

STATE OF MICHIGAN
COURT OF APPEALS

CORY ROSS,

Plaintiff-Appellant,

v

MICHAEL REED and MAURICE MCCLURE,

Defendants-Appellees,

and

CITY OF DETROIT,

Defendant.

UNPUBLISHED

October 17, 2006

No. 263899

Wayne Circuit Court

LC No. 03-320037-NZ

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the July 2005 order of the trial court that dismissed his action without prejudice.¹ We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, who at the time of trial was incarcerated at a correctional facility in Marquette, filed this action against defendants, both City of Detroit police officers, alleging misconduct in the course of his arrest. When plaintiff did not appear at trial, the trial court dismissed the action without prejudice after defendants objected to plaintiff's absence and to his attempt to testify by a de bene esse video deposition.

On the scheduled trial date, plaintiff's counsel stated that plaintiff was unable to appear because he was incarcerated and that, at a pre-trial conference, the trial court had been

¹ The lawsuit also named the City of Detroit as a defendant. The city subsequently moved for, and was granted, summary disposition in November 2004. The city is therefore not a party to this appeal. References to "defendants" in this opinion will be to the individual defendants only.

“emphatic” that it would not issue a writ of habeas corpus to allow plaintiff to appear at trial. Plaintiff’s counsel requested that the matter be allowed to proceed and that plaintiff’s testimony be introduced by a de bene esse video deposition.

Plaintiff, however, never filed a written motion for a writ of habeas corpus to allow him to testify in trial, instead relying on the trial court’s statement in chambers that it would not issue such a writ. Also, although notice of the video deposition was provided to defendants, plaintiff did not seek leave of the court to conduct the deposition, despite the requirement of MCR 2.306(A)(2) that the deposition of a prisoner be taken only by leave of the court. Defendants did not attend the video deposition.

On appeal, plaintiff argues that, because the trial court refused to issue a writ of habeas corpus for plaintiff to appear at trial, he was unavailable as a witness and his video deposition was admissible under MRE 804(b)(1). He further argues that the trial court’s course of action compromised his due process right of reasonable access to the courts. We disagree.

A trial court’s decision to dismiss is reviewed for an abuse of discretion. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995). An abuse of discretion will be found only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias rather than reason. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992).

Prisoners are entitled to a due process right of reasonable access to the courts that guarantees them an adequate and meaningful opportunity to present their claims. *Proctor v White Lake Twp Police Dept*, 248 Mich App 457, 463; 639 NW2d 332 (2001). While the right of reasonable access protects an inmate’s right to prepare a petition or complaint, it does not include an unconditional right to testify in person or by deposition. *Hall v Hall*, 128 Mich App 757, 761; 341 NW2d 206 (1983). Fundamental fairness, however, may require that a prisoner be given some opportunity to present his testimony. *Id.*

Pursuant to MCR 3.304, a trial court may issue a writ of habeas corpus directing that a prisoner be brought to testify, either on its own initiative or on the motion of a party. Whether to allow a prisoner the opportunity to present his testimony is within the trial court’s discretion, and the trial court should consider whether the prisoner’s presence will substantially further the resolution of the case, the expense of the prisoner’s transportation and security, and whether the suit can be stayed until the prisoner is released without prejudice to the action. *Hall, supra* at 762. When a trial court denies a motion for a writ of habeas corpus, it should consider other possibilities for presenting the prisoner’s testimony, such as granting leave to testify by deposition. *Id.*

Unlike the plaintiff in *Hall, supra* at 759, plaintiff in this case did not file a motion for a writ of habeas corpus seeking his appearance and did not seek leave of the trial court to testify by deposition. According to plaintiff, the trial court indicated at a pretrial settlement conference that it would not issue a writ of habeas corpus allowing plaintiff to appear at trial. It is well established, however, that courts speak through their judgments and decrees, not their oral statements. *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997). In the absence of a formal ruling, there is no evidence in the record that the trial court refused to issue a writ to allow plaintiff to attend trial.

Further, even after the trial court's apparent refusal to issue a writ of habeas corpus to allow plaintiff to attend trial, plaintiff did not file a motion for leave to testify by deposition. Although notice of the de bene esse video deposition was given to defendants, plaintiff failed to seek leave of the trial court to conduct the deposition. It appears that plaintiff's request to appear by deposition was not made until the scheduled trial date. Under the circumstances, the defendants would have been prejudiced by the use of the deposition at trial because they were not present when it was taken and, without plaintiff's appearance, would have had no opportunity to cross-examine plaintiff.

Additionally, pursuant to MRE 804(b)(5), deposition testimony is admissible only if the witness is unavailable, the deposition was taken in compliance with law in the course of the same or another proceeding, and the party against whom the testimony is offered had an opportunity and similar motive to cross examine the witness. *Lombardo v Lombardo*, 202 Mich App 151, 155; 507 NW2d 788 (1993). Because plaintiff's deposition was not taken in compliance with MCR 2.306(A)(2), the trial court would not have abused its discretion by denying admission of the deposition on this basis. See *Lombardo, supra* at 156.

Therefore, we conclude that the trial court did not abuse its discretion by denying plaintiff's request to testify by deposition and dismissing the case without prejudice based on plaintiff's failure to appear.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens