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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000285-MR

JAMES ROCKY WRIGHT

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-1117

JOHN D. REES, SCOTT HAAS,
RICHARD KIMBLER, DOUG CRALL,
RON EVERSON, STEVE HILAND,
CHANIN HILAND AND SARAH
SANDERLIN

APPELLEES

OPINION VACATING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, KELLER AND WINE, JUDGES.

CAPERTON, JUDGE: This appeal stems from a *pro se* action filed by James Rocky Wright (Wright), who was an inmate in the Kentucky Department of Corrections system at the time of filing. Wright, who filed this claim to allege

violations of the Eighth Amendment of the U.S. Constitution and Section 17 of the Kentucky Constitution, asserts that his rights were violated when he was denied operations and requested treatment to repair a left inguinal hernia and a left detached and/or ruptured bicep.

The action was filed on August 9, 2006, and on January 10, 2007, an Order of Summary Judgment was entered by the Franklin Circuit Court in response to a motion filed by counsel for appellee Everson. Wright now appeals that Order. For the following reasons, we vacate and remand to the court below for further proceedings consistent with this opinion.

At the time that Wright filed this suit in August of 2006, John Rees, Scott Haas, Richard Kimbler, Doug Crall, Ron Everson, Steve Hiland, Chanin Hiland, and Sarah Sanderlin were named as Defendants. John Rees is the current Commissioner of the Department of Corrections. Dr. Richard Kimbler was formerly the Medical Director for the Department of Corrections prior to Dr. Doug Crall, who filled the position in an interim capacity until July 1, 2004. At that time, Dr. Scott Haas assumed the position, and continues to hold it at this time to the best of this Court's knowledge. Dr. Ron Everson is a physician at the Northpoint Training Center. Dr. Steve Hiland is a physician at the Kentucky State Penitentiary. Chanin Hiland is an advanced registered nurse practitioner at the Kentucky State Penitentiary, and Sarah Sanderlin was formerly a contract worker in the Medical Services Office of the Department of Corrections in Frankfort.

In his complaint, Wright alleged that he wrote to Commissioner Rees regarding his request for surgery, and that Dr. Haas responded to the letter. No further factual allegations were made in the complaint concerning Commissioner Rees or Dr. Haas. Further, Rees alleged that Drs. Kimbler and Crall took actions to defer his hernia surgery in 2002. With respect to Dr. Everson, Wright alleges that he was examined by Dr. Everson in 2004, and that Everson requested approval for the hernia surgery, which was ultimately denied. Concerning Steve and Chanin Hiland and Sarah Sanderlin, Wright alleged that they served on the committee reviewing the grievance that Wright filed with respect to the denial of his surgery.

A careful review of the official court docket indicates that on August 9, 2006, the day the complaint was filed, a summons was issued for each of the respondents. All were to be served via personal service, with the exception of Ron Everson, who was to be served by certified mail. Initially, none of the August 9, 2006, record entries confirm that summons were served on any party. A subsequent docket entry indicates that Everson was served with summons on October 21, 2006, however, there was no return of service on the remaining respondents. Accordingly, Everson was the only respondent served and before the court, and it was he who filed an answer and motion for summary judgment through counsel seeking to have the case dismissed in its entirety with respect to all named defendants.

On January 10, 2007, an order of summary judgment was entered by the Franklin Circuit Court, dismissing this claim in its entirety with prejudice, with

respect to all respondents. As its basis for denial, the court cited Wright's failure to exhaust administrative remedies for his claims against each respondent, as mandated by KRS 454.415, and the cases of *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998), *Jones Bey v. Johnson*, 407 F.3d 801, 807 (6th Cir. 2005).

Further, the court found that the applicable one-year statute of limitations for §1983 actions in Kentucky barred any claim prior to August 8, 2005, as Wright filed this claim on August 8, 2006. Finally, the court noted that Wright only discussed respondents Hiland, Hiland, and Sanderlin in reference to a grievance review, and granted summary judgment on the basis that officials whose only action involves the denial of administrative grievances or the failure to act are not liable under §1983. Following the entry of that order, Wright appealed, naming all respondents.

As noted, a review of the official court docket indicates that of all the respondents named by Wright in this suit, only Everson was served and properly before the court. The remaining parties did not formally enter an appearance, and counsel for Everson filed a motion requesting that those respondents be dismissed, or alternatively, that they be allowed to file a brief. The motion to dismiss was passed by the Court of Appeals motion panel, and the request to allow the filing of briefs was granted. Having reviewed the record thoroughly, we now address the merits of the motion to dismiss filed by Everson.

Certainly, the law in this Commonwealth is clear that an individual who has not been served with a summons, and who was not properly before the

court below is not a proper party on appeal. *Moore v. Bates*, 332 S.W.2d 636, 638 (Ky. 1960), citing *Hopkins v. Layne*, 269 S.W. 336 (Ky. App. 1925). For the court below to have had jurisdiction over the respondents, and for due process to have been satisfied, service of summons was necessary. *Gardner v. Lincoln Bank & Trust Co.*, 64 S.W.2d 497, 502 (Ky. App. 1933).

As noted, a review of the docket indicates that the only respondent to receive service and appear in the action below was Everson. Accordingly, we believe it appropriate to vacate the order of summary judgment with respect to all defendants aside from appellee Everson, and we remand this matter back to the court below. With respect to appellee Everson, we also believe it appropriate to vacate the order of summary judgment, but for different reasons which we outline herein below.

At the time that Everson filed his motion for summary judgment, his initial arguments concerned exhaustion of administrative remedies, on the basis of the decisions rendered in *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998), *Jones Bey v. Johnson*, 407 F.3d 801, 807 (6th Cir. 2005), and KRS 454.415, all of which required dismissal of a claim for failure to exhaust. However, in *Jones v. Bock*, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007), the Supreme Court specifically indicated that it was abrogating *Brown v. Toombs* in finding that an inmate is no longer required to specially plead or demonstrate exhaustion in his complaint.

The Court also specifically overruled *Jones Bey* in holding that an inmate's compliance with the PLRA exhaustion requirement with respect to some, but not all, claims, does not warrant dismissal of the entire action. In light of the Supreme Court's clear and unequivocal position on this issue, as well as the holding of the *Brown* court that any dismissal on the basis of exhaustion be without prejudice, we find administrative exhaustion to be an insufficient basis for summary judgment, and we vacate the order on that basis, and remand to the trial court for a determination as to whether summary judgment is appropriate with respect to appellee Everson on other grounds.

In vacating the order on the aforementioned grounds, we nevertheless concur with the court below that the appropriate statute of limitations for a §1983 action in Kentucky is the one-year statute for personal injury set forth in KRS 454.415. *Wilson v. Garcia*, 471 U.S. 261, 280; 105 S.Ct. 1938; 85 L.Ed.2d 254 (1985); *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990). As Wright brought the instant action on August 9, 2006, any claim that his constitutional rights were violated by the defendants prior to August 9, 2005, are barred by the aforementioned statute of limitations. Likewise, we concur with the court below that any claims brought against officials whose only action involves the denial of administrative grievances or a failure to act must fail, as those individuals cannot be found liable under such grounds pursuant to §1983. *Shehee v. Luttrell*, 199 F.3d 295, 300 (1999); and *Salehpour v. University of Tennessee*,

159 F.3d 199, 206 (6th Cir. 1998), *cert. denied* 526 U.S. 1115, 119 S.Ct. 1763, 143 L.Ed.2d 793 (1999).

In remanding to the court below, we do acknowledge that an issue still remains as to a potential conflict of interest on the part of the circuit court judge. On this issue, Kentucky law is clear. Our Supreme Court has held that any doubt about a judge's qualifications to preside should be resolved in favor of the party with good faith doubts based on substantial grounds. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge and should be able to feel that his cause has been tried by a judge who is wholly free, disinterested, impartial, and independent, and any doubt of qualification should be resolved in favor of a party who, in good faith, questions the qualifications of the judge based upon grounds of substance. *Dotson v. Burchett*, 190 S.W.2d 697, 700 (Ky. 1945).

Certainly, we acknowledge the possibility that no real conflict of interest existed below, and do not dispute Judge Wingate's assertion that his brother-in-law's employment with the Department of Corrections would not prejudice his judgment in this matter. Nevertheless, we find that because the Court did note a conflict, Wright should, on remand, be afforded the opportunity to seek a transfer of his case if he so desires.

We do not find merit in the argument that Wright's failure to seek a transfer at the time the notice of conflict was issued bars him from doing so now. Indeed, a transfer after the order granting summary judgment had already been

entered would not have afforded Wright the opportunity to have his arguments reviewed on the merits by the newly assigned court.

In light of the foregoing, we hereby vacate the order of summary judgment issued by the Franklin Circuit Court, and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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