RENDERED: SEPTEMBER 20, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000654-MR

KENTUCKY DEPARTMENT OF CORRECTIONS, OFFICE OF THE COMMISSIONER — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 17-CI-01297

DONELL L. MITCHEM — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: The Kentucky Department of Corrections (DOC) appeals from an opinion and order of the Franklin Circuit Court granting Donell L.

Mitchem summary judgment and holding that Kentucky Revised Statute (KRS) 532.400(1)(b)[1] is unconstitutional. We affirm.

In November 2016, Mitchem entered a guilty plea to escape in the second degree (KRS 520.030) and was sentenced to one year's imprisonment. With application of good time and program credits, Mitchem served out his sentence on February 8, 2017. *See* 501 Kentucky Administrative Regulation (KAR) 6:080. At the time of his release, Mitchem learned that during his incarceration he had been classified as "close" and was thus subject to a full year of post-incarceration supervision (PIS). In May 2017, Mitchem was returned to custody for failure to maintain contact with his PIS supervisor. His new serve-out date was May 5, 2018.

On December 15, 2017, Mitchem filed an action for declaratory and injunctive relief in the Franklin Circuit Court. He challenged the constitutionality of KRS 532.400(1)(b) and sought his immediate release from the Grant County Detention Center, where he was being held. Mitchem also filed a motion for summary judgment on his claims. The circuit court held three hearings (on February 21, March 21, and March 30, 2018). The circuit court granted Mitchem's motion for summary judgment, but denied injunctive relief, on March 29, 2018. It

[1] KRS 532.400(1)(b) and 532.400(2) provide for one year of post-incarceration supervision ("PIS") of individuals who receive a "close" or "maximum security" classification while in the custody of DOC, after their conviction.

then, after the third hearing, granted Mitchem's release on April 4 of that year. The Department of Corrections appeals.[2]

We begin by reciting our standard of review:

> A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. We explained in *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*:
>
> > While it has been recognized that summary judgment is designed to expedite the disposition of cases and avoid unnecessary trials when no genuine issues of material fact are raised, . . . this Court has also repeatedly admonished that the rule is to be cautiously applied. The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact. The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. It clearly is not the purpose of the summary judgment rule, as we have often declared, to cut

[2] Numerous other similarly situated individuals joined in this action at the circuit court level, and the Franklin Circuit Court granted summary judgment and injunctive relief to them on September 19, 2018. The DOC's appeal pertaining to those individuals (2018-CA-001437-MR) has been held in abeyance pending the outcome of this matter.

> litigants off from their right of trial if they have issues to try.
>
> 807 S.W.2d 476, 480 (Ky. 1991) (internal citations omitted).
>
> "Because summary judgments involve no fact finding, this Court will review the circuit court's decision de novo." *3D Enterprises Contracting Corp. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005). On appeal, "[t]he standard of review . . . of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. Summary judgment is appropriate where the movant shows that the adverse party could not prevail under any circumstances." *Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

Caniff v. CSX Transp., Inc., 438 S.W.3d 368, 372 (Ky. 2014).

The statute in question, titled "Postincarceration Supervision" and enacted in 2011, reads in its entirety as follows:

> (1) In addition to the penalties authorized by law, any person who:
>
> (a) Is convicted of a capital offense or a Class A felony;
>
> (b) Has a maximum or close security classification as defined by administrative regulations promulgated by the department; or
>
> (c) Is not eligible for parole by statute;

shall be subject to a period of postincarceration supervision following release from incarceration upon expiration of sentence or completion of parole.

(2) The period of postincarceration supervision shall be one (1) year.

(3) During the period of postincarceration supervision, the defendant shall:

(a) Be subject to all orders specified by the Department of Corrections; and

(b) Comply with all education, treatment, testing, or combination thereof required by the Department of Corrections.

(4) Persons under postincarceration supervision pursuant to this section shall be subject to the supervision of the Division of Probation and Parole and under the authority of the Parole Board.

(5) If a person violates a provision specified in subsection (3) of this section, the violation shall be reported in writing by the Division of Probation and Parole. Notice of the violation shall be sent to the Parole Board to determine whether probable cause exists to revoke the defendant's postincarceration supervision and reincarcerate the defendant as set forth in KRS 532.060.[3]

(6) The provisions of this section shall not apply to a person who is subject to the provisions of KRS 532.043.

[3] KRS 532.060(4) provides: "In addition to the penalties provided in this section, for any person subject to a period of postincarceration supervision pursuant to KRS 532.400 his or her sentence shall include an additional one (1) year period of postincarceration supervision following release from incarceration upon expiration of sentence if the offender is not otherwise subject to another form of postincarceration supervision. During this period of postincarceration supervision, if an offender violates the provisions of supervision, the offender may be reincarcerated for the remaining period of his or her postincarceration supervision."

> (7) The provisions of this section shall apply only to persons convicted, pleading guilty, or entering an *Alford*[4] plea for an offense committed after June 8, 2011.

The DOC first argues that the circuit court was incorrect in its determination that the statute is violative of due process protections. In so finding, the circuit court had begun by stating that "[d]ue process ensures that a party has notice of any deprivation of a liberty interest, and a fundamentally fair opportunity to be heard." The circuit court then held that KRS 532.400(1)(b) fails to protect those interests. *See* U.S. CONST. amends. IV, V, VI, XIV; Ky. CONST. 11, 16.

In this vein, the DOC initially contends that due process protections are inapplicable to Mitchem's situation because PIS "does not involve the loss of liberty." The resulting additional year of incarceration is certainly a loss of liberty, and the circuit court correctly ruled that due process protections apply to Mitchem's situation. Therefore, we address whether the circuit court was correct in holding that those protections were not met.

Our initial inquiry is whether Mitchem received proper notice of the statute's application and consequences. We agree with the circuit court that Mitchem did not receive such notice. He was not informed of the statute's applicability at sentencing or upon his classification after he entered prison. As the circuit court stated, unlike KRS 532.400 sections (1)(a) and (c), section (1)(b) fails

[4] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

to apprise a convicted person "as to what conduct is eligible to subject a person to PIS." There is no evidence that Mitchem was advised at sentencing about the possibility of an additional year of supervision, nor was the DOC able to produce a signed copy as proof that Mitchem was notified of his classification as "close" when the DOC deemed him so on November 30, 2016. He therefore was denied the due process protection of notice. We are not convinced by the DOC's argument that "ignorance of the law is no excuse," made in reference to Mitchem's lack of knowledge of the DOC's in-house manual listing nine factors regarding conduct befitting "close" or "maximum security" classification. *See* 501 KAR 6:080, Section 1(1)(a).

The circuit court also held, and we are in agreement, that Mitchem was entitled to counsel at this "critical stage" in his criminal prosecution. "Critical stages are events that place the accused in an adversarial situation." *Carrigan v. Commonwealth*, 414 S.W.3d 16, 20 (Ky. App. 2013) (citing *Cain v. Abramson*, 220 S.W.3d 276, 280 (Ky. 2007)). The DOC's likening the PIS process to that of the Sex Offender Registration Act (which has been held not to be a critical stage) is inapposite because there "the registration requirement turns solely on the offender's conviction alone - 'a fact that [the] convicted offender has already had a procedurally safeguarded opportunity to contest.'" *Moffitt v. Commonwealth*, 360 S.W.3d 247, 253 (Ky. App. 2012) (quoting *Connecticut Dep't of Public Safety v.*

Doe, 538 U.S. 1, 7, 123 S.Ct. 1160, 1164, 155 L.Ed.2d 98 (2003)). In Mitchem's circumstances, there existed no such safeguarded opportunity. He was not advised at sentencing of the implications of his classification, nor was he informed during his incarceration that he was classified as "close," which placed him under the purview of KRS 532.400(1)(b). "If a defendant has been completely denied counsel, prejudice is presumed, tainting the proceedings and requiring reversal." *Carrigan*, 414 S.W.3d at 20 (citations omitted). Granting Mitchem's release was the proper remedy here.

Due process also requires a hearing, and there is no question that Mitchem was not afforded one. He was notified of his classification when he served out on February 8, 2017. At that time, after learning of his one-year PIS, Mitchem signed the form under protest to avoid his immediate incarceration for 365 days. Upon being returned to custody, there is nothing in the record to indicate that a hearing was held on the PIS violation. Accordingly, we affirm the circuit court's holding in this respect as well.

We next address whether the statute is unconstitutionally vague. In ruling that it was, the circuit court stated that the statute "fails to provide reasonably clear guidelines for the DOC to follow, leading to an arbitrary application." Ky. CONST. Section 2. The circuit court further stated, "The statute also fails to describe the conduct that will subject a person to a close or maximum

classification subsequently subjecting them to PIS," resulting in "a person of common intelligence . . . 'necessarily guess[ing] at its meaning' and . . . easily 'differ[ing] as to its application,'" (citing *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926)(other citations omitted)). We agree and find no error in this analysis.

We are lastly asked to consider whether the circuit court erred in holding that the statute violated the separation of powers because it allows "the DOC, an executive agency, to encroach on powers expressly enumerated to the judicial branch by issuing a criminal sentence resulting in incarceration without judicial review." KY. CONST. Sections 27 and 28. Had Mitchem been made aware of PIS at his sentencing, the circuit court reasoned, and been given access to counsel and an opportunity to be heard, it would not have held the statute unconstitutional. But as it stands, KRS 532.400(1)(b) is violative of the separation of powers.

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Allison Brown
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Miranda J. Hellman
Assistant Public Advocate
Frankfort, Kentucky