

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

John McLeod, Administrative Law Judge

Appellate Case No. 2014-000962

RECEIVED

MAY 22 2014

SC Court of Appeals

JASON KELLY,

APPELLANT,

— VS —

SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS,

RESPONDENT.

MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES the Appellant, Jason Kelly, pro se, who files this Motion to Proceed In forma Pauperis and, in support hereof, the Appellant will show the Court:

I. STANDARD

Motions to proceed in forma pauperis may be granted where

specifically authorized by statute or required by constitutional provisions. Martin vs. State, 321 S.C. 533, 471 S.E.2d 134 (S.C. 1995).

When indigent litigant files motion to proceed in forma pauperis and the matter does not appear to fit within statutory or constitutional exception to requirement of filing fee, clerk of court must submit motion to judge for ruling as to whether matter fits within statutory exception or concerns fundamental right that requires waiver of filing fee. Id.

II. ARGUMENT

APPELLANT'S APPEAL CONCERNS FUNDAMENTAL RIGHT THAT REQUIRES WAIVER OF FILING FEE.

Appellant filed this appeal from the final judgement of the Administrative Law Court ("ALC"); however, the Appellant is indigent (see attached Financial Statement Certificate) and thus has not paid the required \$100.00⁰⁰ filing fee for this appeal. Therefore, Appellant is requesting this Court to waive the filing fee in light of his indigency due to the fundamental constitutional right(s) involved in this matter.

The matter giving rise to this involves a factual circumstance wherein the Appellant, an SCDC inmate, was sprayed with over sixty (60) grams of tear gas while he layed unconscious on the floor of his assigned cell where he had fallen; there

was absolutely no reason or provocation for the SCDC officer to deploy such unnecessary or excessive force upon Appellant who posed no threat as he layed unconscious on the floor of his cell. Appellant suffered injuries from the unnecessary and excessive force used against him and, therefore, he filed an administrative complaint (alleging Cruel and Unusual Punishment) utilizing SCDC's inmate grievance system which denied the grievance at both levels of review offered by the SCDC.

Appellant appealed from the final decision of the SCDC to the S.C. Administrative Law Court which summarily dismissed the appeal with prejudice finding that the appeal did not implicate a state-created liberty interest.

Appellant contends the appeal did indeed implicate a state-created liberty interest as below:

S.C. Code Ann. § 24-1-130 provide, in part, that the South Carolina Department of Corrections

"shall be responsible for the ... proper care, treatment, feeding, clothing, and management of the prisoners confined therein."

Id., § 24-1-130.

Appellant submit that the above-quoted statutory provision creates a state-created liberty interest in inmates (of SCDC) to be free from improper care or treatment by SCDC employees in accordance with the standard pronounced by the Supreme Court of South Carolina in Sullivan vs. SCDC which held that

a prisoner's "condition of confinement can implicate a state-created liberty interest." Id., 586 S.E.2d 124 (S.C.2003). According to the Sullivan decision,

" A prisoner's state-created liberty interests, which are protected by the Due Process Clause, will generally be limited to freedom from restraint that imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life. "

Id., 586 S.E.2d 124 (S.C.2003).

Appellant trust this Court will find no trouble holding that an SCDC employee's use of unnecessary or excessive force against an unconscious inmate in need of medical attention is indeed improper care or improper treatment that imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life. Therefore, the Appellant asserts the appeal to the ALC did implicate a state-created liberty interest under S.C. Code Ann. § 24-1-130. (FN1) Moreover, the appeal involved a fundamental right because the Fourteenth Amendment (i.e., funda-

FN1. In addition to § 24-1-130, SCDC's internal policies/regulations also create a liberty interest in an SCDC inmate being free from improper care/treatment that imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life because the rules and regulations were made pursuant to grant of legislative power (see § 24-1-140) which mean they take on force of statutory law. See *Reed vs. Hansbarger*, 314 S.E.2d 616 (W.Va. 1984) ("Once executive officer or agency has made and adopted valid rules and regulations pursuant to grant of legislative powers, they take on force of statutory law.")

damental right) is violated where prison officers employ force against a prisoner when it is not necessary. See Miller vs. Leathers, 913 F.2d 1085, 1088 (4th Cir. 1990) (prison guard may not use force against prisoner without sufficient provocation); Treats vs. Morgan, 308 F.3d 868 (8th Cir. 2002) ("the evidence does not show an objective need for the force which was used because [prisoner] had not jeopardized any person's safety or threatened prison security."); Ort vs. White, 813 F.2d 318 (11th Cir. 1987) (Fourteenth Amendment violation occurs where prison officers employ force without necessity); see Exhibit "A" attached.

Accordingly, this Court should waive the filing fee for this appeal and allow Appellant to proceed to briefing.

III. CONCLUSION

Based upon the foregoing reasons and legal authority, the Court should grant this motion to proceed in forma pauperis.

May 20, 2014
Turbeville, South Carolina

(see reverse side)

I SO MOVE,

Jason Kelly

Mr. Jason Kelly, # 287190

Turbeville Correctional Inst.

P.O. Box 252

Turbeville, S.C. 29162

(APPELLANT PRO SE)

Re: Jason Kelly vs. SCDC

Appellate Case No. 2014-000962

Certificate of Service

I, Jason Kelly, do hereby certify that I have served the Motion to Proceed In forma Pauperis upon the SCDC by depositing a copy of said motion in the U.S. Mail, postage prepaid, addressed to:

SCDC - Office of General Counsel

P.O. Box 21787

Columbia, S.C. 29221-1787

5/21/14
(Date)

Jason Kelly
(Signature)

SCDC

MAY 21 2014

MAIL ROOM

(Exhibit "A")
 SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
 INCIDENT REPORT

FILED
 Page 1
 APR 19 2013

Institution / Center: <u>Turbinville Correctional Institution</u>		Date of Report: <u>4-1-13</u>		Time of Report: <u>1012 pm</u>	
Reporting Official: <u>Sgt James Tellison 035704</u>		Date of Incident: <u>4-1-13</u>		Time of Incident: <u>approx 7⁰⁰ pm</u>	
Location of Incident: <u>SMU 149</u>		Employee(s) Involved:			
Inmate(s)/Resident:	SCDC#	Age	Race	Sex	
1. <u>Blair, Marcus</u>	<u>329604</u>		<u>B</u>	<u>M</u>	1. <u>Sgt E. Mack</u>
2. <u>Kelly, Jason</u>	<u>287190</u>		<u>B</u>	<u>M</u>	2. <u>Sgt D. McFadden</u>
3.					3.
4.					4.
5.					5.

FOI CLASSIFICATION

On the above date and approximate time: I Sgt James Tellison was alone on the floor of SMU due to staff shortage. 1/M Blair, Marcus 329604 called me to the door of SMU 149, claiming that his cellmate, 1/M Kelly, Jason 287190 had slipped and fallen. I attempted to get 1/M Kelly to respond to verbal calls as he was unresponsive, I administered chemical restraints (MK-9 beginning weight 333.5/pending weight 270.5). 1/M Kelly stirred but did not arise, so I phoned Main Control to alert First Responders. Sgt E Mack and Sgt D. McFadden entered and assisted me in carrying 1/M Kelly to the SMU Medical Room, where Nurses Bennett and Green were able to get him to answer questions. 1/M Kelly was allowed to shower and escorted by Sgt E Mack to Medical. 1/M Kelly was escorted back to SMU and secured in cell 149 at approx 847 pm.

Signature: Sgt James Tellison

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Evidence:

Witness(es):

Supervisor's Comments: Forward for info

Signature: [Signature] Title: LT Date/Time: 4-2-13 1:50 am

Major / Responsible Authority: 1/M Formation, I/M

Was seen by Medical. Injured 411 Returned to Cell

Signature: [Signature] Title: Major Date: 4/3/13

STG Related - Refer to STG Committee
 Yes No Unknown

This Incident is DRUG related
 Yes No Unknown

ITM Action Taken
 Informal Resolution
 Administrative Resolution
 Refer to Disciplinary Hearing

SCDC

APR 30-2014

**INMATE TRUST FUND ACCOUNT REPORT
for SOUTH CAROLINA COURT FILING FEES**

Turben. 11e

MAIL ROOM

INSTRUCTIONS TO INMATE: Complete top portion then give to your mailroom. When returned from Accounting, you must mail this form with any payment to the Court.

By signing my name below, I am asking the Financial Accounting Office of the South Carolina Department of Corrections to complete this report. In accordance with SC Code of Laws §24-27-100 and 150, I authorize payment of the full filing fee. If I have insufficient funds in my account at this time to pay the court's full filing fee, I authorize SCDC to deduct the initial and subsequent payments until payment is completed. \downarrow \$150.00

INMATE NAME (print): Jason Kelly TA 128

SCDC# 287190 INMATE SIGNATURE: Jason Kelly

I plan to file this action in the SC County of Columbia

The section below is for SCDC - Financial Accounting Branch's use ONLY.

- (1) Total deposits to inmate's account for preceding six months' period* \$ 0
- (2) Twenty percent (20%) of line 1 \$ 0
- (3) Account balance - current date \$ 0
- (4) PAYMENT AMOUNT **
(lesser of line 2 or line 3)
Enclosed check # _____ \$ 0

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****NOTE to COURT:** If payment is for partial fee, Court must notify SCDC once case is accepted and filed. Send notice with case # and balance owed to address below. SCDC will NOT process any additional payments until notification is received from Court.

South Carolina Department of Corrections
Financial Accounting - Room 234
PO Box 21787
Columbia, SC 29221-1787

*Admission date is noted here if inmate incarcerated less than six months _____

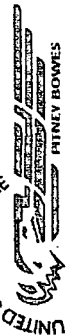
[Signature]
Prepared by Financial Accounting Branch - SCDC

5/8/14
Date

TURBEVILLE C.L.
MAIL ROOM
BOX 252
TURBEVILLE S.C. 29162

Jason Kelly #287190

19
UNITED STATES POSTAGE



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0002009326 MAY 21 2014
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SC Court of Appeals

South Carolina Court of Appeals
Clerk's office
P.O. Box 11629
Columbia, S.C. 29211