

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK KINNEY,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED

May 29, 2008

No. 277809

Ionia Circuit Court

LC No. 06-025197-AS

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Plaintiff, acting *in propria persona*, appeals as of right a circuit court order dismissing his complaint for superintending control. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant Department of Corrections (DOC) charged plaintiff with four major misconducts, including attempted escape, assault and battery of a corrections officer, possession of dangerous contraband, and destruction of property valued at \$10 or more, on September 3, 2004. Plaintiff pleaded guilty to all charges except assault and battery. Following a hearing, the hearing officer accepted plaintiff's pleas, and found him guilty of assault and battery. In a decision mailed to plaintiff on March 4, 2004, the hearing officer denied rehearing.

MCL 791.255(2) provides as follows:

Within 60 days after the date of delivery or mailing of notice of the decision on the motion or application for rehearing, if the motion or application is denied or within 60 days after the decision of the department or hearing officer on the rehearing, a prisoner aggrieved by a final decision or order may file an application for direct review in the circuit court in the county where the petitioner resides or in the circuit court of Ingham county.

Plaintiff had 60 days from March 4, or until May 3, 2004, to file an application for review of defendant's decision in circuit court. On April 14, 2004, 19 days before the deadline, plaintiff delivered a petition for review to prison officials for processing through the institution's expedited legal mail system. A DOC disbursement authorization indicates that plaintiff's mailing was placed in the outgoing mail on April 15, 2004, at 1:15 p.m.

For reasons that are not clear, the Ingham Circuit Court did not receive the mailing until May 10, 2004. On July 14, 2004, the circuit court issued a 21-day order suspending plaintiff's appeal and directing plaintiff to resubmit the pleading with a partial filing fee.

Plaintiff received the 21-day order on July 19, 2004, and on July 20, 2004, he delivered the required paperwork to prison officials for withdrawal of the fee from his prison account and transmittal to the circuit court via the institution's expedited legal mail system. The DOC disbursement authorization indicates that plaintiff's mailing was placed in the outgoing mail on July 21, 2004, at 2:05 p.m. The circuit court received the mailing on August 13, 2004.

In an order entered on December 3, 2004, the circuit court, acting sua sponte and relying on *Keenan v Dep't of Corrections*, 250 Mich App 628, 636; 649 NW2d 133 (2002), dismissed plaintiff's petition for judicial review on the ground that it was submitted outside both the original 60-day period that ended on May 3, 2004, and the 21-day period created by the order of July 14, 2004. The circuit court concluded that it lacked jurisdiction to hear plaintiff's appeal.

Plaintiff sought delayed leave to appeal the circuit court's order. This Court denied the delayed application for lack of merit in the grounds presented. Our Supreme Court denied plaintiff's subsequent application for leave to appeal.

Plaintiff filed a complaint for superintending control in Ionia Circuit Court, seeking to challenge his conviction of major misconduct charges on the ground that the convictions were not supported by the requisite evidence. Plaintiff asserted that he lacked any other adequate remedy because the DOC prevented him from utilizing the appeal process established by MCL 791.255 by "twice causing significant and unreasonable delays in the mailing" of his appeal papers, thereby causing the papers to be received by the circuit court after the filing deadlines expired and the appeal to be dismissed.

Defendant moved to dismiss the complaint for superintending control, arguing that dismissal was required because plaintiff had another adequate remedy, i.e., an appeal of right to the circuit court and appeals by leave to this Court and our Supreme Court. The circuit court agreed with defendant and dismissed the case.

A complaint for superintending control is an original civil action designed to order a lower court or tribunal to perform a legal duty. *Barham v Workers' Compensation Appeal Bd*, 184 Mich App 121, 127; 457 NW2d 349 (1990). A court may invoke the power of superintending control only when the plaintiff lacks a legal remedy and demonstrates that the lower court or tribunal has failed to perform a clear legal duty. *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 121-122; 420 NW2d 141 (1988). If the plaintiff has a legal remedy, the court may not grant superintending control and must dismiss the case. MCR 3.302(D)(2).

We review a court's decision to grant or deny a petition for superintending control for an abuse of discretion. See *In re Rupert*, 205 Mich App 474, 477; 517 NW2d 794 (1994).

We affirm. The delay between the mailing of plaintiff's legal papers from the institution and the receipt of those papers by the circuit court is unexplained. However, the fact that delivery of the papers was delayed on two occasions does not alter the fact that plaintiff had an appeal of right to the circuit court available to him. Plaintiff had an adequate legal remedy;

therefore, the circuit court correctly dismissed the complaint for superintending control. MCR 3.302(D)(2).

Moreover, superintending control was not available to plaintiff under any circumstances. As noted, a complaint for superintending control is a civil action that is designed to compel a lower court or tribunal to perform a legal duty. *Barham, supra* at 127. Defendant did not refuse to adjudicate plaintiff's challenge to the major misconduct charge of assault and battery of a corrections officer. Rather, defendant's hearing officer found plaintiff guilty of that charge. A review of plaintiff's complaint for superintending control reveals that plaintiff simply disagrees with the hearing officer's findings. Plaintiff's complaint for superintending control was not designed to compel defendant to perform a legal duty, but rather sought to overturn a decision with which plaintiff disagrees. Superintending control is not available for such purposes. *Czuprynski, supra* at 121-122.

Affirmed.

/s/ Alton T. Davis

/s/ Christopher M. Murray

/s/ Jane M. Beckering