RENDERED: FEBRUARY 20, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001884-MR

MICHAEL LEE WELLS — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 07-CI-00286

JOHN REES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

WINE, JUDGE: The Appellant Michael Wells ("Wells") appeals from an order of the Oldham County Circuit Court denying his Petition for Declaratory Relief.[1] For

[1] We first note that Wells's brief fails to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(vii) in that the brief does not contain a copy of the judgment he is appealing. CR 76.12(8)(a) permits this Court to strike a brief for substantial failure to comply with the rule. However, given Wells' *pro se* status, we elect not to do so.

the reasons stated herein, we affirm the August 14, 2007 judgment of the trial court.

Wells was sentenced on May 14, 1992 to a life sentence for a murder conviction. On at least three occasions, including most recently in March 2007, Wells petitioned the Kentucky Department of Corrections ("DOC") to reduce his custody from Level 3, Restricted Custody to Level 2, Minimum. Each time his request was denied, Wells appealed unsuccessfully to the warden and the Commissioner of DOC. On April 23, 2007, Wells petitioned, *pro se*, the Oldham Circuit Court for Declaratory Relief pursuant to Kentucky Revised Statutes (KRS) 418.040. Included with his petition were several certificates of achievement as well as letters of accommodations. Along with its response to the petition, DOC included a copy of the *Kentucky Corrections Policy and Procedure 18.5*, pertaining to Custody and Security Guidelines. Section II D, Other Guidelines, provides, "1. An inmate shall not be eligible for reduced custody if he has: d. a capital offense conviction."

Also included in Wells's response to the DOC's motion to dismiss was a copy of the DOC's *Inmate Classification Manual*. Section 5 provides,

> An inmate convicted of a highest severity offense **is not eligible** for an override to minimum custody. However, inmates convicted of murder, complicity to or aiding and abetting murder maybe eligible for reduced custody **with approval of the Commissioner**. Recommendations for

> reducing the custody level of these inmates must be submitted via a Reduction in Custody Form to the Classification Branch Manager for proper processing. If approval is received, the custody reduction shall remain in effect unless there is a change that warrants a custody review.

Considering all the pleadings and documents, the court summarily denied the petition on August 14, 2007. This appeal followed.

According to CR 12.03, if on a motion to dismiss the trial court considers matters outside the pleadings, then the trial court must treat the motion as one for summary judgment. Because the Oldham Circuit Court considered matters outside the pleadings, it should have construed the defendant's motion as a motion for summary judgment.

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996). In order to successfully oppose the motion, the nonmoving party must come forward with some affirmative evidence that a genuine issue of material fact exists. *Lewis v. B & R Corporation,* 56 S.W.3d 432, 436 (Ky. App. 2001). Our standard of review on an order of summary judgment is *de novo,* and is limited to questions of law. *Blevins v. Moran,* 12 S.W.3d 698, 700 (Ky. App. 2000). We review with that standard in mind.

Contrary to Wells's arguments before this Court, we can find no factual dispute, nor does Wells point to any facts in question in his response to DOC's motion to dismiss submitted to the trial court. Both parties relied on the same documents utilized by DOC to deny reclassification when this issue was briefed before the trial court. Although the syntax on page 8 of DOC's brief before this Court is confusing, DOC does not concede there are facts in dispute, rather the DOC disagrees with Wells's contention the trial court ruling was improper because there were facts in dispute.

The law is well settled that inmates do not have a constitutional right to a particular security classification or to be housed in a particular institution. *Marksberry v. Chandler,* 126 S.W.3d 747 (Ky. App. 2004). In *Mahoney v. Carter*, 938 S.W.2d 575 (Ky. 1997), our Supreme Court recognized persons who are lawfully incarcerated have only the narrowest range of protected liberty interests. *See Hewitt v. Helms,* 459 U.S. 460, 467, 103 S.Ct. 864, 869, 74 L.Ed.2d 675 (1983). Further, a prisoner has no inherent right to a particular security classification or to be housed in a particular institution. *Beard v. Livesay,*798 F.2d 874, 875 (6th Cir. 1986).

In fact, so long as the conditions or the degree of confinement to which the prisoner is subjected do not exceed the sentence which was imposed and are not otherwise in violation of the Constitution, the due process clause of the Fourteenth Amendment does not subject an inmate's treatment by prison authorities to judicial oversight. *Hewitt,* 459 U.S. at 468, 103 S.Ct. at 869-70.

Therefore, any liberty interest which may apply to appellant must be created by state law or regulation. *Mahoney*, 938 S.W.2d at 576.

Finally, Wells now makes arguments before this Court which were never presented to the trial court, including the failure of the DOC to complete a Reduction in Custody Form. An appellate court will not consider an argument unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the argument. *Shelton v. Commonwealth,* 992 S.W.2d 849, 852 (Ky. App. 1998). Further, as our Supreme Court stated in *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976), an appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Because this argument was not presented to the trial court, it is not properly preserved for appellate review. *Daugherty v. Commonwealth,* 572 S.W.2d 861, 863 (Ky. 1978).

The order of the Oldham Circuit Court is affirmed.

ALL CONCUR.

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