. Specifically, Sanders claims that his amended motion was denied because due to the court clerk's error, he was not able to file his motion in time. These issues, however, are irrelevant to the case at hand because the original declaratory judgment was dismissed. The circuit court then had the discretion in whether or not to allow an amendment to the original motion. Despite what Sanders

claims, the circuit court denied, not granted, Sanders motion for leave to amend. The central issue here is whether or not the circuit court abused its discretion in denying Sander's motion to amend his declaratory judgment.

Sanders did timely file his motion for leave to amend by filing eight days after the judgment denying his declaratory judgment was entered. Kentucky Rule of Civil Procedure (CR) 15.01 provides that amendments to pleadings "shall be freely given when justice so requires." However, once a trial court has made a ruling on whether to grant leave to amend, our standard of review of that decision is one of clear abuse of discretion. Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 548 (1998), citing Graves v. Winer, Ky., 351 S.W.2d 193 (1961). In determining whether to grant leave to amend, the trial court may look at factors that include "the failure to cure deficiencies by amendment or the futility of the amendment itself." Bowling, 981 S.W.2d at 548, quoting First National Bank of Cincinnati v. Hartmann, Ky. App., 747 S.W.2d 614, 616 (1988).

Upon reviewing the record, we find that the circuit court did not abuse its discretion in denying Sanders leave to amend his complaint. Under the "futility of the amendment itself" factor and based on Sanders motion for leave to amend, the circuit court had reason to find that Sanders amendment would not change the dismissal of the original declaratory

judgment. In his motion for leave to amend, Sanders alleges that as a *pro se* litigant, his complaint should be liberally construed. He also claims since he lacks knowledge of the law, he should receive more time to become familiar with the appropriate law to help prove his claims. In his motion to amend, the only other stated ground for leave was he needed the edition of the Corrections Policy and Procedure 15.6 that was in effect at the time of the incident before he could properly argue the issue. The only other allegation Sanders made was that he was never able to examine the Correction Policies and Procedures ("CPP") 15.6 that was in effect at the time of the infractions.

Sanders asserts in his original declaratory motion that his due process rights were violated because he did not receive a copy of the incident report within 72 hours from the time of the incident. The CPP does not require that Sanders be given the investigative report within 72 hours of the incident, nor does any case law provide Sanders with that asserted right. Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). Granting Sanders motion for leave to amend based only on the assertions that he needed to read the applicable CPP or that he was unfamiliar with the law would not alter the circuit court's decision dismissing the original declaratory motion.

Sanders also alleged in his original declaratory motion that the disciplinary report was not clear and concise. Sanders did not specify how these write-ups were lacking, only that they were not "according to how the Policy . . . 15.6 states that this report [s]hall be (sic)." The purposes of these reports are (1) to produce a written record for judicial review and (2) "to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact." Id. at 564, 94 S. Ct. at 2978 (citations omitted). There is nothing to suggest these reports were not clear and concise.

Granting leave to amend, based on this ground, would also be futile. Upon reviewing the disciplinary reports, it is clear that Sanders was provided with notice of the charges to enable him in such a way as to prepare for his defense. The reports state the events that occurred, who was involved, and lists the evidence that was going to be used at the hearing. Clearly, Sanders was able to discern from the reports what charges were being brought against him and adequately prepare for his defense. Sanders motion for leave to amend only alleged that he needed the edition of the CPP procedures in effect at the time of the violation, and by allowing him this would not alter the circuit court's dismissal since the CPP's were not

violated. Also, the trial court had been provided a copy of the applicable CPP before ruling.

Next, Sanders alleged in his original declaratory motion that the evidence used against him at the disciplinary hearing was improper because it was unreliable. Sanders asserted that it was unreliable because a nickname was used on the tape, instead of his original name. According to the reports, Sanders requested to have the tape played at his hearing. The warden also stated that the tape clearly identified Sanders as the caller on the tape. Sanders motion for leave to amend did not point out any other reason why these tapes were inadmissible or how an amendment would show a due process claim. Sanders has not provided any additional information which would require the circuit court to believe the amendment would have changed the result of the previous dismissal.

Aside from the denial of leave to amend, Sanders asserts that the dismissal of his original declaratory judgment was improper. The United States Supreme Court has held that only minimal procedures are necessary to protect the due process of a prisoner where his behavior credits are at stake. These minimal procedures are advanced notice of the disciplinary charges, a reasonable opportunity to be heard (including the opportunity to call witnesses and present documentary evidence),

and a brief written statement by the fact finder of the evidence relied upon and the reasons for the disciplinary action. Id. at 563-567, 94 S. Ct. at 2978-2980. Kentucky has also followed these requirements. Stanford v. Parker, Ky. App., 949 S.W.2d 616, 617 (1996); Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 357 (1997). Sanders has failed to demonstrate that the procedure followed by the prison adjustment committee failed to provide him with due process since he had (1) notice of the disciplinary charges, (2) he had the opportunity to call witnesses, he just chose not to, and (3) he received written notice as to why the adjustment committee found him guilty. The adjustment hearing officer relied on the taped phone conversation and the disciplinary report to convict Sanders. The information provided by Sanders on the investigative report relates to the events the hearing committee found the phone tape to reflect. Sanders even admits on one of the investigative reports that he made a phone call to his aunt and that his mother was at her house. The warden also noted that there was enough information on the tape to identify Sanders as the caller, even if a nickname was used by his mother. The standard of review over adjustment committee decisions to revoke good time credits must be supported by "some evidence." Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 455, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356 (1985). This standard

has also been adopted by Kentucky courts. Stanford, 949 S.W.2d at 617; O'Dea, 939 S.W.2d at 357. There is evidence in the record that the adjustment committee relied on in finding Sanders guilty. This evidence qualifies as "some evidence" to support the decision of the adjustment committee. The fact that Sanders admits to talking to his mother and aunt on the investigative reports helps to provide some evidence that Sanders was on the taped conversation. Those tapes also provide some evidence for the adjustment committee to deduce their conclusion that Sanders was guilty of the disciplinary charges. Since the findings of fact by the adjustment committee were supported by some evidence, its decision will not be overturned.

Finally, Sanders asserted, in his unauthorized supplemental motion to his original declaratory motion, that he was not provided with a copy of the taped telephone conversation used at the hearing in accordance with CPP 15.6 VI(C)(4)(b)(3). The appellee contends that Sanders has failed to preserve this for review as he did not raise this issue in either his appeal to the warden, his original declaratory motion, or his motion for leave to amend the declaratory motion. A person cannot "invoke CR 59.05 to raise arguments and introduce evidence that could and should have been presented during the proceedings before entry of the judgment." Hopkins v. Ratliff, Ky. App., 957 S.W.2d 300, 301 (1997). "The failure to raise an issue

before an administrative body precludes a litigant from asserting that issue in an action for judicial review of the agency's action." O'Dea v. Clark, Ky. App., 883 S.W.2d 888, 892 (1994), citing Personnel Board v. Heck, Ky. App., 725 S.W.2d 13 (1986). "The focal point for [this] judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." O'Dea, 939 S.W.2d at 356, quoting Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743, 105 S. Ct. 1598, 1607, 84 L. Ed. 2d 643 (1985). Sanders filed his motion for leave to amend his original declaratory motion on August 30, 2002. However, he did not file an actual amended motion until September 24, 2002 (almost a month later) and five days after the circuit court had denied Sanders leave to amend. Thus, Sanders amended motion was unauthorized and dismissed by the circuit court as being untimely since a judgment had already been entered. Since Sanders did not raise this issue of not being provided with a copy of the taped phone conversation pursuant to CPP 15.6 VI(C)(4)(b)(3) until he filed an unauthorized amended motion, these issues were not considered by the trial court. They cannot now be considered here for the first time.

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

SCHRODER, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT.

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