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**Commonwealth of Kentucky
Court of Appeals**

NO. 2018-CA-001062-MR

CHRISTOPHER PEYTON

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 17-CI-01227

RAVONNE SIMS, WARDEN; AND
JAMES ERWIN, COMMISSIONER OF
THE KENTUCKY DEPARTMENT
OF CORRECTIONS

APPELLEES

OPINION
AFFIRMING

*** * * *

BEFORE: COMBS, DIXON, AND GOODWINE, JUDGES.

COMBS, JUDGE: Inmate Christopher Peyton, *pro se*, appeals an order of the Franklin Circuit Court dismissing his petition for a declaration of rights. After our review, we affirm.

Peyton is an inmate incarcerated in the Roederer Correctional Complex where he is serving a sentence for murder and tampering with physical evidence. Peyton committed murder while his mother waited in the car, and his mother pled guilty to facilitation to murder and tampering with physical evidence for her role in her son's criminal activity.

Peyton sought to add his mother to his prison visitation list, but his request was initially denied by a classification and treatment officer because his mother was an active parolee. Peyton's mother wrote a letter to the Warden, Ravonne Sims, to ask permission to visit her son. Warden Sims denied her request because prisons may prohibit inmates from visiting with persons who had been involved in their criminal behavior.

Peyton asked Warden Sims to reconsider his request, but she refused. Peyton then filed a grievance, and the grievance committee concurred with Warden Sims's decision. Peyton appealed the grievance committee's decision to Warden Sims, and she reiterated that her decision to exclude Peyton's mother from his visitation list was made because they "acted in unison to commit a crime in which there was a deliberate taking of a life."

Peyton then filed a petition for declaration of rights in the Franklin Circuit Court, arguing that his right to due process was violated when he was denied visitation with his mother. Warden Sims and Commissioner James Erwin

responded by filing a motion to dismiss, arguing that Peyton failed to state a claim upon which relief may be granted. The circuit court granted the motion to dismiss on the ground that Peyton did not have a liberty interest in being able to visit with his mother and that no due process right was violated. This appeal followed.

“A motion to dismiss for failure to state a claim upon which relief may be granted ‘admits as true the material facts of the complaint.’” *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (quoting *Upchurch v. Clinton Cty.*, 330 S.W.2d 428, 429-30 (Ky. 1959)). Accordingly, “a court should not grant such a motion ‘unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved[.]’” *Id.* (quoting *Pari-Mutuel Clerks’ Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977)). “Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law . . . an appellate court reviews the issue *de novo.*” *Id.* (citation omitted).

Peyton makes two arguments on appeal: (1) the circuit court erred because he has a protected liberty interest in visitation with his mother and that denial of such visitation is an atypical, significant deprivation of his liberty interest; and (2) the circuit court erred in allowing the Department of Corrections absolute discretion to deny visitors based solely upon their involvement in an inmate’s criminal behavior.

CPP¹ 16.1 grants broad discretion to wardens to determine whether certain persons should be excluded from visiting inmates. Peyton's visitation request was denied pursuant to CPP 16.1(2)(E)(6), which provides that “[a] visitor may be excluded from the institution if: [t]he visitor is directly related to the inmate's criminal behavior.” The Fourteenth Amendment provides in pertinent part: “nor shall any State deprive any person of life, liberty, or property without due process of law[.]” It is true that “denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence, and is therefore not independently protected by the Due Process Clause.” However, states can “create enforceable liberty interests in the prison setting.”

Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 461, 109 S. Ct. 1904, 1909, 104 L. Ed. 2d 506 (1989) (internal quotation marks and citation omitted).

In determining whether an inmate has a protected liberty interest created by state law, we apply a two-part analysis. First, *Thompson* requires a determination that a prison regulation must contain “explicitly mandatory language” that demands a particular outcome. *Id.* at 462-63, 109 S. Ct. at 1910. In a later opinion, the Supreme Court pointed out that *Thompson* and other case law “shift[ed] the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation.” *Sandin v. Conner*, 515

¹ Kentucky Department of Corrections Policies and Procedures.

U.S. 472, 481, 115 S. Ct. 2293, 2299, 132 L. Ed. 2d 418 (1995). The Court determined that analysis of mandatory language alone is inadequate because “the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause.” *Id.* at 483, 115 S. Ct. at 2300. In addition to examining whether a prison regulation contains mandatory language that restricts the discretion of prison officials, we also must determine whether a regulation “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Id.* at 484, 115 S. Ct. at 2300.

Peyton argues that his right to due process was violated when he was denied visitation with his mother. CPP 16.1 gives prison administrators authority to determine whether persons are excluded from visiting the institution; it provides that prison administrators *may* exclude certain visitors. The applicable policy lacks mandatory language requiring the prison to allow Peyton’s mother to visit. Thus, a protected liberty interest has not been created under state law.

Furthermore, Peyton has not experienced a significant hardship because “[t]he denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence, and therefore is not independently protected by the Due Process Clause.” *Thompson*, 490 U.S. at 461, 109 S. Ct. at 1909 (internal quotation marks and citation omitted).

We conclude that Peyton does not have a protected liberty interest in visitation with his mother and that the circuit court correctly found that the Department of Corrections has the absolute discretion to deny visitation based on a visitor's involvement in an inmate's criminal behavior.

We affirm the order of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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