

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard W. Illes, Sr.,	:	
Appellant	:	
	:	
v.	:	No. 552 C.D. 2008
	:	SUBMITTED: June 27, 2008
Department of Corrections	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: October 8, 2008

Richard Illes, Sr. appeals *pro se* the order of the Court of Common Pleas of Erie County sustaining a preliminary objection in the nature of a demurrer and dismissing his second amended civil complaint.

Illes filed his civil complaint to challenge the Department of Corrections' policy prohibiting inmates from signing artwork created while incarcerated. His second amended complaint contains the following factual averments:

11. The Defendants have held art sales at SCI-Albion for many years where inmates could sell their artwork to employees of SCI-Albion.

12. The art sales were, and are, organized, sanctioned, and conducted by the Defendants, and their employees.

13. Such sales cannot be considered a business activity, since the Defendants would be violating their own policies against inmates conducting a business activity, since they organize the sales.

14. Many artists, including the Plaintiff, have sold their artwork in the art sales held by the Defendants and have always signed their artwork, which is an expected, common practice in the art world.

15. Prior to the art sale in the summer of 2007, a memo was posted throughout the prison stating that prisoners are no longer allowed to sign their artwork and could not offer their work for sale in the art sale if they did sign their artwork.

16. Plaintiff filed a grievance challenging the policy prohibiting artists from signing their artwork on April 11, 2007, (Appendix A), based on the Defendants denying inmates their First Amendment Rights of Freedom of Expression, a right also guaranteed by the Constitution of the Commonwealth of Pennsylvania.

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18. The grievance officer, Mrs. Adams, denied the grievance on April 24, 2007, stating “Artwork being sold cannot be signed by the inmate for security reasons,” and that inmates are not allowed to conduct a business (Appendix B).

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22. The final review by the Secretary’s Office of Inmate Grievances and Appeals states that “It is clear, according to policy 7.8.1, Inmate Recreational and Therapeutic Activities, that you **are not permitted to sign any artwork created while incarcerated.**” (Appendix F, Bold type added).

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25. That a signed piece of artwork creates a security risk, while an unsigned piece of artwork does not create a security risk defies common sense.

26. Prohibiting artists from signing their artistic work when it cannot reasonably be related to prison security is in violation of the United States and Pennsylvania Constitutions.

27. Requiring inmates to abdicate the rights granted by the United States and Pennsylvania Constitutions in order to enter their works in the art sale is a violation of the Equal Protection Clauses of the United States and Pennsylvania Constitutions and is contrary to public policy and interests.

28. Inmates, including the Plaintiff, have sold artwork to the public and have established names in a small segment of the art world and prohibiting them from signing their works could allow others to sign their works and get recognition and benefits that should go to the artist.

....

31. The Defendants, throughout the grievance procedure, failed to state how this policy furthers the claimed penological interest of security that they wish to invoke as the reason to deny inmates their federal and state constitutional rights.

Illes averred that he has a First Amendment right to sign his artwork and that the prison policy requiring him to submit artwork unsigned violates his right to equal protection and is against public policy. He sought an order prohibiting the Department of Corrections from denying inmates the right to sign their artwork, regardless of whether the art is submitted for sale, and from denying inmates the opportunity to sell signed artwork, restitution, punitive damages, legal fees, and expenses.

The trial court sustained the demurrer filed by the Department of Corrections and dismissed the complaint. The trial court concluded that Illes failed

to state a constitutionally justiciable claim under 42 U.S.C. § 1983, that the Commonwealth was immune from suit in tort and/or negligence, and that grievance decisions are not judicially reviewable.

Appeal from an order of a trial court sustaining a demurrer presents solely a question of law and is subject to our plenary review. The court must accept as true all well-pleaded allegations of material fact in the complaint as well as any inferences reasonably deduced therefrom, resolving any doubt in favor of overruling the demurrer. *Id.* The allegations of a *pro se* complainant are held to a less stringent standard than that applied to pleadings filed by attorneys, such that if the complainant has pleaded facts that may entitle him to relief, preliminary objections will be overruled. *Id.*

Failure to State a Claim, Section 1983

On appeal, Illes argues that the trial court erred in sustaining the preliminary objections and dismissing his complaint because the complaint stated a claim for violation of his right to freedom of expression.

To state a prima facie claim under 42 U.S.C. § 1983, a plaintiff must 1) aver a violation of rights secured by the United States Constitution and the laws of the United States, and 2) show that the alleged deprivation was committed by a person acting under color of state law. *Owens v. Shannon*, 808 A.2d 607 (Pa. Cmwlth. 2002).

The Department of Corrections argues that Illes fails to state a prima facie claim 1) because the Department of Corrections is not a person under Section 1983, and an action against Secretary Beard is an action against the Commonwealth and thus precluded under *Will v. Michigan Department of State*

Police, 491 U.S. 58 (1989), and 2) because Illes pleaded no facts to show a violation of a federal right. It further argues that negligent or intentional deprivations of property do not state a claim of constitutional magnitude where an adequate post-deprivation remedy exists under state law, *Hudson v. Palmer*, 468 U.S. 517 (1984), and that Illes had a constitutionally adequate post-deprivation remedy through the prison grievance process.

Person Acting Under Color of State Law

Although, as a matter of general principle, in a case brought in state court, “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983[.]” *Will*, 491 U.S. at 71, “a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official capacity actions for prospective relief are not treated as actions against the State.’” *Id.* n.10 [quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (citing *Ex parte Young*, 209 U.S. 123 (1908))].

Illes initially named only the Department of Corrections as a defendant, but in his second amended complaint, Illes added Secretary of Corrections, Jeffrey A. Beard, Ph.D., as defendant, and he averred that the corrections policy, approved and implemented by Beard, violates his First Amendment right to freedom of expression and that he exhausted his administrative remedies. Part of Illes’s request for relief is prospective; i.e., an order directing the Department of Corrections and Secretary Beard to cease prohibiting inmates from signing their artwork. Thus, Secretary Beard is a person for purposes of Illes’s Section 1983 claim for prospective relief, but not a person for purposes of his claim for damages.

Violation of Federal Right

Although imprisonment does not automatically deprive an inmate of constitutional protections, including those of the First Amendment, those rights may at times be restricted in the prison context. *Beard v. Banks*, 548 U.S. 521 (2006); *Pell v. Procunier*, 417 U.S. 817 (1974). Courts evaluate prison policies and regulations alleged to violate an inmate's First Amendment rights under the four-factor test stated in *Turner v. Safley*, 482 U.S. 78 (1987).¹ Certainly, the prison context is rife with limitations on freedom of expression, many of which have been determined to be reasonably related to legitimate penological objectives. *Bronson v. Cent. Office Review Comm.*, 554 Pa. 317, 721 A.2d 357 (1998) (policy prohibiting possession of civilian clothing); *Small v. Horn*, 554 Pa. 600, 722 A.2d 664 (1998) (policy prohibiting possession of civilian clothing); *Meggett v. Pa. Dep't of Corr.*, 892 A.2d 872 (Pa. Cmwlth. 2006) (policy limiting hair styles).

The inmate challenging a prison policy or regulation bears the burden of showing that it is constitutionally unreasonable. *Overton v. Bazzetta*, 539 U.S. 126 (2003). Prison administrators, whose professional judgment is accorded substantial deference, must come forward with a legitimate government interest that justifies and furthers the policy or regulation in question. *Id.*

In this case, Illes essentially averred that a policy that prohibits him from signing his artwork and from submitting signed artwork for sale violates his

¹ Applying *Turner*, a court must assess: 1) whether the prison policy or regulation bears a valid, rational connection to the legitimate interest offered to justify it; 2) whether inmates retain alternative means of exercising the circumscribed right; 3) the costs of accommodating the right; and 4) whether an alternative to the regulation would fully accommodate the right at a *de minimis* cost to valid penological interests. 482 U.S. at 89-90.

First Amendment right to freedom of expression. The policy in question in this case appears to be Department of Corrections Policy 7.8.1, Inmate Recreational and Therapeutic Activities (Amended Complaint, para. 22; Appendix F), which was not appended to the amended complaint nor to the preliminary objections.

The grievance decisions appended to the second amended complaint reflect that the government interest put forth to justify the policy is prison security. In response to a grievance Illes filed to challenge the policy, grievance officers explained that the policy does not prohibit an inmate from signing his artwork. (Amended Complaint, Appendices B and F.) The grievance decisions quote the policy as informing inmates that it creates no rights in an inmate to sell artwork, and it does not obligate the Department of Corrections to make inmate artwork available for sale. Paraphrasing the policy, the grievance decisions state that inmates have no right to sell artwork and no right to conduct private business; artwork to be sold cannot be signed for security reasons, and that if an inmate chooses to sign his artwork, it cannot be sold while he is incarcerated.

At issue, then, is whether a policy prohibiting an inmate from signing his artwork and/or a policy of accepting only unsigned inmate artwork for sale at an authorized sale, impermissibly infringes upon Illes's right to freedom of expression. A review of the amended complaint compels the conclusion that Illes has stated a cognizable Section 1983 claim for violation of his First Amendment right to freedom of expression. Upon the facts averred, we cannot ascertain with certainty that Illes is not entitled to relief. Rather, as noted below, the issue cannot be decided without further proceedings. The trial court erred in sustaining the demurrer to the Section 1983 claim for prospective relief.

Deprivation of Property

The Department of Corrections argues that Illes had a constitutionally adequate post-deprivation remedy through the prison grievance system for any alleged deprivation of property. *Hudson*. Other than a bare averment that the policy denies the right to protection of creative works under federal copyright law, Illes did not plead facts that might be construed as stating a claim for deprivation of property. Illes failed to state a claim for deprivation of property that would entitle him to restitution. The trial court properly sustained the demurrer with respect to any constitutional claim for deprivation of property.

Lack of Jurisdiction to Review Grievance Decision

Illes argues that the trial court erred when it determined that grievance decisions are not judicially reviewable, and in his second amended complaint he averred that he was challenging the final determination of his grievance. Illes referenced *Brittain v. Beard*, 932 A.2d 324 (Pa. Cmwlth. 2007), and *Kretchmar v. Department of Corrections*, 831 A.2d 793 (Pa. Cmwlth. 2003), for the proposition that grievance decisions are subject to judicial review when constitutional rights are implicated.

As we stated above, Illes's second amended complaint presented a clear First Amendment challenge to a policy of preventing inmate artists from signing their artwork. Moreover, in his answer to preliminary objections, Illes specifically denied the averment that he was challenging a grievance decision,² and

² “Denied. Plaintiff is challenging a Department of Correction (DOC) grievance decision, but is also challenging the policy of the DOC that prohibits artists from signing artwork of any type, even if they do not intend to sell said artwork in the art sales, which violates the United (Footnote continued on next page...)”

the averment that he sought an order enjoining the continued enforcement of the policy prohibiting inmates from selling signed artwork.³ Because Illes alleged a violation of specific constitutional rights, the trial court erred in concluding that judicial review was not available after Illes failed to obtain relief through the grievance procedures. *See Kretchmar*.

State-Based Tort and Negligence Claims

The trial court sustained the Department of Corrections' demurrer asserting immunity from suit for intentional torts and for negligent acts that do not fall within an enumerated exception to sovereign immunity. Illes does not challenge the trial court's conclusion with respect to these objections, and the trial court properly sustained the objections asserting immunity from suit for intentional torts and for negligence that does not fall within an exception to sovereign immunity.

Conclusion

Although some infringement of inmates' constitutional rights must be tolerated in pursuit of prison officials' objectives of maintaining prison security, *Bell v. Wolfish*, 441 U.S. 520 (1979), without a responsive pleading, it is impossible to ascertain the exact nature of the prison policy in question or the underlying penological objectives, and it is impossible for the court to determine

(continued...)

States and Pennsylvania Constitutional rights of free speech and expression.” (Ans. to POs, para. 3.)

³ “Denied. Plaintiff is seeking an order prohibiting the DOC from preventing artists from signing their artwork, and from prohibiting them from entering said signed artwork in the art sales.” (Ans. to POs, para. 5.)

whether the policy is constitutionally unreasonable under *Turner*. Accepting as true Illes's material allegations, we cannot ascertain with certainty that he is not entitled to relief on his Section 1983 claim.

Accordingly, the order of the trial court is affirmed in part and reversed in part, and this matter is remanded for further proceedings in accordance with this opinion.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 8th day of October, 2008, the order of Court of Common Pleas of Erie County in the above-captioned matter is hereby AFFIRMED IN PART, and REVERSED IN PART, and this matter is REMANDED for further proceedings on petitioner's Section 1983 claim in accordance with this court's opinion.

Jurisdiction is relinquished.

BONNIE BRIGANCE LEADBETTER,
President Judge