

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000599-MR

ANDRE DRAPER-EL

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-00043

DEPARTMENT OF CORRECTIONS,
COMMONWEALTH OF KENTUCKY
AND LADONNA H. THOMPSON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Andre Draper-El, *pro se*, appeals from a judgment of the Franklin Circuit Court dismissing his tort action alleging constitutional violations while incarcerated. We affirm.

Sometime after Draper-El was transferred to Green River Correctional Complex on November 3, 2005, his inmate account was frozen based upon outstanding charges of \$134.36 for copying charges for court filings and telephone costs incurred at the Western Kentucky Correctional Complex. Through a series of letters and complaints, Draper-El attempted to discover why his account was frozen. He filed a series of grievances and, by November 25, 2007, his account was unfrozen and credited with the amounts deducted.

On July 9, 2008, Draper-El filed a petition for declaratory judgment against the Commonwealth of Kentucky and the Department of Corrections claiming that he was entitled to damages based upon his inability to purchase hygiene supplies while his account was frozen. The circuit court determined that his claims should have properly been presented to the Board of Claims and dismissed his petition without prejudice.

Rather than appealing or filing an action before the Board of Claims, on February 3, 2009, Draper-El filed a second action against the same parties in which he again presented claims based upon his inability to purchase hygiene supplies while his account was frozen. The trial court determined that Draper-El was filing the same cause of action previously dismissed. The only difference in this new cause of action was an increase in the amount of monetary damages claimed and the addition of a new punitive damages claim. Consequently, the trial court dismissed it without prejudice finding no jurisdiction to hear and adjudicate his

claims, which should have been filed with the Board of Claims pursuant to KRS 44.070 to 44.160.

In *Draper-El v. Commonwealth*, 2009-CA-000703-MR, 2010 WL 3447667 (Ky.App. 2010), this Court affirmed the trial court's dismissal of the negligence claims, concluding that they should have been presented to the Board of Claims. However, we concluded that the trial court failed to consider and rule upon Draper-El's constitutional claims, which could not be adjudicated by the Board of Claims, and reversed and remanded.

After the case was remanded, the trial court considered Draper-El's constitutional claims and determined that they were without merit because the Kentucky Department of Corrections supplies inmates with the necessary basic hygiene products as listed in the Kentucky Corrections Policy and Procedure (KCPP) 14.2 incorporated in 501 KAR 6:020, which mandates that the Department of Corrections provide basic personal hygiene items necessary for the health of inmates. It further found that Draper-El was not entitled to injunctive relief because under KCPP15.7(C)(1)(b), the Department of Corrections was entitled to apply incoming funds to his debt for the charges he incurred. Accordingly, the trial court dismissed Draper-El's petition.

Draper-El now appeals this dismissal. Draper-El attempts to use the present case as a vehicle to relitigate his previously dismissed case claiming that he had a due process right to a ruling in his favor when the parties failed to respond to his previous petition. He also appears to be claiming that he was entitled to a

judgment in his favor when the Department of Corrections did not promptly respond to this Court's opinion. Draper-El also claims that he had a right to an evidentiary hearing or further investigation on his claims of a constitutional violation, the infliction of cruel and unusual punishment.

The Department of Corrections argues that Draper-El is not entitled to any award based upon his prior case, that an evidentiary hearing was unnecessary because the statute of limitations had expired, and that Draper-El suffered no constitutional deprivation because he had access to basic hygiene products.

The appropriate standard for reviewing the dismissal of Draper-El's tort action based upon claims of constitutional violations is the summary judgment review standard. *See Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky.App. 1997).

Under this standard, the appellate court must determine "whether there are genuine issues of material fact and, if not, whether the movant is entitled to judgment as a matter of law. Whenever it is reasonable to do so, ambiguities in the record must be construed in favor of the non-moving party." *Id.*

We consider whether Draper-El's present constitutional claims are timely under the statute of limitations and whether his constitutional claims have merit.

The trial court did not address the Department of Corrections' argument that Draper-El's case is time barred under the statute of limitations. However, we agree with the Department of Corrections that the statute of limitations has run.

According to the record, even if Draper-El had valid constitutional claims, any deprivation was remedied by November 25, 2007. The instant case was not filed until January 12, 2009. Pursuant to KRS 413.140, a one-year statute of limitations is in effect for constitutional claims presented in Kentucky courts that are analogous to 42 U.S.C. § 1983. *Million v. Raymer*, 139 S.W.3d 914, 919 (Ky. 2004); *see also Hill v. Thompson*, 297 S.W.3d 892, 898 (Ky.App. 2009). Because Draper-El filed his action after this one-year period expired, his constitutional claims are procedurally barred.

Draper-El's claims of violations of his rights to due process and equal protection are also without merit as a matter of law. Draper-El's inmate account was property in which he had an interest, and he was entitled to some process. *Sickles v. Campbell County, Kentucky*, 501 F.3d 726, 730 (6th Cir. 2007). However, he was not entitled to pre-deprivation process under the circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L.Ed.2d 18 (1976).

In *Sickles*, 501 F.3d at 731, the Court held that withdrawing money from jail inmates' canteen accounts to pay for costs of booking and room and board did not require prior notice and an opportunity to be heard prior to the deprivation "[i]n view of the modest private interests at stake, the small risk of error, the limited benefits of additional safeguards and the unchallenged government interests in the policy." These same considerations apply here. Appropriate post-procedural processes were available to Draper-El through the grievance process, which he ultimately employed successfully, showing their adequacy.

Draper-El also received adequate protection under the Equal Protection Clause because the policies that resulted in his deprivation have a rational basis, ensuring that the state will be paid what it is owed. *See Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997).

Upon considering the trial court's ruling on the Eighth Amendment issue, Draper-El fails to refute or contest the trial court's determination that he had access to appropriate hygiene products as required by the KCPP 14.2 and the Constitution. Inmates are entitled to humane treatment and an Eighth Amendment violation can be found where prison officials deliberately deprive inmates of something essential for basic human existence, deliberately risking seriously harming the inmate. *Farmer v. Brennan*, 511 U.S. 825, 832-37, 114 S.Ct. 1970, 1976-79, 128 L.Ed.2d 811 (1994). The lack of access to the most basic of hygiene products can cause such harm. *Carver v. Bunch*, 946 F.2d 451, 452 (6th Cir. 1991). Basic hygiene requires providing soap and toilet paper. *See Wright v. McMann*, 387 F.2d 519, 526 (2nd Cir. 1967). *See also Black v. Brown*, 513 F.2d 652, 655 (7th Cir. 1975); *Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985); *Novak v. Beto*, 453 F.2d 661, 665 (5th Cir. 1971).

Other denials of hygiene products and access can also cause a violation where the deprivation is not temporary and causes actual medical harm. *See e.g. Flannory v. Bonn*, 604 F.3d 249 (6th Cir. 2010), (inmate deprived of toothpaste for 337 days resulting in gum disease and a tooth extraction); *Bradley v. Pucket*, 157 F.3d 1022 (5th Cir. 1998), (disabled inmate on lockdown alleged he could not use

the showering facilities, resulting in no bathing for two months, causing a fungal infection). *See Novak v. Beto*, 453 F.2d 661, 665 (5th Cir. 1971), (no violation where solitary confinement prisoners bathed three times a week, and had access to toilets, a drinking fountain, toilet paper, toothpaste and toothbrushes).

Although Draper-El alleges that he was without hygiene products during the time his account was frozen, the specific products are not listed in his petition. The only indication of which hygiene product he could not access is a letter to a prison official claiming that he could not obtain deodorant. Draper-El does not claim to have been deprived of any of the hygiene items that KCPP is mandated to supply under 14.2. Draper-El also fails to claim that this deprivation put him at risk of serious harm, resulted in any lasting health impacts, or that prison officials wantonly disregarded his safety or health where he still had access to other hygiene items. Deodorant is not necessary for overall health. While in our modern society it may seem to be a necessity, we conclude that as a matter of law its deprivation does not rise to the level of a constitutional violation.

For the reasons stated, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Andre Draper-El, *Pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

J. Todd Henning
Justice & Public Safety Cabinet
Frankfort, Kentucky

