

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000034-MR

JAMES HIGHTOWER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 13-CI-00984

LADONNA THOMPSON, COMMISSIONER;
GARY BECKSTROM, WARDEN;
CARLA SPARKS, UNIT ADMINISTRATOR;
AND TIMOTHY ROSE, SGT.,
PROPERTY ROOM

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: James Hightower appeals from the Franklin Circuit Court's order dismissing his petition for declaration of rights based on the failure to state a claim upon which relief can be granted. After careful review, we affirm.

In March 2013, Hightower was being housed in segregation at Eastern Kentucky Correctional Complex (EKCC). On March 8, 2013, Hightower received a decision from the Kentucky Court of Appeals affirming the denial of his Kentucky Rules of Civil Procedure (CR) 60.02 and Kentucky Rules of Criminal Procedure (RCr) 10.26 motions. In its opinion, this Court noted the history of Hightower's post-conviction appeals. That opinion explained that the case was Hightower's second attempt at challenging his sentence under CR 60.02. In 2004, this Court had also reviewed a motion by Hightower challenging his sentence under RCr 11.42. In the most recent opinion, this Court dismissed Hightower's first argument, finding that he was arguing issues that were already addressed in his earlier appeal. Hightower's remaining arguments about jurisdiction and ineffective assistance of counsel were found to be without merit.

On March 18, 2013, Hightower submitted a request to visit the property room of the segregation unit. The request specifically stated that he wanted to be taken to the property room for "All paper work for on going [sic] case in court." The request did not give the staff notice that Hightower's case was in the Court of Appeals. The request did not advise that the Court of Appeals had recently rendered a decision or that there was a due date of any kind, nor did it inform the staff of what motion Hightower intended to file. The notice shows that the request was approved by the property room supervisor on April 29, 2013.

On April 23, 2013, Hightower filed grievance 13-246 regarding the property room request. In the grievance, Hightower stated that he had filled out a

request to go to the property room to get legal work. Hightower was assisted with the grievance by an inmate grievance aide. Unit Administrator Carla Sparks presided over the grievance. On April 29, 2013, she reached an informal resolution that allowed Hightower to go to the property room. Hightower was not satisfied with the informal resolution. On May 13, 2013, Hightower filed an appeal of the resolution to the grievance committee. On May 15, 2013, he filed an appeal of that committee decision with the Warden. On June 5, 2013, Hightower filed an appeal of the grievance to the Commissioner of the Department of Corrections. The grievance was denied at all stages.

On September 13, 2013, Hightower filed a petition for declaration of rights in the Franklin Circuit Court. On December 6, 2013, the court issued a decision dismissing the petition for failure to state a claim upon which relief could be granted. The court found that Hightower had not been denied access to the courts by any action of the Appellees and that Hightower had failed to make a statement in the complaint that he intended to file a non-frivolous pleading. This appeal now follows.

On appeal, Hightower argues he was denied access to the courts by the Appellees and that the circuit court erred in this regard. In support of this, Hightower argues that he could not prepare meaningful legal papers when he was in segregation and had no access to legal libraries or other people other than the staff working segregation.

A review of the record indicates that Hightower was not denied access to the courts. Hightower received a decision from this Court denying his post-conviction filed under CR 60.02 and RCr 10.26. At that point, Hightower could have filed a number of different pleadings or notices; however, he failed to give Appellees notice of what he had received from this Court or what motion or notice he intended to file. The request only stated that he needed access to his legal files for an ongoing case in court. The circuit court found that the property room visit request was the only notice provided to Appellees, and it did not provide any notice that Hightower was under a deadline. Absent knowledge of a deadline and notice of what pleading Hightower intended to file, it simply cannot be determined from the record that Appellees denied him access to the courts.

In fact, the record shows that the Appellees did not do anything to prevent Hightower from filing a motion or pleading in this Court. He made a request to look at his legal paper work, but he did not claim that he did not have access to writing material, mail, and legal aides. The right of access to the courts prohibits prison officials from “actively interfering with inmates’ attempts to prepare legal documents[,]” or file them. *Lewis v. Casey*, 518 U.S. 343, 350, 116 S.Ct. 2174, 2179, 135 L.Ed.2d 606 (1996). An access to courts claim must establish an intentional, not merely negligent, interference with access. *See Pink v. Lester*, 52 F.3d. 73, 76-77 (4th Cir. 1995); *Kincaid v. Vail*, 969 F.2d 594, 601-02 (7th Cir. 1992). We do not find any evidence in the record supporting Hightower’s

accusation that the Appellees actively interfered with his ability to prepare documents or file them with this Court.

None of the individual Appellees actively or intentionally interfered with Hightower's access to the courts. The property room clerk only received the written request for a visit to the property room. The form only stated that Hightower wanted "[a]ll paperwork for an on going case in court." The circuit court did not find that to be sufficient grounds for a finding of intentional interference with access to courts. The other Appellees only participated in hearing the grievance filed by Hightower. Unit Administrator Sparks presided over the initial grievance and investigation into the alleged deadline. The Warden of the facility and the Commissioner reviewed the appeal of the grievance decisions. None of the administrators acted in any way to intentionally prevent Hightower from filing a pleading or delivering a document to the Court of Appeals. The circuit court properly found that the Appellees did not act to deny Hightower access to the courts.

Next, Hightower argues that the circuit court erred in its ruling that Hightower made no mention of the pleading he intended to file. Hightower argues that he was not required to state in his complaint that his pleading was non-frivolous. A review of the case law cited by the circuit court and Hightower indicates that he had the burden of showing the circuit court that he had suffered an actual injury. It is a petitioner's responsibility to set forth an actual injury to pending litigation that challenges his conviction or confinement. *Lewis*, 518 U.S.

at 351; *Harbin-Bey v. Rutter*, 420 F.3d 571, 578 (6th Cir. 2005). In addition, the petitioner must demonstrate that the actual injury was to an underlying claim that is not frivolous. *Clark v. Johnston*, 413 Fed.Appx. 804, 816 (6th Cir. 2011) (citing *Hadix v. Johnson*, 182 F.3d 400, 405-06 (6th Cir. 1999)). To satisfy these requirements, a petitioner must plead the underlying claim and facts to support it so that the court could ensure that what was lost was not a “non-frivolous” claim. *Brown v. Matauszak*, 415 Fed.Appx. 608, 613 (6th Cir. 2011). We find no error in the trial court’s finding that Hightower did not include a claim that the pleading he intended to file was non-frivolous, particularly in light of the fact that he had filed numerous petitions and other appeals previously.

We do not find any error in the circuit court’s denial of Hightower’s petition. This Court noted in its opinion denying his CR 60.02 and RCr 10.26 claims that it was Hightower’s second CR 60.02 motion. The Court made a point to mention that Hightower was raising issues that had already been addressed in his direct appeal, under a previous CR 60.02 motion, or in a previous RCr 11.42 motion. The Court also found that Hightower was raising claims issues he had waived in his guilty plea or were specifically refuted by existing law. While the Court stopped short of declaring Hightower’s case to be frivolous, our decision indicates that the claims were largely without merit.

A prisoner’s right of access to the courts extends only to direct appeals of their conviction, habeas corpus applications, and civil rights claims. *Thaddeus-X v. Blatter*, 175 F.3d 387, 391 (6th Cir. 1999) (quoting *Lewis*, 518 U.S.

at 355). To state a claim, a petitioner must allege that particular actions of the respondents prevented him from pursuing, or cause the rejection of, litigation that falls under one of those categories. The right of access to the courts only requires that inmates be provided the tools needed in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement.

Lewis, supra. Impairment of any other litigation is simply one of the incidental consequences of conviction and incarceration.

Discerning no reversible error, we affirm the December 6, 2013, order of the Franklin Circuit Court denying Hightower's petition for declaration of rights for failure to state a claim upon which relief could be granted.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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