IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2008-CP-00727

CHARLIE TAYLOR
APPELLANT

vs.

LOLA NELSON
APPELLEE

On Appeal From the Circuit Court
of Sunflower County, Mississippi

BRIEF OF APPELLEES

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

JAMES M. "JIM" NORRIS
ATTORNEY SENIOR, MDOC

JANE L. MAPP
SPECIAL ASSIST. ATTORNEY GENERAL
MSB# [redacted]
510 George Street, Suite 212
Jackson, MS 39202
(601) 359-5770

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal:

1. Charlie Taylor, MDOC # R6798, Appellant
2. Lola Nelson, Appellee
3. W. Ashley Hines, Circuit Court Judge
4. Jim Hood, Attorney General

The undersigned counsel further certifies that the following attorneys have an interest in the outcome of this case:

For Appellees:

1. James Norris, Attorney, Mississippi Department of Corrections
2. Jane L. Mapp, Special Assistant Attorney General

By: Jane L. Mapp/lc

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STATEMENT OF THE CASE

On or about December, 2007, Charlie Taylor (Taylor), a state inmate legally incarcerated within the Mississippi Department of Corrections (MDOC), filed a Petition entitled "Motion to Show Cause" in the Circuit Court of Sunflower County, Mississippi, against MDOC Disciplinary Hearing Officer Lola Nelson and numerous other MDOC employees . (CP at 3). In his petition Taylor sought judicial review pursuant to Miss. Code Ann. § 47-5-807 of various decisions of MDOC's Administrative Remedy Program upholding a number of Rules Violation Reports (RVRs) issued to Taylor. Taylor claimed that he was being subjected to cruel and unusual punishment and violations of his procedural due process rights contrary to MDOC policy, statutory law and in violation of his constitutional rights.

Taylor specifically alleges in his petition that on June 20, 2005 he was issued RVR # [redacted] for violating a non-existent prison rule for which he was subsequently found guilty. He goes on to state that on March 22, 2007 he was sprayed with mace by Wendell Anderson and denied medical treatment by Eddie Cates after he refused to take a DNA test. He complains that his DNA was forcefully taken and he was subsequently issued RVR [redacted] for violating a non-existent prison rule. Lastly, he states that on August 22, 2007 he was given another RVR, [redacted] for violating yet another non-existent prison rule, this time for passing items to an inmate in another cell on his tier. Taylor asserts in he petition that there is a pattern by prison staff to harass him and falsify documents in order to keep him in lockdown (D-custody).

The documentation that Taylor attached as exhibits to his petition show that RVR # 607078 was for a violation of Rule # 11, interfering with the orderly running of a facility, through the act of flooding his cell. (C.P. at 23). RVR # 786457 involved a violation of Rule # 19, refusing to obey the order of a staff member, when he refused to come to the cell bars for DNA collection. (C.P. at 46). RVR, #792576 was also for a violation of Rule 11 when he was caught on security cameras passing items to another inmate on his tier. (C.P. at 30). These exhibits show that Taylor received disciplinary hearings on each of these RVRs and he even admitted during the hearing on RVR #607078 that he had in fact flooded his cell but claimed that he "had" to flood it. (C.P. 23, 30, 46).

Taylor included in the record documentation showing the he did appeal each of the RVRs through MDOC's Administrative Remedy Program, but he only included evidence that he actually exhausted his administrative remedies regarding his appeal of RVR# 607078. He received a certificate of completion regarding the appeal of RVR# 607078 on November 20, 2007 and he sought judicial review of that adverse decision on December 18, 2007. He attached copies of his requests to appeal the other two RVRs, but he did not attach any documentation showing that those appeals had been exhausted.

A response was filed on January 10, 2008 to Taylor's petition in which the Respondents asserted the defenses of failure to state a claim, statutory immunity from monetary damages, and lack of jurisdiction as to all of Taylor's claims except his appeal of RVR # 607078 because of his failure to exhaust his administrative remedies.

On or about February 27, 2008, Circuit Judge Ashley Hines entered an Order dismissing the case for failure to state a claim holding that the actions taken against Taylor were "supported by substantial evidence was not arbitrary or capricious, was within the agency's scope or power, and did not violate any of the constitutional or statutory rights of the petitioner." (C.P. at72-73).

Thereafter, Taylor filed a "Motion to Alter and Amend Judgment" which was subsequently denied by the trial court. (C.P. at 75; 86). Feeling aggrieved by the lower court's decision, Taylor filed his Notice of Appeal to this Court. (CP. at 87).

SUMMARY OF THE ARGUMENT

A court's jurisdiction regarding an agency decision is limited to a review of whether the decision was "unsupported by substantial evidence; arbitrary or capricious; beyond the agency's scope or powers; or violative of the constitutional or statutory rights of the aggrieved party." ***Sanders v. Miss. Dep't of Corrections***, 912 So.2d 189, 192 (Miss.Ct.App. 2005) (quoting ***Griffis v. Miss. Dep't of Corrections***, 809 So.2d 779, 782 (Miss.Ct.App.2002)).

Only RVR # 607078 is properly before the court for judicial review as Taylor failed to properly exhaust his administrative remedies as to the other RVRs prior to seeking judicial review. Miss. Code Ann. § 47-5-801, *et seq*. There he was charged with violating Rule # 11 which is entitled "engaging in or encouraging a group demonstration or conduct which interferes with the security or orderly running of a facility." Taylor interfered with the orderly running of the facility by flooding his cell.

Taylor has not stated a claim which implicates the due process clause; and therefore, none of the allegations made by Taylor, even if true, are sufficient to have the RVR expunged from his record. This is especially true in light of the fact that Taylor admitted his guilt at the disciplinary hearing.

Taylor's claims regarding the July 9, 2008 hearing before the trial court and the subsequent order of the court requiring him to pay an additional $96.00 for the cost of the appellate record do not involve the merits of his complaint and are not properly before the court for review.

ARGUMENT

1. Whether the Decision Rendered by the Mississippi Department of Corrections Was Supported by Substantial Evidence, Was Not Arbitrary And/or Capricious, Was Within the Agency's Scope or Power and Did Not Violate Any of the Constitutional or Statutory Rights of the Petitioner.

Taylor alleges that the decision of MDOC denying his appeal of RVR # 607078 was not supported by substantial evidence, was arbitrary and capricious, and violated his statutory and constitutional rights. Taylor does not offer any evidence to support his allegations, he merely states that the August 10, 2005 decision rendered by Michael German deprived him of his procedural due process rights, but he does not say why.

Taylor was issued RVR # 607078 on June 20, 2005 for violating prison rule # 11, interfering with the orderly running of the facility, when he flooded his cell. He received a copy of the RVR on that same day. (C.P. at 23). An investigation into the incident was conducted and Taylor was interviewed, but declined to give a statement at that time. (C.P. 24). Following the conclusion of the investigation on June 28, 2005, Taylor was given a 24

hour disciplinary hearing notice informing him that a disciplinary hearing had been scheduled on or about July 8, 2005. Due to an excessive workload, Taylor's disciplinary hearing was continued until August 10, 2005. At the disciplinary hearing which was held before Hearing Officer Michael German, Taylor admitted that he had in fact flooded his cell. A punishment of the loss of canteen privileges for 15 days was imposed. (C.P. 23).

Taylor appealed the RVR as allowed under MDOC policy, but due to numerous other grievances that he had already filed, the appeal was backlogged. (C.P. at 17). Taylor did not include his initial grievance in the record, but in his reply to the agency's first step response he complains that someone other than Lola Nelson conducted his disciplinary and alleges that that person, Michael German, had not been appointed by the commissioner as required by Miss. Code Ann. § 47-5-99. Taylor gives no evidence to support his vague allegations that Michael German was not properly appointed by the commissioner has a disciplinary hearing officer.

In his reply to the to the agency's second responses he complains that "the specific act of Rule # 11 has not been addressed" and that proof of due process had not been presented. The agency found that all applicable due process requirements were met and all applicable policies and procedures were followed and that Taylor had not offered any new evidence to support is claims.

Taylor has not stated a claim which implicates the due process clause or any other constitutional protection. In ***Sandin v. Conner***, 515 U.S.472, 115 S. Ct. 2293 (1995), the United

States Supreme Court noted that although "states may under certain circumstances create liberty interests which are protected by the due process clause . . . these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the due process clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life". ***Id.*** at 2300. In ***Sandin***, the discipline administered the prisoner was confinement in isolation. Because this discipline fell "within the expected parameters of the sentence imposed by a court of law," ***Id.*** at 2301, and "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest," the court held that neither the due process clause itself nor state law or regulations afforded a protected liberty interest that would entitle the prisoner to the procedural protections set forth by the court in ***Wolf v. McDonnell***, 418 U.S. 539, 41 L. Ed. 2d 935 (1974).

The discipline imposed on Taylor as a result of RVR # 607078 was the loss of canteen privileges for 15 days. Taylor, as a state inmate, does not have a right to access to canteen purchases while incarcerated. Pursuant to ***Sandin***, Taylor's loss of canteen privileges fell within the parameters of the sentence imposed by a court of law and did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest.

Since Taylor has not stated a claim which implicates the due process clause, none of the allegations made by Taylor, even if true, are sufficient to have the RVR expunged from his record. This is especially true in light of the fact that Taylor admitted his guilt at the disciplinary hearing. Accordingly, this issue is without merit.

2. Whether Taylor Stated a Claim upon Which Relief Can Be Granted.

Taylor argues that his petition should not have been dismissed for failure to state a claim unless it appears from the record that Taylor can prove not set of facts to support his claims. Taylor states he raised the following three separate claims in his complaint:

> 1. Whether Taylor's procedural due process right was violated contrary to Miss. Code Ann. §47-5-99 and MDOC policy 18-01-01.

As addressed in the previous issue, the discipline imposed on Taylor was well within the parameters of the sentence imposed by a court of law and did not present the type of atypical, significant deprivation which would entitle him to due process protections.

> 2. Whether Taylor's procedural due process right was violated for being found guilty for non-existence [sic] prison rules contrary o MDOC policy 18-01-01.

Only RVR # 607078 is properly before the court for judicial review as he failed to properly exhaust his administrative remedies as to the other RVRs prior to seeking judicial review. Miss. Code Ann. § 47-5-801, *et seq*. There he was charged with violating Rule # 11 which is entitled "engaging in or encouraging a group demonstration or conduct which interferes with the security or orderly running of a facility." Taylor interfered with the orderly running of the facility by flooding his cell.

That fact that RVR # R6798 is not properly before the court for review notwithstanding, Taylor was charged with violating Rule # 11 on this RVR as well. He interfered with the security of the facility by passing items to another inmate on his tier. Passing items between the cells is prohibited because inmates can exchange contraband or pass information regarding gang activities or other potential security threats.

RVR # 786457 which is also not properly before the court for reviewed involved a violation of prison rule # 19, "refusing to obey the order of a staff member." Taylor was found guilty of this rule after refusing the order to come to the cell bars for DNA collection which is mandated by Miss. Code Ann. § 47-5-183. Per that statute, MDOC is authorized to "secure a biological sample for purposes of DNA identification analysis from every individual convicted of a felony or in its custody...."

Each of these RVRs involved clear violation of prison rules.

3. Whether Taylor was abused by prison staff contrary to MDOC Policy 20-05-01 in violation of the Eighth and Fourteenth Amendments.

Taylor states that when he refused to allow a sample of his DNA to be collected that he as sprayed with mace, placed in restraints, and that his DNA was taken against his will. Per Miss. Code Ann. § 47-5-183, MDOC is authorized to "secure a biological sample for purposes of DNA identification analysis from every individual convicted of a felony or in its custody...." Taylor states that he was sprayed with mace, but admits that it was only after refusing to submit to having a sample of his DNA collected. Taylor failed to include a copy of MDOC Policy 20-05-01 regarding the use of force in the record. His failure to include a copy of such a procedure in the record makes is impossible for the court to conclude that the alleged actions of the officers violated this policy. **See, *Jackson v. Gray***, 945 So.2d 427, 428 (Miss.Ct.App. 2006). Furthermore, this issue is procedurally barred because Taylor failed to exhaust his administrative remedies concerning this issue.

It is well settled that a court's jurisdiction regarding an agency decision is limited to a review of whether the decision was "unsupported by substantial evidence; arbitrary or capricious; beyond the agency's scope or powers; or violative of the constitutional or statutory rights of the aggrieved party." ***Sanders v. Miss. Dep't of Corrections***, 912 So.2d 189, 192 (Miss.Ct.App. 2005) (quoting ***Griffis v. Miss. Dep't of Corrections***, 809 So.2d 779, 782 (Miss.Ct.App.2002)). The only claim that was properly before the trial court was Taylor's appeal of RVR # 607078 to which he admitted guilt. Nonetheless, Taylor presented no evidence that the decisions of the agency regarding any of his RVRs or grievance was "unsupported by substantial evidence; arbitrary or capricious; beyond the agency's scope or powers; or violative of the constitutional or statutory rights of the aggrieved party" and therefore the trial court appropriately dismissed his petition for failure to state a claim upon which relief may be granted.

3. Whether Excessive Force Was Administered by Prison Staff Maliciously and Sadistically to Cause Harm for Refusing to Take a DNA Test.

Taylor argues that on March 22, 3007, excessive force was used against him in violation of his Eighth Amendment rights. Taylor states that after refusing to submit to DNA testing he was sprayed with mace, place in restraints, and refused medical treatment.

Taylor is procedurally barred from proceeding with his claim of excessive force until he exhausts his administrative remedies. Miss. Code Ann. § 47-5-803; see also, ***Putnam v. Epps***, 963 So.2d 1232, 1234 (Miss.App.Ct. 2007). Taylor attached to his petition a copy of an initial request for administrative remedy in which he appeals RVR # 786457 after being found guilty of refusing a staff order to come to his cell bars for DNA collection. In that

same grievance he states that excessive force was used against him in when he was allegedly sprayed with mace, placed in restraints, and refused medical treatment. Taylor offers no proof that he had completed the grievance process and exhausted his administrative remedies at the time he filed his complaint. Accordingly, this issued is procedurally barred.

4. Whether Taylor's Complaint Meets the Standard of Review Pursuant to Miss. Code Ann. § 47- 5-76.

Taylor complains that Judge Hines ordered MDOC to withdraw 20% of the funds in his inmate account each month until the filing fee and costs associated with Taylor's complaint had been paid in full. Taylor argues that he is not a pauper and that he has already paid these fees so the money should not be withdrawn from his inmate account.

Pursuant to Miss. Code Ann. § 47-5-76 if an inmate files a pauper's affidavit in a civil action against an MDOC defendant regarding conditions of his confinement, MDOC is assessed the cost of the action; however the department may automatically withdraw 20% of the funds in the offender's inmate account each month until all fees have been reimbursed.

If Taylor has paid the filing fees and costs in full there would no need to automatically withdraw the funds from his inmate account each month. Funds are only withdrawn if an inmate files his complaint as a pauper. Undoubtedly, the court was unaware that Taylor had not filed a pauper's affidavit as most inmates do, but instead paid the filing fee at the time his complaint was filed. Therefore, this language in the trial court's order was merely surplusage as there was no monies that needed to be reimbursed.

5. Whether Taylor Exhausted RVR #786457, 792576 and 727820.

Taylor argues that he has in fact exhausted his administrative remedies as to RVRs #786457, 792576 and 727820. He states that he filed his requests for administrative remedies on each of the three RVRs and that agency officials did not respond and therefore his administrative remedies should be deemed exhausted because more that 90 days have elapsed. Taylor has cited no authority to support his argument that if the grievance procedure has not been completed within 90 days then an inmate's administrative remedies should automatically be deemed exhausted. An inmate can not fail to comply with the rules of the Administrative Remedy Program and then argue that he may automatically seek judicial review after 90 days regardless of exhaustion.

As to RVR # 727820, Taylor has failed to even include a copy of the RVR in the record, much less any evidence that he filed a timely appeal. Without the RVR before it for review, this court on appeal has no evidence which would allow it to reverse the findings of the trial court or the agency in regards to this RVR. **See**, ***Jackson v. Gray***, 945 So.2d 427, 428 (Miss.Ct.App. 2006).

Taylor's appeal of RVR # 792576 was initially rejected because he failed to include a completed copy of the RVR with his appeal as required by policy. Accordingly, any delay in processing this appeal was a result of Taylor's actions, not the agency. The Administrative Remedy Program can not be expected to properly review an appeal of an RVR without the RVR itself. ***Id.***

Lastly, as to RVR # 786457 Taylor has offered no evidence that he made every effort to exhaust his administrative remedies prior to seeking judicial review. The record before the court shows that Taylor files so many grievances with the Administrative Remedy Program that they were backlogged for long periods of time. The Administrative Remedy Program will process only on grievance at a time. He did not complete the grievance process on RVR # 607078 until November 20, 2007 and upon final disposition of that appeal the Administrative Remedy Program would begin reviewing his next grievance. If Taylor wanted RVR #786457 heard sooner he could have withdrawn some of his earlier grievances, otherwise he would have to wait until all of his previously filed grievances were disposed of. If this was not the policy, an inmate could file an unlimited number of grievances which would prevent the agency for promptly hearing the grievances of other inmates. By processing only one grievance at a time, the agency insures that every inmate has timely access to the Administrative Remedy Program. If the court held that an inmate may seek judicial review of an adverse agency decision without exhausting his administrative remedies simply because 90 days has elapsed from the date it was filed it would be rewarding inmates like Taylor that file numerous grievances and the program would become irrelevant.

Even though the trial court did not specifically dismiss Taylor's claims regarding these three RVRs for failure to exhaust his administrative remedies, it is a jurisdictional issue which may the asserted at anytime. Accordingly, the state defendants would assert that all of Taylor's claims regarding RVRs #786457, 792576 and 727820 are procedurally barred for failure to exhaust his administrative remedies. Miss. Code Ann. § 47-5-803.

6. Whether Taylor Was Denied Due Process at His July 9, 2008 Hearing.

Taylor alleges that Judge Hines violated his due process rights by failing to give him prior notice of the hearing regarding his petition. He states that he was given notice of the hearing only 20 minutes before it began and that he was then ordered to pay an additional $96.00. Taylor alleges that the failure to give him notice of a hearing at which he was ordered to pay an additional $96.00 towards the costs of his appeal violated his due process rights.

The Order dismissing Taylor's complaint was filed on February 28, 2008. He filed his Notice of Appeal and Designation of the Record on March 25, 2008. A review of the docket sheet indicates that after a deficiency notice was issued by the Supreme Court Clerk, Taylor paid the $100.00 filing fee, but there is no indication on the docket sheet that he paid the full cost of the record on appeal at that time. (C.P. at 1).

The docket sheet shows that Taylor was transported to the Sunflower County Circuit Court on July 9, 2008 for a hearing, but since a final judgment had been entered in the case some five months earlier clearly it was not for a hearing on the merits, but a hearing to determine whether or not the deposit for the Record and/or Transcript on Appeal should be increased. At the hearing Taylor was ordered to deposit the amount of $96.00 within 14 days of the date of the order in compliance with Rule 11(b)(2) of the Mississippi Rules of Appellate Procedure.

Rule 11(b)(1) states that "[w]ithin seven (7) days of filing a notice of appeal, the appellant shall estimate the cost of preparation of the record on appeal ... and shall deposit that sum with the clerk of the court whose judgment or order has been appealed." Rule 11(b)(2) goes on to state as follows,

> If dissatisfied with the amount tendered, either the clerk of the trial court or the court reporter may apply for an increase to the trial court which, after reasonable advance notice and opportunity to be heard having been afforded all parties, and for good cause sown, may order the amount of the deposit increased. The party taking the appeal shall comply with any such order within 14 days of the date of entry. The deposit and any such order shall be provisional, subject to adjustment after the transcript has been completed and its actual cost ascertained.

It is clear from the record that after filing his notice of appeal and paying the Supreme Court filing fee, Taylor did not deposit suffice funds to cover the full cost of preparing the record on appeal. As there was no hearing on the merits in this case the costs associated with the record on appeal involved only the costs of preparing, binding, certifying, and mailing the clerk's papers. The costs were undoubtedly at least $96.00 more that Taylor deposited with the clerk. The clerk's bill and certificate attached as the last page of the Record show that the total cost was $296.00 which included the $100.00 filing fee, $180.00 for the transcript of the clerk's papers, $15.00 postage and binding, and $1.00 for two certificates under seal.

Taylor's argument that his due process rights were somehow violated because he did not receive sufficient notice of the hearing regarding and increase in to his deposit is without merit. He was not required to pay more than the actual cost of the record on appeal and

therefore he suffered no damages. Taylor's appeal to this court could not proceed without the record and the record could not be filed until all costs were paid. Accordingly, this issue is without merit.

7. Whether Taylor Is Being Afforded Due Process and an Effective Appellate Review by the Denial of the July 9, 2008 Hearing Transcript to Support Claim Before the Court.

Taylor alleges that his due process rights were violated when he was denied a copy of the transcript from the July 9, 2008 hearing before the trial court. The July 9, 2008 hearing appears, after review of the docket sheet, to be merely a hearing regarding an increase to the deposit Taylor submitted for the costs of preparing the record on appeal. The hearing did not involve the merits of his case and has no bearing on this appeal. Taylor does not contend that he was required to pay more that the actual costs of the appeal; and therefore, this issue should be dismissed as without merit.

CONCLUSION

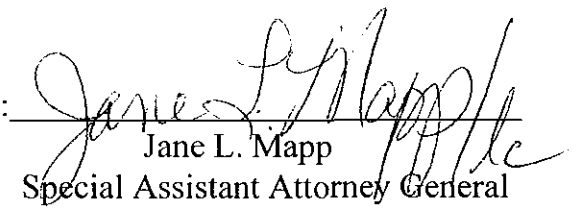
Based on the arguments of fact and law herein above, the dismissal of Appellant's complaint by the lower court was appropriate and should be affirmed.

Respectfully submitted,

Lola Nelson
Respondent/Appellee

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

JAMES M. "JIM" NORRIS
ATTORNEY SENIOR, MDOC
MS BAR NO. 3882

BY: 

Jane L. Mapp
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I, Jane L. Mapp, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing **Brief of Appellee** in the above-styled and numbered cause to the following:

Charlie Taylor, #R6798
CMCF
P.O. Box 88550
Pearl, MS 39288

Hon. Ashley Hines
Circuit Court Judge
P.O. Box 1315
Greenville, MS 38702-1315

This, the 23rd day of January, 2009.

Jane L. Mapp
Special Assistant Attorney General

510 George Street, Suite 212
Jackson, MS 39202
Telephone: (601) 359-5770