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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001237-MR

RONALD HOPKINS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 18-CI-00423

AARON SMITH — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Ronald Hopkins, *pro se*, brings this appeal from a June 7, 2018, Order of the Franklin Circuit Court dismissing his Petition for a Declaration of Rights regarding the Department of Corrections' Policies and Procedures (CPP) governing inmates' finances. We affirm.

Hopkins is an inmate at the Kentucky State Reformatory in LaGrange. According to Hopkins, in 2016, an inmate account supervisor helped him open an account at a bank in Lexington, Kentucky, in which he eventually deposited over $6,200, by way of transfers from his institutional account at the prison. Effective October 1, 2016, the Department of Corrections amended CPP 15.7 to prohibit an inmate from sending money outside the institution and limited an inmate from having access to more than $1,000 in their institutional account (with any amounts over that cap to be frozen).[1]

In July 2017, Hopkins sent Warden Aaron Smith a letter asking to send money from his institutional account to his bank in Lexington, claiming he was at the $1,000 maximum in his institutional account. Smith responded simply, "Unfortunately, I will not be able to grant your request." Record on appeal at 28. Hopkins then filed a grievance, writing on the grievance form that he "was told that I can't send the money from my inmate account that is at the $1000.00 limit too [sic] my bank in Lexington[,] Ky." Record on appeal at 20. In the "action requested" section of the grievance form Hopkins wrote that he "would like to be able to send my money off my books/account to my bank in Lexington[,] Ky." *Id.*

[1] Specifically, the Department of Corrections' Policies and Procedures (CPP) 15.7(II)(B)2. states that, with exceptions not at issue here, "[m]oney of any dollar amount shall not be sent outside the institution . . . ." CPP 15.7(II)(E) provides that an inmate's institutional account "may have a maximum balance of one thousand dollars ($1000.00)" but, upon request, "[t]he Warden or his designee may approve exceptions . . . ." Finally, CPP 15.7(II)(F)2. states that "the amount over the [$1,000] limit shall be frozen and not accessible by the inmate."

The grievance was summarily denied at the informal resolution stage due to the prohibition in CPP 15.7 on inmates sending money outside the institution. Hopkins then requested relief from the grievance committee, but a majority of that body affirmed, though one member of the committee dissented. Warden Smith then denied Hopkins' request for relief in February 2018. Hopkins then sought review by the Commissioner of the Department of Corrections, but the record does not contain any ruling by the Commissioner. Hopkins filed his Petition for Declaratory Judgment in the Franklin Circuit Court on May 4, 2018.[2]

Hopkins' petition named Warden Smith and James Erwin, then-Commissioner of the Department of Corrections, as respondents. In lieu of filing an answer, on June 4, 2018, Smith and Erwin filed a joint motion to dismiss/motion for summary judgment arguing, as they do before this Court, that the petition was without merit because CPP 15.7 related to "institutional safety,

[2] Counsel for the Department of Corrections has raised no argument in either the trial court or before this Court that Ronald Hopkins failed to exhaust his administrative remedies, nor was the omission of a decision by the Commissioner mentioned by the trial court. Petitions from prisoners who failed to exhaust their administrative remedies are properly dismissed. *See, e.g.*, *Lee v. Haney*, 517 S.W.3d 500, 503 (Ky. App. 2017); Kentucky Revised Statute 454.415(1)(d) (requiring exhaustion of administrative remedies before a prisoner may file an action regarding "[a] conditions-of-confinement issue"). Generally, however, failure to exhaust administrative remedies is an affirmative defense that may be waived. *See* 2 Am. Jur. 2d *Administrative Law* § 453 (2019). Under the unique facts of this case, we must assume that either the Commissioner issued a ruling adverse to Hopkins which is known to the Department of Corrections' counsel but mysteriously was not placed in the record on appeal *or* the Department of Corrections has chosen to waive any failure by Hopkins to exhaust his administrative remedies.

including, but not limited to[,] preventing inmates from using external unmonitored accounts to hire others to engage in activities that incarceration prevents them from doing—engaging in illicit activities, harassing victims, etc." Record on appeal at 45. Three days later, the trial court issued an order granting the motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f).[3] Hopkins then filed a motion to alter, amend, or vacate, urging the court to reconsider due to the allegedly draconian impact of the policies at issue. By order entered June 27, 2018, the trial court denied Hopkins' motion to alter, amend, or vacate. This appeal follows.

A motion to dismiss for failure to state a claim under CR 12.02(f) is a question of law and is therefore subject to *de novo* review. *Campbell v. Ballard*, 559 S.W.3d 869, 870 (Ky. App. 2018) (citing *Carruthers v. Edwards*, 395 S.W.3d 488, 491 (Ky. App. 2012)). The pleadings must be liberally construed in a light most favorable to petitioner, and the allegations contained in the complaint are taken as true. *Id.* at 870-71.

[3] The trial court explicitly granted dismissal, not summary judgment. There is no indication that the court considered anything outside the pleadings. Thus, the ruling was not converted to a summary judgment ruling. We note that the court failed to afford Hopkins sufficient time to respond before granting the motion to dismiss, but Hopkins does not argue the facially premature order caused him prejudice. And, in any event, Hopkins was able to place his arguments on the record via his motion to alter, amend, or vacate.

Courts generally give "deference and flexibility" to prison officials "in the fine-tuning of the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 482-83 (1995) (citations omitted). Thus, though "prisoners do not shed all constitutional rights at the prison gate," incarceration inherently limits a prisoner's rights. *Id.* at 485 (citations omitted). To set forth an actionable violation of a liberty interest protected by the Due Process Clause, a prisoner must show that the challenged institutional action "imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. In short, "a highly deferential standard of judicial review is constitutionally appropriate with respect to both the factfinding that underlies prison disciplinary decisions and the construction of prison regulations." *Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997).

Hopkins' primary argument, as we have gleaned from his *pro se* brief, is that CPP 15.7 violates his rights by limiting his control over, and access to, his monetary funds. The parties have not cited, nor have we independently located, any precedent addressing the propriety of the challenged portions of CPP 15.7.[4] Hopkins' argument to the contrary notwithstanding, the validity and interpretation

[4] CPP 15.7 was challenged in federal court but the case was dismissed without reaching the merits because the prisoner plaintiffs did not have more than $1,000 in their inmate accounts or outside bank accounts. *Balcar v. Kentucky State Reformatory*, No. 3:16-CV-P687-GNS, 2017 WL 119479 (W.D. Ky. Jan. 11, 2017).

of the relevant policies present questions of law, not issues of disputed facts. For purposes of our review, we accept Hopkins' contentions that he has an outside bank account in which he cannot deposit funds and is only able to access $1,000 in his institutional account.

Contrary to Hopkins' belief, CPP 15.7 does not confiscate his funds. The money in his outside bank account remains his, as do the funds in his inmate account. Even if we accept, solely for the sake of argument, that Hopkins has a property interest in his prison account and his outside account, his money is not being taken. Instead, CPP 15.7 temporarily restricts his access to some of his funds and "there is a difference between the inmate's ownership rights in the property and the inmate's right to possess the property while in prison." *Stansbury v. Hannigan*, 960 P.2d 227, 238 (Kan. 1998).

Hopkins has not met his burden to show that CPP 15.7 presents an atypical and significant hardship on prisoners. For example, Hopkins has not shown that he needs access to more funds to help pay for necessary expenses, such as medical care for a family member. Moreover, as the trial court held, CPP 15.7 is rationally related to institutional security. The correctness of that conclusion is plain since it is easy to envision a host of illicit or illegal acts which a prisoner could effectuate, either personally or via proxy, if given ready access to large sums of money while incarcerated. We agree with the United States Court of Appeals

for the Eighth Circuit's conclusion regarding a similar policy: "Prohibiting private inmate accounts advances the legitimate penological interest in prohibiting such [illicit] activities and therefore is rationally related to that interest." *Foster v. Hughes*, 979 F.2d 130, 133 (8th Cir. 1992); s*ee also, e.g.*, *Coleman v. McGinnis*, 843 F.Supp. 320, 325 (E.D. Mich. 1994). Similarly, limiting an inmate's access to his institutional account to a maximum of $1,000 is permissibly related to institutional security and safety.

We are also mindful that "prisoners are not entitled to the full panoply of process due non-prisoners." *Foley v. Haney*, 345 S.W.3d 861, 866 (Ky. App. 2011). "The 'normal activity' to which a prison is committed—the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence—necessarily requires that considerable attention be devoted to the maintenance of security." *Pell v. Procunier*, 417 U.S. 817, 826-27 (1974).

In this appeal, Hopkins has failed to show that he was not afforded adequate procedural or substantive due process rights, nor has he shown that CPP 15.7 violates his right to equal protection.[5] We agree with the trial court that the

[5] Hopkins attempts to argue in his brief that he has actually been limited to a maximum of $800 in his institutional account, but he did not raise that argument in his petition and so it is not preserved for our review. *See Goben v. Parker*, 88 S.W.3d 432, 433 (Ky. App. 2002).

challenged policies and procedures are rational, permissible efforts by corrections officials to further the "central" goal of institutional safety. *Pell*, 417 U.S. at 823.

For the foregoing reasons, the Franklin Circuit Court's June 7, 2018, Order dismissing the petition is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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