

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-16-00210-CV

ROBERT NORMAN SMITHBACK, Appellant

V.

MICHAEL BUTCHER, ET AL, Appellees

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. CIV29146

MEMORANDUM OPINION

Robert Norman Smithback appeals from the dismissal of his civil suit for his failure to comply with Chapter 14 of the Civil Practice and Remedies Code. *See generally* Tex. Civ. Prac. & Rem. Code Ann. §§ 14.001–.014 (West 2017). We affirm the trial court’s judgment.

Smithback, an inmate housed in a secure facility administered by the Correctional Institutions Division of the Texas Department of Criminal Justice, filed the suit *pro se* and *in forma pauperis* on July 1, 2014. Smithback alleged that he was

deprived of his civil rights when in retaliation for attempting to initiate a federal criminal prosecution against State and Federal officials, he was assaulted by a cellmate in August 2011, and no criminal charges were initiated. Smithback also alleged that unnamed Department officials were interfering with Smithback's mail because he had received no response to requests for representation that he mailed to three different lawyers between December 2011 and May 2014. Smithback sued Michael Butcher, individually and in his official capacity as warden of the Polunsky Unit, and Captain John Bolton, individually and in his official capacity as an employee of the Texas Department of Criminal Justice. He further alleged that other unknown prison officials and private individuals were also responsible for violating his civil rights. Smithback attached a copy of his inmate account statement to his petition, but he did not attach a declaration of previous filings.

Bolton filed a motion to dismiss. Bolton argued that Smithback failed to timely file a claim after receiving a written decision from the grievance system in 2011. *See id.* § 14.005(b). Bolton also argued that Smithback failed to include an affidavit relating to his previous filings. *Id.* § 14.004. Finally, Bolton maintained that Smithback failed to plead facts showing that his constitutional rights were violated by the defendants or that the defendants engaged in conduct outside the reasonable

exercise of prison discipline. *See id.* § 14.003(a), (b). The trial court dismissed the suit for failure to comply with Chapter 14 of the Civil Practice and Remedies Code.

In his appeal brief, Smithback contends the trial court erred by dismissing the case under Chapter 14. Smithback argues that Chapter 14 does not apply to him because he is not legally confined by the Texas Department of Criminal Justice, as he is still attempting to overturn his 2002 conviction. Section 14.001(3) defines “Inmate” as “a person housed in a secure correctional facility.” *Id.* § 14.001(3). In his brief, Smithback asserts that he has been incarcerated since 2002, and his trial court pleadings demonstrate that he has been incarcerated in the Texas prison system and housed in the Polunsky Unit and the Stiles Unit. Therefore, he is an “inmate” as defined by section 14.001(3), making Chapter 14 applicable. *Id.*

Section 14.004 of the Civil Practice and Remedies Code requires an inmate who filed a declaration of inability to pay costs to file a separate affidavit or declaration:

- (1) identifying each action, other than an action under the Family Code, previously brought by the person and in which the person was not represented by an attorney, without regard to whether the person was an inmate at the time the action was brought; and
- (2) describing each action that was previously brought by:
 - (A) stating the operative facts for which relief was sought;

(B) listing the case name, cause number, and the court in which the action was brought;

(C) identifying each party named in the action; and

(D) stating the result of the action, including whether the action or a claim that was a basis for the action was dismissed as frivolous or malicious under Section 13.001 or Section 14.003 or otherwise.

Id. § 14.004(a). Furthermore, “[i]f the affidavit or unsworn declaration filed under this section states that a previous action or claim was dismissed as frivolous or malicious, the affidavit or unsworn declaration must state the date of the final order affirming the dismissal.” *Id.* § 14.004(b).

In his brief, Smithback claims that after he filed his petition, he supplemented his filings with a Motion for Bench Warrant and an Affidavit of Previous Filings. Neither document appears in the clerk’s record. In his motion to dismiss, Bolton represented to the trial court that no declaration of previous filings had been filed, and there is no indication in the record that Smithback filed a document that contained the information required by section 14.004(a) of the Civil Practice and Remedies Code. *See id.* § 14.004. We presume the omitted documents support the trial court’s judgment. *See In re T.M.G.R.*, 164 S.W.3d 851, 854 (Tex. App.—Beaumont 2005, no pet.).

Additionally, Smithback argues that the applicable limitations period is the statute of limitations for a personal injury suit arising as a result of criminal conduct rather than the period for filing a grievance by an inmate. *Compare* Tex. Civ. Prac. & Rem. Code Ann. § 14.005 *with* § 16.0045 (West 2015). However, section 14.005’s requirement of exhaustion of remedies is “not a statute of limitations, but a procedural tool to screen inmate lawsuits.” *Doyle v. Lucy*, No. 14-03-00039-CV, 2004 WL 612905, at *3 (Tex. App.—Houston [14th Dist.] Mar. 30, 2004, no pet.) (mem. op.). In applying the exhaustion of remedies requirement in the Prison Reform Litigation Act¹ to a § 1983 suit filed in federal court, the Supreme Court of the United States noted, “This Court has described the doctrine as follows: ‘[A]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice.*’” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (emphasis added)). Smithback’s claims against prison employees concerned matters that were the subject of two grievances. *See* Tex. Gov’t Code Ann. § 501.008(d) (West 2012). Therefore, the trial court did not err by applying the exhaustion of remedies requirements of section 14.005 to Smithback.

¹ 42 U.S.C. § 1997e *et seq.*

We conclude the trial court did not err in dismissing the suit. We overrule the issue raised in this appeal and affirm the trial court's judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on November 2, 2017
Opinion Delivered November 9, 2017

Before McKeithen, C.J., Kreger and Horton, JJ.