

WILLIE J. WASHINGTON,)
)
 Plaintiff/Appellant,)
)
 VS.)
)
 TENNESSEE DEPARTMENT OF)
 CORRECTION, DONAL CAMPBELL,)
 COMMISSIONER, CENTRAL RECORDS,)
 ET AL,)
)
 Defendants/Appellees.)

Davidson Chancery
No. 95-1716-II
Appeal No.
01-A-01-9603-CH-00131

FILED

June 19, 1996

Cecil W. Crowson
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

HONORABLE ELLEN HOBBS LYLE, CHANCELLOR

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MODIFIED, AFFIRMED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

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

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Defendants/Appellees.)	

OPINION

The plaintiff, Willie J. Washington, has appealed from a summary judgment of the Trial Court dismissing his suit for a declaratory judgment that:

That this Honorable Court issue a Declaratory Order to replace all his PPSC time toward his original sentence as imposed toward his original expiration date of November 30, 2008 when incarcerated and the proper amount of credits applied, and his immediate discharge forms enacted to an expired sentence by law to avoid civil liability and punitive damages for false imprisonment by the defendants.

Plaintiff prays the defendants accordingly to laws of this State will provide all sentence reduction credits not applied and under laws which prevail and mandatorily invoke such to be applied by laws of this State applied.

The complaint asserts that the officials of the Department of Correction has erroneously computed the time of his incarceration, and that a correct computation would result in his immediate release.

On August 21, 1995, the defendants moved for summary judgment supported by affidavit that the computation of the projected time of plaintiff's incarceration was correctly computed to extend to the year 2027 subject to future entitlement to Prisoner Sentence Reduction Credits.

No evidence was filed by plaintiff; and, on October 30, 1995, the Trial Court entered a “Memorandum and Order” setting out undisputed dispositive facts and the law applicable thereto and granting summary judgment in favor of all defendants. The judgment contains the following provision:

. . . Because the petitioner filed his oath as a pauper, the Court determines that only state litigation tax is assessed against the petitioner.

On appeal, plaintiff presents the following issues:

- I. Did the Chancery Court err in dismissing the application for a declaratory order without allowing pro se petitioner a hearing?
- II. Was the Chancery Court correct in denying petitioner the relief he requested, “earned sentence credits,” to which he is entitled as a matter of law?

TRCP Rule 56 provides for summary judgments. Rule 56.05 provides in pertinent part as follows:

Form of Affidavits - Further Testimony - Defense Required. - . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
. . .

Once a moving party has made a properly supported motion for summary judgment, the burden of production of evidence shifts to the non-moving party to produce evidence which will produce a genuine issue as to a material fact. *Braswell v. Carothers*, Tenn. App. 1983, 863 S.W.2d 722.

Unsworn allegations of fact in pleading or brief do not create an issue as to facts shown by sworn evidence.

For lack of a demonstrated issue as to a material fact, and under the law applicable thereto, the defendants are entitled to summary dismissal.

The quoted provision of the judgment relieving plaintiff of costs is not consonant with TCA § 20-12-133 which provides:

Judgment against pauper. - On failure, for any reason, to prosecute the action or suit with effect, judgment or decree shall be given against such poor persons, and execution awarded, as in other cases.

The judgment of the Trial Court is modified to render judgment against plaintiff for costs for which execution may issue. As modified, the judgment is affirmed. Pursuant to TCA § 27-1-122, this appeal is hereby declared to be a frivolous appeal. Upon remand the Trial Court will hear evidence and fix the amount of damages. Just damages. Costs of this appeal are assessed against the plaintiff.

Modified, Affirmed and Remanded.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE

BEN H. CANTRELL, JUDGE