

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001349-MR

LARRY BAILEY

APPELLANT

v.

APPEAL FROM ELLIOTT CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 06-CI-00036

GARY BECKSTROM, WARDEN; PHIL BRAMBLETT;
RODNEY GILLIHAN; REBECCA LEWIS; D. LYKINS;
and STEVE HANLEY, WARDEN OF B.C.C.

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Larry Bailey appeals the Elliott Circuit Court's dismissal of his declaratory judgment action in which he requested a review of a disciplinary proceeding.

Having reviewed the entire record before the circuit court, we affirm.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On August 31, 2005, at the Blackburn Correctional Complex (BCC), Corrections Officer Stephanie Clark heard loud shouting coming from one of the holding areas inside the prison. When Clark reached the scene, she observed Bailey, who was holding a mop wringer, yelling at another inmate, Jason Saunders. Clark asked Bailey if there was a problem. Bailey responded that there was no problem. Clark then instructed Bailey to go out into the hallway. Turning her attention to Saunders, she asked if there was a problem, and he also said that there was no problem. Clark then informed Saunders that he had to come with her. As he approached her, she observed a large gash on Saunder's face that was bleeding profusely. The medical staff was notified. During his transport to the hospital for treatment, Saunders informed prison officials that Bailey had caused his injury by striking him in the face.

Within hours, Clark had concluded her investigation into this incident. As a result of her investigation, Clark filed a disciplinary report against Bailey. Bailey was charged with physical action resulting in the serious injury of another inmate, a Category VII, Item 4 violation of Corrections Policy and Procedure 15.2. He was also charged with refusing to obey an order, a Category III, Item 2 violation, which is not an issue before this court. When presented with part one of the disciplinary report, Bailey pled not guilty, waived his right to a 24-hour prehearing notice, reserved his right to be present at the hearing, and was assigned a legal aide to assist him with his defense. The disciplinary report, which contained the charged offense and the facts supporting the charge, was forwarded to the adjustment committee.

The adjustment committee conducted a disciplinary hearing on August 31, 2005. Bailey was found guilty of physical action resulting in the serious injury of another inmate. Bailey was penalized by the forfeiture of two years of non-restorable “good-time” credit, assigned to administrative segregation for 180 days, and ordered to pay the Cabinet restitution for the medical expenses that it incurred in treating Saunders.

On September 1, 2005, Bailey was transferred to the Little Sandy Correctional Complex (LSCC). Bailey then appealed his conviction. BCC ordered that Bailey’s conviction for injuring Saunders be vacated and that he receive a new hearing on the charge. As Bailey was incarcerated at LSCC and his hearing would be conducted there, an LSCC officer conducted another investigation in which he utilized the original disciplinary report that was created at BCC. The officer's disciplinary report was transcribed and typewritten for clarity. This final report was presented to Bailey on October 18, 2005.

The second disciplinary hearing began on October 20, 2005, but was continued to provide adequate time for Bailey to confer with his legal aide. On October 27, 2005, Bailey's disciplinary hearing was finally conducted, and he was again found guilty and received the same punishment as was imposed after his initial conviction. Bailey appealed his conviction to the LSCC Warden who upheld the adjustment committee’s decision. The warden concluded that some of Bailey’s statements in his appeal constituted an admission of guilt.

Bailey then filed a declaration of rights petition pursuant to KRS 418.040 in the Elliott Circuit Court; however, Bailey never attached a copy of his appeal to the warden with his petition. The Cabinet filed a motion to dismiss because of Bailey's failure to attach a copy of his appeal to the warden to his petition for declaratory relief. The circuit court granted the motion, and this appeal followed.

In *Houston v. Fletcher*, 193 S.W.3d 276, 277 (Ky.App. 2006), this Court held that a defendant must attach the proper documentation to his petition "verifying the arguments that had been raised in his administrative appeal to the [w]arden" In *Houston*, as in the case *sub judice*, the Department argued that because of the omission of this documentation that the defendant failed to establish that he had exhausted his administrative remedies as required under KRS 454.415(1).² Again, in *Houston*, as in the case *sub judice*, this procedural failure caused the circuit court to dismiss the petition for declaration of rights.

We conclude that the circuit court properly dismissed Bailey's petition. KRS 454.415(1) mandates that an inmate attach the necessary documents to his complaint verifying that his administrative remedies have been exhausted. In this case, Bailey did not meet this statutory requirement. In his reply brief, attempting to demonstrate that KRS 454.415(1) had been satisfied, Bailey wrote these exact words:

Appellee's admits that Appellant did file his appeal to the L.S.C.C. Warden, Beckstrom, but that he failed to attach a

² This statutory provision was revised in 2006; however, the revisions do not affect the outcome of this case. Additionally, we are using the numbering of the statute as it existed when the court's dismissal order was entered.

copy of his appeal; This is a mis-statement of facts; in so much, that the United States Court of Appeals for the 6th Cir. has recently rendered a brightline decision in the case of Bey vs Johnson, 407 F. 3d 801, 2005 Fed. App. 0194P., holding that: once the prisoner has undertaken [sic] his grievance is considered fully exhausted.³

We understand Bailey to mean that the mere fact that a circuit court has actual notice that an inmate had appealed to the warden that the exhaustion requirement of KRS 454.415(1) has been satisfied. We disagree.

Addressing Bailey's argument, we first note that *Bey v. Johnson* was a federal statutory interpretation case regarding a federal court's application of the Prison Litigation Reform Act's exhaustion of remedies requirement. Therefore, *Bey* does not control our decision today nor is it applicable to Bailey's case which involves the application of KRS 454.415(1). *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567, 571 (Ky.App. 2005) (holding that even a federal court's interpretation of Kentucky law is merely persuasive authority; thus, such decisions are not binding on Kentucky courts).

More importantly in our decision in *Houston*, 193 S.W.3d, at 278, this Court held that:

Although Houston [the defendant] did attach to his circuit court petition documents indicating that the Warden had heard and denied his appeals, there is no documentation setting forth the grounds of three of his four appeals. It is

³ This Court notes that the U.S. Supreme Court vacated and remanded *Bey v. Johnson* back to the Sixth Circuit for further consideration in light of its decision in *Jones v. Bock*, 549 U.S. ----, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007).

impossible to determine whether the arguments in Houston's petition for declaration of rights were identical to those raised before the Warden. The circuit court was, therefore, unable to ascertain whether Houston had exhausted his administrative remedies as to the first three administrative appeals presented to the Warden.

Despite Bailey's legal citations to the contrary, *Houston* is on point and controlling in this appeal.

Because he did not attach his appeal to the warden with his petition for declaratory relief, the circuit court was unable to ascertain whether Bailey had exhausted his remedies as to the arguments that Bailey asserted before it. Therefore, in accordance with *Houston*, we agree that the circuit court properly ruled that Bailey failed to demonstrate that he had exhausted his administrative remedies as required under KRS 454.415(1).

For the forgoing reasons, the order of the Elliott Circuit Court dismissing Bailey's petition for a declaration of rights is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry Bailey, *pro se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Emily Dennis
Frankfort, Kentucky