

FRED J. BOWEN,	)	
	)	
Plaintiff/Appellant,	)	
	)	Davidson Chancery
	)	No. 95-928-III
VS.	)	
	)	Appeal No.
	)	01-A-01-9602-CH-00063
TENNESSEE DEPARTMENT OF	)	
CORRECTION,	)	
	)	
Defendant/Appellee.	)	

<p><b>FILED</b></p> <p><b>June 19, 1996</b></p> <p><b>Cecil W. Crowson</b> Appellate Court Clerk</p>
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IN THE COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY  
AT NASHVILLE, TENNESSEE

HONORABLE ROBERT S. BRANDT, CHANCELLOR

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AFFIRMED AND REMANDED

HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:  
SAMUEL L. LEWIS, JUDGE  
BEN H. CANTRELL, JUDGE

FRED J. BOWEN,	)	
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OPINION

The plaintiff, Fred J. Bowen, has appealed from a summary judgment dismissing his “Petition for Declaratory Judgment Pursuant to the Administrative Procedure Act.”

The petition alleges:

FACTS OF THE CASE

On December 12, 1994, plaintiff filed for a declaratory order against Tennessee Department of Correction requesting sentence reduction credits be appropriately awarded, calculated, and posted to reflect his true eligibility date for sentence expiration. (Exhibit “A”)

About January 2, 1995, plaintiff received copy of certified mail receipt showing Tennessee Department of Correction received plaintiff’s request for declaratory order on December 15, 1994. (Exhibit “B”)

As of present date (March 20, 1995) plaintiff has not received response from Tennessee Department of Correction. (Exhibit “C”)

ARGUMENT

According to the Administrative Procedure Act, Tennessee Department of Correction is acting illegally by denying plaintiff an administrative hearing for declaratory order in accordance with the provisions of “Conduct of Contested Cases” hearings pursuant to the Administrative Procedure Act § 4-5-301.

According to the Administrative Procedure Act, Tennessee Department of Correction is operating illegally by adopting rules that are not in compliance with the provisions of Chapter Five (5), governing Administrative Procedure Act, which does not require plaintiff’s petition for declaratory order for a contested hearing to be set within sixty (60) days after receipt of plaintiff’s petition, and therefore, enforce “improperly adopted rules” pursuant to Tennessee Code Annotated § 4-5-216.

Plaintiff contends that Tennessee Department of Correction is illegally extending his incarceration approximately twenty (20) years by refusing to correctly award, calculate, and post sentence credits pursuant to the Sentence Reform Act that was in effect on August 9, 1972, the date Tennessee Governor Winfield Dunn commuted plaintiff's sentence from death to ninety-nine (99) years. (See Exhibit "A")

The petition prays:

1. That this Honorable Court grants plaintiff's petition;
2. That this Honorable Court issue forth an Order to Tennessee Department of Correction ordering it to immediately comply with Tennessee Sentencing Reform Act in effect during August 9, 1972 (Exhibit "A") and enter plaintiff's correct sentence expiration date; . . . .

The defendant moved for summary judgment, supported by affidavit of the Manager, Sentence Information Services, of Defendant/Department stating the following:

The sentence computation for this offender has been reviewed at the request of the State Attorney General's office.

Mr. Bowen was convicted in Sullivan County July 25, 1970. He was sentenced to Death by Electrocutation for Murder 1st Degree in Case #5183BL. The Death sentence was commuted to 99 years by Governor Winfield Dunn, August 9, 1972. The Tennessee Supreme Court affirmed the judgment of the Criminal Court as commuted to imprisonment for a term of 99 years.

Effective March 1, 1986, Mr. Bowen elected to waive into the Prisoner Sentence Reduction Credit Law, from the Prisoner Performance Sentence Credit Law. The waiving from PPSC to PSRC allowed him the opportunity to earn an extra day each month as long as he remained on minimum security and disciplinary free. Effective August 10, 1994, Mr. Bowen elected to rescind the signing of the credit waiver and opted to return to the original sentence credit law. When this happened, all credits earned under the credit system from March 1, 1986, to August 10, 1994, were converted to the old law (PPSC). The total number of sentence reduction credits earned to date is 1,939 days.

The current probationary parole date is June 14, 1996; the expiration date is June 8, 2015. These dates correctly reflect the number of credits earned by this offender.

No evidence was filed by petitioner in contradiction of the quoted affidavit.

As stated, the Trial Court summarily dismissed the petition.

On appeal, plaintiff presents a single issue as follows:

Did the Trial Judge err in granting summary judgment in favor of defendant based on support [of] affidavit which appeared to have correctly calculated Mr. Bowen's sentence reduction credits when genuine issue of material fact clearly existed?

As stated, plaintiff filed no evidence in contradiction of the affidavit submitted by defendant. The quoted issue presents the simple question of whether a genuine issue of fact is presented by the record.

Plaintiff's brief cites no evidence in the record to create an issue, and none has been found by this Court. Allegations and argument do not supply evidence.

When the moving party has made a properly supported motion for summary judgment, the burden of producing evidence shifts to the non-moving party to produce evidence which would establish a factual dispute. *Braswell v. Caruthers*, Tenn. App. 1993, 863 S.W.2d 722.

In the present case, the failure of plaintiff to properly respond with evidence left the facts undisputed and justified the entry of summary judgment.

The appeal is determined to be frivolous. On remand, the Trial Court will hear evidence and render an appropriate judgment for damages for frivolous appeal. Costs of this appeal are taxed against the plaintiff. The cause is remanded to the Trial Court for further proceedings.

Affirmed and Remanded.

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HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

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SAMUEL L. LEWIS, JUDGE

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BEN H. CANTRELL, JUDGE