

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001448-MR

ROBERT W. SLAVEN

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 08-CI-00158

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF CORRECTIONS

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, TAYLOR AND THOMPSON, JUDGES.

ACREE, JUDGE: On August 13, 2002, Robert Slaven was convicted of three counts of First-Degree Sexual Abuse, and given five years' probation with several conditions. One condition required Slaven to enroll in, actively participate in, and successfully complete a sexual offender treatment program (SOTP).

On August 17, 2004, Slaven's first probation violation hearing was conducted by the Hardin Circuit Court. Among the alleged violations was Slaven's failure to attend and complete the SOTP. Slaven alleges that the circuit court ruled that he completed the required treatment program. Whether this is a fact cannot be determined from the record. However, the hearing did not result in the revocation of Slaven's probation.

On December 6, 2005, the Hardin Circuit Court held a second hearing on Slaven's violations of the terms of his probation. Again, the Commonwealth's allegations included his failure to attend and complete the SOTP. The court revoked Slaven's probation, and sentenced him to twelve years in prison.

In prison, Slaven sought an award of "good time credit"¹ toward the fulfillment of his sentence. The Department of Corrections, Division of Probation and Parole, determined that Slaven had not completed a sexual offender treatment

¹ "Good time" credit was explained in *Watkins v. Fannin*, 278 S.W.3d 637, 640-41 (Ky.App. 2009), as follows:

The Kentucky Legislature delegated to the Department [of Corrections] the discretionary authority to award "good-time" credit to reduce a prisoner's sentence. Pursuant to [KRS] 197.045(1), a prisoner "may receive a credit on his sentence . . . to be determined by the department from the conduct of the prisoner." KRS 197.045(1). Conversely, "[t]he department may forfeit any good time previously earned by the prisoner or deny the prisoner the right to earn good time in any amount if during the term of imprisonment, a prisoner commits any offense or violates the rules of the institution." *Id.*

program and, pursuant to Kentucky Revised Statutes (KRS) 197.045(4)², denied Slaven the good time credit he sought.

Slaven then filed a declaratory judgment action in Oldham Circuit Court to challenge the Department's determination. The Department of Corrections responded with a motion to dismiss, arguing that no evidence supported Slaven's claim for good time credit. Slaven thereby failed to articulate a genuine controversy as required under KRS 418.040. The circuit court granted the motion to dismiss and Slaven appealed to this Court.

We rely upon *Smith v. O'Dea*, 939 S.W.2d 353 (Ky.App. 1997) for the proper standard of review. There, we stated,

the circuit court granted the appellee's motion to dismiss [the inmate's] petition for failure to articulate a genuine controversy as required under KRS 418.040. Similar to motions to dismiss for lack of controversy, [Kentucky Rules of Civil Procedure (CR)] CR 12 motions to dismiss for failure to state a claim, and CR 56 motions for summary judgment are typical Corrections Department responses to inmate declaratory judgment petitions. . . . [A] motion for summary judgment provides, in most cases, the most appropriate procedure and standards for addressing these petitions. . . .

Appellant's petition arises in a context that colors somewhat the application of the general summary judgment standard. . . .

² In pertinent part, KRS 197.045(4) reads as follows: "Any eligible sexual offender, as defined in KRS 197.410, who has not successfully completed the sex offender treatment program as determined by the program director shall not be entitled to the benefit of any credit on his sentence. A sexual offender who does not complete the sex offender treatment program for any reason shall serve his entire sentence without benefit of good time, parole, or other form of early release."

Where, as here, principles of administrative law and appellate procedure bear upon the court's decision, the usual summary judgment analysis must be qualified. The problem is to reconcile the requirement under the general summary judgment standard to view as favorably to the non-moving party as is reasonably possible the facts and any inferences drawn therefrom, with a reviewing court's duty to acknowledge an agency's discretionary authority, its expertise, and its superior access to evidence. In these circumstances we believe summary judgment for the Corrections Department is proper if and only if the inmate's petition and any supporting materials, construed in light of the entire agency record (including, if submitted, administrators' affidavits describing the context of their acts or decisions), does not raise specific, genuine issues of material fact sufficient to overcome the presumption of agency propriety, and the Department is entitled to judgment as a matter of law. The court must be sensitive to the possibility of prison abuses and not dismiss legitimate petitions merely because of unskilled presentations. [citation omitted]. However, it must also be free to respond expeditiously to meritless petitions. By requiring inmates to plead with a fairly high degree of factual specificity and by reading their allegations in light of the full agency record, courts will be better able to perform both aspects of this task.

Smith at 355 fn.1, 355-56.

Our review is limited to the record before us. *Jackson v. Jackson*, 571 S.W.2d 90, 93 (Ky.App. 1978)(“matters not disclosed by record cannot be considered on appeal.”). The record does not include the ruling in the first revocation hearing in Hardin County. Without that information, we cannot conclude, as Slaven desires we do, that the ruling of the first revocation hearing in Hardin Circuit Court precludes any subsequent factual finding that Slaven never completed the SOTP. Without that information, we cannot even consider such a

ruling in determining whether there is a material issue of fact regarding completion of such a program.

The evidence that *is* in the record is summarized as follows.

Hank Mayfield, a certified sex offender therapist, wrote a letter to the Department of Corrections to be used in Slaven's first probation revocation hearing. The letter, dated August 17, 2004, states,

Mr. Slaven began S.O.T.P. treatment . . . on September 30, 2002. Mr. Slaven's participation in the group has been above expectation. . . . Mr. Slaven['s probation] should not be revoked. He has met the goals and expectations set down in the S.O.T.P. program.

While this letter clearly evidences Slaven's satisfactory participation in the SOTP, it falls short of stating that Slaven had *completed* the program. As Slaven himself notes, completion of the program is evidenced by a certificate. No such certificate is in the record before us.

Slaven also points to a memorandum dated April 24, 2006, from Dan Bickers of the Department of Corrections, Division of Mental Health. He says that Bickers "accepted the letter from Hank Mayfield as proof of Completion of the Sex Offender Treatment [P]rogram." However, that assertion is not supported by the record. The memorandum, in fact, states,

[Y]ou stated that you completed the Sex Offender Treatment Program in the summer of 2004 with Mayfield and Associates of Elizabethtown. (emphasis supplied)

Slaven was not considered for the Department's own program because of his own representation. However, Slaven's self-serving statement cannot be considered

proof that he actually completed the program. Without his confirmation, the memorandum would not even suffice to prove he made the representation. And while Slaven does not argue estoppel, we cannot hold as a matter of law that the Department is prevented from asserting that he never completed the SOTP.³

Weiland v. Bd. of Trs. of Ky. Ret. Sys., 25 S.W.3d 88, 91 (Ky. 2000), *quoting Elec. and Water Plant Bd. of City of Frankfort v. Suburban Acres Dev., Inc.*, 513 S.W.2d 489, 491 (Ky. 1974)(setting forth elements of estoppel).

Slaven states that during his second probation revocation hearing on December 6, 2005, “it was asked how long the Sex Offender Treatment Program was and it was stated . . . that it was a two year program.” We can contemplate no reason for asking that question unless Slaven had yet to complete the program despite the fact that three years had expired from the time he began it with Hank Mayfield.

A report of the Department of Corrections, Division of Probation and Parole, dated October 10, 2005, includes these entries.

He [Slaven] was to continue treatment. Again, Mr. Slaven has been in non-compliance. Louise Peterson of Mayfield and Associates, advised this [Slaven’s probation] officer that Mr. Slaven has not attended ANY sessions of his required treatment since June 11, 2004, and that his treatment assignment folder is empty (he has been given written assignments to do and has not turned in any). Although Mr. Slaven attends some, the requirement is that he attend his group regularly unless he has a valid reason. He [sic] absences are greater than his attendances at this point in time. He is not in

³ However, we do not believe he should be denied participation in the Department’s SOTP because of his erroneous belief that he already completed it.

compliance with treatment. This has been discussed with Mr. Slaven on more than one occasion. . . .

On October 3, 2005, this officer asked the defendant if he was still attending SOTP with Mayfield and Associates. He reported that he had completed his SOTP and had a certificate from them. This officer contacted Mayfield and Associates to inquire if the defendant had in fact completed SOTP as I have not received any documentation from them since July of 2004. Mr. [Dale] Pysher [sic], from Mayfield and Associated [sic] informed me that the defendant had been terminated in July of 2004 for non-compliance. I then e-mailed Teresa Bland in Louisville, KY [with the Department of Corrections SOTP] to see if the defendant was enrolled in SOTP there. I received a reply from Ms. Bland on 10/10/05 informing me that the defendant is not enrolled in SOTP there.

The officer requested that Slaven's probation be revoked for, among other reasons, "[f]ailure to attend and complete SOTP." On March 28, 2006, finding generally "that the Defendants has [sic] violated his/her terms of probation," the Hardin Circuit Court revoked Slaven's probation.

Applying the proper standard of review set out in *Smith*, we conclude that while Slaven presented evidence of his participation in SOTP, there is insufficient evidence to create a genuine issue of material fact that he *completed* the program. This was a condition of his probation, but more importantly under KRS 197.045, it is a condition to Slaven's claim to good time credit. Therefore, the Oldham Circuit Court's grant of the Department's motion to dismiss Slaven's petition for declaratory judgment was proper. He failed to articulate a genuine controversy as required under KRS 418.040.

For the above reasons, the circuit court's order dismissing Slaven's petition for declaratory judgment is affirmed.

ALL CONCUR.

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