

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal FROM ADMINISTRATIVE LAW COURT
John McLeod, Administrative Law Judge

Appellate Case No. 2014-000962

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AUG 14 2014

S.C. SUPREME COURT

JASON KELLY,

APPELLANT,

-VS-

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AUG 15 2014

SC Court of Appeals

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 S.C.D.C 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 S.C.D.C. 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 S.C.D.C.'s inmate grievance system which denied the grievance at both levels of review offered by the S.C.D.C.

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 S.C.D.C) to be free from improper care or treatment by S.C.D.C employees in accordance with the standard pronounced by the Supreme Court of South Carolina in Sullivan vs. S.C.D.C 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 a typical 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 trusts this Court will find no trouble holding that an S.C.D.C. 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 a typical or significant hardship on the inmate in relation to the ordinary incidents of prison life. Therefore, the Appellant asserts the appeal to the A.L.C. did implicate a state-created liberty interest under SC Code Ann. § 24-1-130. (FNI) Moreover, the appeal involved a fundamental right because the Fourteenth Amendment (i.e., funda-

FNI. In addition to § 24-1-130, S.C.D.C.'s internal policies/regulations also create a liberty interest in an S.C.D.C. inmate being free from improper care/treatment that imposes a typical 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. Hansborge, 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.")

clamorous 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 —, 2014
Turbeville, South Carolina

Mr Jason Kelly, #287190
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PO Box 252
Turbeville, S.C. 29162
(APPELLANT PRO SE)

The State of South Carolina

In The Supreme Court

Appeal From The Court of Appeals

Case No. # 2014-000962

Jason Kelly Appellant,

v.

South Carolina Department

of Correction Respondant.

Proof of Service

I certify that I have served the notice of Appeal on Aug. 11, 2014, addressed to the South Carolina court of Appeals, Clerk of Court office and the South Carolina Supreme Court, Clerk of Court; [South Carolina Court of Appeals, Clerk of Court, post office box 11629, Columbia, S.C., 29211] and [South Carolina Supreme Court, Supreme Court Building, 1231 Gervais Street, P.O. Box 11330, Columbia, S.C., 29211], through Turbeville Correctional Institution on

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SC Court of Appeals

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