

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001490-MR

HENRY B. LIVINGSTON

APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 10-CI-00549

CLARK TAYLOR, WARDEN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Inmate Henry Beck Livingston appeals, *pro se*, from the dismissal of his petition for a declaration of rights. Upon review, we affirm the Oldham Circuit Court.

¹ Senior Judge Joseph E. Lambert 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. Senior Judge Lambert authored this opinion prior to the completion of his senior judge service effective November 2, 2012. Release of the opinion was delayed by administrative handling.

History

Livingston claims that Sergeant Percy Pool of the Luther Lockett Correctional Complex recruited a fellow inmate, Henry Hall, to plant a weapon in his cell.

Livingston claims that before this act occurred, he wrote several letters to the Warden, Clark Taylor, in which he complained of Sergeant Pool's aggressive behavior towards him. Warden Taylor purportedly responded to Livingston via letter to let him know that the allegations had been referred for investigation to Pool's supervisor.

Livingston claims that Pool began to harass him and make statements in front of him and other inmates about the complaints. Livingston avers that Sergeant Pool retaliated against him on May 24, 2009, by announcing a search involving Livingston's cell block and having the inmate Hall hide a homemade "shank" under Livingston's mattress.

Livingston was placed in a segregation unit for a month for the dangerous contraband. Livingston states that he wrote the Warden from segregation and stated that he was missing approximately \$500.00 worth of property and that he was not receiving proper medical care for his various medical needs while in segregation.

Upon his release from segregation, due to the correctional facility's alleged failure to provide adequate medical care, Livingston was in renal failure. Indeed, Livingston was taken directly to K.S.R. hospital for kidney failure

treatment upon release. Livingston was told that he could no longer take the anti-inflammatory drugs for his knee condition because of the renal failure. Livingston was also allegedly told, since the Department of Corrections does not allow inmates narcotics for pain, that he would simply have to suffer through the pain in his knees.

While in the hospital, Livingston ran into inmate Hall. Livingston avers that Hall confessed to hiding the shank under his mattress because Pool had caught him with “dope” the previous week and asked him to do it. Hall informed Livingston that he relayed this same information to a Captain Jordan immediately after the search and that Captain Jordan subjected him to a polygraph test, which he passed. Hall also stated that he agreed to wear a “wire” as part of an internal investigation, in which Pool admitted to asking Hall to plant the “shank.”

Livingston filed a criminal complaint against Pool for the underlying incidents. Information in the record indicates that the investigating officer believed the allegations to be unfounded. The detective on the case noted that the correctional facility could not provide him with a tape from when Hall was wired, but nonetheless stated that Pool made no incriminating statements on the tape.

Regardless, Livingston filed the underlying petition for declaratory relief, alleging violation of his Fourth Amendment rights (concerning the shank and/or stolen property), his Eighth Amendment rights (concerning failure to provide proper medical treatment while he was in segregation) and internal KDCP procedures (because he was the only inmate placed in segregation, although he

shared a two-person cell). He asked for “a jury trial and damages” for the violation of his rights.²

The trial court dismissed his petition, finding that there was no actual controversy. Specifically, the court noted Livingston failed to show there was any “right or duty or liability” upon which the court could issue a declaratory judgment. Livingston now appeals.

Analysis

Under Kentucky Revised Statute(s) (KRS) 418.040, a plaintiff may ask for a declaration of rights, and the courts of this jurisdiction may make a binding declaration thereof, “whether or not consequential relief is or could be asked” for. We have previously recognized that a “petition for declaratory judgment pursuant to KRS 418.040 has become the vehicle, whenever habeas corpus proceedings are inappropriate, whereby inmates may seek review of their disputes with the Corrections Department.” *Smith v. O’Dea*, 939 S.W.2d 353, 355 (Ky.App. 1997).

However, if an inmate seeks a trial and money damages, rather than resolution of a particular dispute with the Department of Corrections (such as a complaint about the calculation of a sentence or the result of a disciplinary hearing) a declaratory action is not the proper procedural avenue. Instead, the inmate should file an action with the Board of Claims, a civil action in the circuit court

² Indeed, Livingston appeared to proceed as if it were a civil trial for money damages instead of a petition for declaratory relief.

against individually named officers or employees for non-immune acts or omissions, or a §1983 action in federal court.

If Livingston seeks money damages from prison officials or the Department of Corrections, then he must file an appropriate action. We have no jurisdiction to declare that the defendant must be afforded a jury trial when our review is of a petition for a declaration of rights.

Moreover, we note that Livingston provided no proof that his administrative remedies had been exhausted in the present case. Thus, his petition would not have been proper even if Livingston had been seeking declaratory relief. *See* KRS 454.415; *Houston v. Fletcher*, 193 S.W.3d 276, 277 (Ky.App. 2006)(inmate must attach documentation to petition evidencing appeal and arguments raised therein). Indeed, no action shall be brought by an inmate, or on their behalf, with respect to (1) an inmate disciplinary proceeding, (2) a sentence calculation, (3) custody credit, or (4) a conditions-of-confinement issue, “until administrative remedies as set forth in the policies and procedures of the Department of Corrections, county jail, or other local or regional correctional facility are exhausted.” *Id.* This is true “even if the remedy the inmate seeks is unavailable.”

It is of note that any disciplinary action against Livingston for the “shank” and his ultimate placement in segregation or loss of good-time credit have all been waived by failure to exhaust administrative remedies. The only remaining issue, not covered by KRS 454.415, is the correctional facility’s alleged failure to

provide adequate medical care. Thus, the only issue Livingston could bring in one of the above-named actions, periods of statutory limitation permitting, would be his failure to receive appropriate medical care and subsequent renal failure.

Accordingly, for the foregoing reasons, we affirm the Oldham Circuit Court's dismissal of the petition.

ALL CONCUR.

BRIEF FOR APPELLANT:

Henry B. Livingston, *pro se*
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BRIEF FOR APPELLEE:

Stafford Easterling
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