2013 IL App (4th) 120885-U

NO. 4-12-0885

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 13, 2013
Carla Bender
4th District Appellate
Court, IL

WINFRED OLIVER, Plaintiff-Appellant, v. RANDY PFISTER, JEFFREY GUBUT, DONALD GISH, ANGELICA JOYNER, PATRICK HASTINGS, EDDIE JONES, SHERRY BENTON, GUY PIERCE, JEFFREY GABOR, MICHAEL P. RANDLE, and S.A. GODINEZ, Defendants-Appellees.	)	Appeal from Circuit Court of Sangamon County No. 11MR688 Honorable John Schmidt, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in *sua sponte* dismissing plaintiff's *pro se* petition for a writ of *certiorari* because the matter was not ripe for adjudication where defendants had not been served with the petition.

¶ 2 On November 8, 2011, plaintiff, Winfred Oliver, an inmate at Pontiac Correctional Center, filed a *pro se* petition for a writ of *certiorari* in the trial court, seeking review of prison disciplinary proceedings related to an allegation he possessed child pornography. On January 2, 2012, the trial court dismissed plaintiff's complaint as frivolous. Plaintiff appeals. We vacate the court's dismissal and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 According to Illinois Department of Corrections prison inmate search results, plaintiff is currently in Pontiac, serving a 50-year sentence on his conviction for predatory

criminal sexual assault. He is projected to be released from prison on January 2, 2050.

¶ 5 On April 6, 2011, plaintiff was cited for violating disciplinary rule No. 501 (violating state or federal laws (720 ILCS 5/11-20.1 (West 2010)) (child pornography). According to the disciplinary report, on April 5, 2011, correctional officers discovered what appeared to them to be child pornography in plaintiff's cell. Specifically, the report stated the officers found the following:

> "2 pornographic magazines were altered to have pictures of young girls[']faces cut out of non pornographic magazines and then the heads and faces of young girls were pasted to the nude bodies of adult females. Also found were loose materials of young men in various poses and a photo album with [plaintiff's] name written inside of it depicting children in various poses."

¶ 6 On April 19, 2011, plaintiff submitted a written response to the charges, arguing the altered magazines cannot be considered child pornography because, *inter alia*, the Illinois Supreme Court previously found section 11-20.1(f)(7) unconstitutional in *People v. Alexander*, 204 Ill. 2d 472, 791 N.E.2d 506 (2003).

¶ 7 Following an April 26, 2011, disciplinary hearing, the Adjustment Committee found plaintiff committed the charged offense and recommended the following disciplinary measures: (1) one year of "C-grade," (2) one year of segregation, (3) revocation of one year of good-conduct credits, and (4) revocation of one year of audiovisual privileges.

¶ 8 Plaintiff filed a grievance to the Administrative Review Board. However, on October 5, 2011, the Administrative Review Board affirmed the Adjustment Committee's

finding.

¶ 9 On November 8, 2011, plaintiff filed a petition for common law writ of *certiorari* in the trial court. Plaintiff alleged the finding of guilt was improper where defendants violated various administrative, state, and federal procedural due-process protections.

¶ 10 On January 2, 2012, the trial court dismissed plaintiff's petition as "frivolous."

¶ 11 On February 7, 2012, plaintiff filed a motion to reconsider, which the trial court denied on August 17, 2012.

¶ 12 This appeal followed.

¶ 13 II. ARGUMENT

¶ 14 In *Powell v. Lewellyn*, 2012 IL App (4th) 110168, ¶ 11, 976 N.E.2d 1106, this court recently vacated a *sua sponte* dismissal of a plaintiff's *pro se* petition for injunctive relief and damages, finding the trial court acted prematurely. In *Powell*, just 13 days separated the plaintiff's filing of his petition and the court's *sua sponte* dismissal. Moreover, the record did not show the defendants had been served with a notice or summons. *Powell*, 2012 IL App (4th) 110168, ¶10, 976 N.E.2d 1106. We concluded the case was not yet ripe for adjudication where the petitioner was not afforded a reasonable time to obtain service on the defendants prior to the court's dismissal. *Powell*, 2012 IL App (4th) 110168, ¶ 11, 976 N.E.2d 1106. We note, had the plaintiff effectuated service on the defendants, the defendants would not have been afforded a reasonable time to respond.

¶ 15 *Powell* relied upon the supreme court's decision in *People v. Laugharn*, 233 Ill. 2d 318, 323, 909 N.E.2d 802, 805 (2009), which vacated a *sua sponte* order dismissing a *pro se* prisoner's section 2-1401 petition (735 ILCS 5/2-1401) (West 2004)). *Laugharn*, 233 Ill. 2d at

323, 909 N.E.2d at 805. In *Laugharn,* the ordinary 30-day period for the defendant to answer or otherwise file a responsive pleading had not expired. *Laugharn*, 233 Ill. 2d at 323, 909 N.E.2d at 805. In fact, just seven days separated the filing of the section 2-1401 petition and its dismissal. *Laugharn*, 233 Ill. 2d at 323, 909 N.E.2d at 805. The *Laugharn* court found the trial court's *sua sponte* dismissal was not ripe for adjudication because the State had not been afforded time to respond. As a result, the court found the trial court's dismissal was improper. *Laugharn*, 233 Ill. 2d at 323, 909 N.E.2d at 805.

¶ 16 In this case, plaintiff filed his complaint on November 8, 2011. On January 2, 2012, the trial court *sua sponte* dismissed plaintiff's petition as "frivolous." However, our review of the record does not reveal defendants were ever served with a notice or a summons. In an April 3, 2012, letter to the circuit clerk, Assistant Attorney General Lisa Behle stated the following:

> "During a recent search through Sangamon County's online docket records, I found that an entry was made in [*Oliver v. Pfister, et al.*, case No. 2011-MR-688] on February 23, 2012, which states: 'Court is in receipt of the Petitioner's request for hearing. AAG Lisa Beh[l]e is to schedule a hearing in this matter with in [*sic*] 45 days.' The online docket shows that the entry was sent to Plaintiff Winfred Oliver and Defendant Randy Pfister. Yet, as far as I know, no defendants were ever served in that case. I did not receive a copy of that order. I never appeared in that case and believe that the order may be in error."

¶ 17 Following the reasoning in *Powell* and *Laugharn*, the trial court's dismissal of plaintiff's petition must be vacated because the case is not ripe for adjudication where defendants have not been served or issued a summons. If plaintiff wishes his claim to be heard, he must serve defendants. See *Powell*, 2012 IL App (4th) 110168, ¶ 14, 976 N.E.2d 1106. In the event plaintiff does not pursue his case, the trial court may dismiss it after a reasonable period of time for want of prosecution. See *Powell*, 2012 IL App (4th) 110168, ¶14, 976 N.E.2d 1106.

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, we vacate the trial court's dismissal order and remand for further proceedings consistent with this order.

¶ 20 Judgment vacated; cause remanded for further proceedings.