RENDERED: NOVEMBER 7, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000812-MR

ANTONIO SUBLETT — APPELLANT

v.

APPEAL FROM ELLIOTT CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 07-CI-00153

JAMES STANIFORD, CAPTAIN;
ET AL. — APPELLEE

OPINION AND ORDER
DISMISSING APPEAL

** ** ** ** **

BEFORE: ACREE AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

VANMETER, JUDGE: Antonio Sublett appeals *pro se* from the dismissal of his complaint seeking restoration of good time prison credit. For the reasons stated

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

herein, we dismiss the appeal for Sublett's failure to name indispensible parties to the appeal.

This matter has its origin in the delivery of an envelope containing a United States postal money order addressed to Sublett at Little Sandy Correctional Complex, under circumstances which raised the suspicions of the prison officials.[2] After an investigation, Sublett was charged with and found guilty of "using mail to obtain money, goods or services by fraud." The prison adjustment committee[3] assessed sixty days of disciplinary segregation and forfeiture of sixty days of good time credit. Sublett appealed to the warden, who affirmed the decision. Sublett then filed a declaration of rights action in the Elliott Circuit Court against Captain James Staniford, the investigating officer, Sgt. Marlo M. Fannin, the chairman of the adjustment committee, Warden Joseph Mako, and the Little Sandy Correctional Complex (collectively "prison officials"), arguing that the adjustment committee's decision was based on insufficient evidence. The trial court dismissed the petition on the prison officials' motion.[4] This appeal follows.

[2] The facts were that the envelope, ostensibly from Sublett's mother, misspelled his and her last name; the envelope bore a postmark from Lexington although her address was in Louisville; and the money order had been obtained in West Liberty. The latter town is approximately 75 miles from Lexington and approximately 150 miles from Louisville.

[3] Under Kentucky Corrections Policies and Procedures (KCPP) 15.6(I), the adjustment committee is "a committee appointed by the Warden of an institution empowered to hear, adjudicate and assess appropriate discipline for violations of rules or regulations."

[4] The prison officials' Response and Motion to Dismiss is more appropriately considered a motion for summary judgment in that the motion incorporated matters outside the pleadings. Kentucky Rules of Civil Procedure (CR) 12.03.

The caption of the notice of appeal names only "CAPT. JAMES STANIFORD, et al." as "Respondents." The body of the Notice of Appeal designates the "Appellee(s)" only as "Hon. Angela Dunham, esq, Counsel for Capt. James Staniford, et al."

As a prefatory matter, we note that our review of the record appears to confirm that the deprivation of Sublett's good time prison credits did not comport to the minimal "some evidence" standard[5] required by *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454-56, 105 S.Ct. 2768, 2773-74, 86 L.Ed.2d 356 (1985); *see also Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (due process requires a prison to provide procedural protections before depriving an inmate of his or her protected liberty interest in good time credits).

That said, we are without jurisdiction to grant Sublett any relief because he failed to name anyone, other than counsel or Capt. James Staniford, as a party to the appeal in either the caption or the body of his notice of appeal. CR 73.03(1) requires a notice of appeal to "specify by name all appellants and all

[5] The initial write up by Capt. Staniford about this incident includes his conclusion that the "money order was received under false pretenses." His supervisor's review imposed the charge of "using mail to obtain money, goods or services by fraud[,] Category 5-8." KCPP 15.2(II)(C) (effective Jun. 2, 2006). However, under KCPP 16.2 (effective Mar. 9, 2007), "[a]n inmate may receive mail from any sender" except certain contraband prohibited by the policy, such as pornography. Furthermore, under KCPP No. 15.7(A) (effective Nov. 15, 2006), "[a]n inmate shall be allowed to receive funds in accordance with the following: 1. Funds received shall be in the form of a: a) U.S. postal money order . . . made payable to the inmate and shall include the inmate's institutional number." It thus appears that the receipt of money orders by inmates from non-family members, in and of itself, does not violate prison policies and procedures. While the record supports a finding that Sublett was not forthcoming about the source of the funds, he was not charged with perjury, lying or receiving funds "under suspicious circumstances." Furthermore, if the purpose of the charged offense is to ensure that prison officials are aware of, and not misled as to, the source of all funds received by an inmate, then certainly a procedure could be drafted and instituted to set forth more clearly such a purpose.

appellees" and specifically notes that "et al." is not a "proper designation of parties[.]" While *pro se* litigants are sometimes held to less stringent standards than lawyers in drafting formal pleadings, *see Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), Kentucky courts still require *pro se* litigants to follow the Kentucky Rules of Civil Procedure.

The failure to name an indispensable party in the notice of appeal is more complex than a simple adding of the names; this is considered a defect in jurisdiction resulting in the appellate court's inability to proceed. *See City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990). "It is well-established that failure to name an indispensable party in the notice of appeal results in dismissal of the appeal." *Slone v. Casey*, 194 S.W.3d 336, 337 (Ky.App. 2006) (citing *City of Devondale,* 795 S.W.2d 954; CR 19.02). The fact that the Kentucky Department of Justice, which defended this appeal, has not raised this issue is not relevant, as an appellate court may not acquire jurisdiction through waiver. *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005).

For purposes of appeal, a necessary party is one who would be a necessary party for further proceedings in the circuit court if the judgment were reversed. *Land v. Salem Bank*, 279 Ky. 449, 453, 130 S.W.2d 818, 821 (1939); *Murphy v. O'Reiley*, 78 Ky. 263, 264 (1880); *Hammond v. Dep't for Human Res.*, 652 S.W.2d 91 (Ky.App. 1983). Here, Staniford was merely the investigating officer. This matter became final as to any other possible parties, such as the warden and the chairman of the adjustment committee, when the trial court order

was not appealed as to them. On any remand to the Elliott Circuit Court, we would be unable to direct the trial court to take any action involving parties who were not a part of this appeal. Our search has revealed many cases involving *pro se* prisoners, and petitions for declaration of rights involving the forfeiture of good time prison credits. The respondents have included the Department of Corrections, *e.g., McMillen v. Kentucky Dept. of Corrections*, 233 S.W.3d 203 (Ky.App. 2007) (the warden was also named a party appellee); the commissioner of the Department of Corrections, *e.g., Smith v. Rees*, 2004-CA-002524-MR, 2006 WL 358265 (Ky.App., Feb. 17, 2006) (John D. Rees was the commissioner);[6] wardens, *e.g., Smith v. O'Dea*, 939 S.W.2d 353 (Ky.App. 1997); and even the head of a prison adjustment committee, *see Mask v. Jones*, No. 2006-CA-001225-MR (Ky.App. Nov. 21, 2007) (Sgt. Eric Jones, as the chairman of the adjustment committee which found Mask guilty, was represented by the Justice and Public Safety Cabinet). The naming of such persons or entities as parties is proper because each has some ostensible authority over the process of reviewing the possible forfeiture of prison good time credits, and has the ability to take corrective action in the event the appeal is successful. The same cannot be said of the investigating officer, Capt. Staniford,[7] who lacks any designated authority to provide any of the

[6] In *Rees*, we noted as a potential problem with Smith's appeal the fact that he failed to name any of eighteen respondents, other than Rees, as appellees, in the notice of appeal. Since Rees was the commissioner of the Department of Corrections who had denied Smith's grievance over the loss of good time credits, the court assumed that the other eighteen individuals were not indispensible parties. *Rees*, slip op. at 3-4.

[7] Arguably, under KCPP 15.6, the proper party to any declaration of rights action is the warden and/or the Department of Corrections, since the warden is the final arbiter at the institutional level. KCPP 15.6(II)(F)(7). As that question is not before us, we do not decide it.

requested relief. In this case, the warden and the chairman of the adjustment committee were parties to Sublett's declaration of rights action, but were not named as appellees in the notice of appeal.

ORDER

This appeal is hereby dismissed for failure to name indispensible parties to the appeal. The Elliott Circuit Court's order is affirmed.

ALL CONCUR.

ENTERED: November 7, 2008

/s/ Laurance B. VanMeter
JUDGE, COURT OF APPEALS

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