

IN THE SUPREME COURT OF IOWA

NO. 16-1171

Union County No. PCCV017906

KEVIN KEL FRANKLIN, JR.,

Applicant - Appellant,

vs.

STATE OF IOWA,

Respondent - Appellee.

**APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WARREN COUNTY**

Honorable John D. Lloyd, Presiding

APPELLANT'S FINAL REPLY BRIEF

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CERTIFICATE OF FILING AND SERVICE

I, Jill Moomey, do hereby certify that on March 22, 2017, I electronically filed this document with the Clerk of the Supreme Court using the EDMS system which will send notification to the Attorney General of Iowa. I further certify that I will mail a copy of this document to the Appellant via U.S. mail this date.

/s/ Jill Moomey
Jill Moomey

TABLE OF CONTENTS

CERTIFICATE OF FILING AND SERVICE. ii
TABLE OF AUTHORITIES. iv
REPLY. 1
CONCLUSION. 2
ATTORNEY’S COST CERTIFICATE. 6
CERTIFICATE OF COMPLIANCE. 7

TABLE OF AUTHORITIES

AUTHORITIES

CASES **PAGE(S)**

Fassett v. State, No. 15-0816, 2016 WL 3554954 (Iowa Ct. App. June 29, 2016)..... 1-5

Pettit v. Iowa Department of Corrections, No. 16-0582, 2017 WL 728124 (Iowa Fed. 24, 2017)..... 1, 3-5

STATUTES AND RULES

Iowa Code § 822.2(e)..... 3, 4-5

Iowa Code § 822.2(f)..... 4

Iowa Code § 822.2(1)(e). 6

OTHER

REPLY

The State asserts this appeal should be transferred to the Iowa Court of Appeals because that Court held “the timing of inmates’ participation in sex offender treatment are agency actions that must be challenged under chapter 17A.” Appellee Brief p. 4 (citing *Fassett v. State*, No. 15-0816, 2016 WL 3554954 at *6-7 (Iowa Ct. App. June 29, 2016)). Later, the State asserts that “[T]he recent decision of the Iowa Supreme Court in *Pettit v. Iowa Department of Corrections*, No. 16-0582, 2017 WL 728124 (Iowa Feb. 24, 2017) does not affect the holding of *Fassett*.” Appellee Brief p. 10.

Unfortunately, the lack of clarity in distinguishing which issues must be challenged under Chapter 17A and which must be challenged under Chapter 822 leaves an inmate in the position of a dog forever forced to chase its tail.

In *Fassett*, the Court of Appeals found “the only issue preserved for appellate review is whether the district court erred in finding it lacked authority to grant the relief requested by Fassett’s application under chapter 822.” *Fassett* at *1. The Court specifically noted the arguments actually presented in the district court:

Fassett argued he should not be required to complete the SOTP because he had already discharged his sentence for his sole sex-offense conviction. His court-appointed counsel characterized the situation as an “ongoing thing” and argued the statute of limitations therefore did not apply. **Fassett asked the district court to enter an order stating he had discharged his sentence for the third-degree sexual abuse charge and should not be required to take SOTP before being eligible for parole on the sixty-six year sentences.**

...

The State responded by arguing the district court didn't have the authority to order the department of corrections to release Fassett or to order a sentence is discharged. The State further argued the department of corrections and the Iowa Board of Parole have authority to determine what requirements an inmate must meet in order to be eligible for release on parole and at what point during an inmate's prison sentence a required program will be offered.

Fassett at *2 (emphasis added). The district court ruled on the record, stating: “I’m going to dismiss it on the grounds that on the face of it, it’s not something that I have jurisdiction over or anything I can make an order about.” *Fassett* at *2.

Although Fassett did not argue that he was currently being denied the opportunity to take SOTP or that he should now be permitted to take SOTP, the Court apparently decided to re-characterize Fassett’s claim and re-frame the issue, even though the re-framed issue was not raised in the district court.

... Fassett is actually complaining of the appropriateness of the decision by the department of corrections and the board of parole to delay his participation in the SOTP given the policy requirement he participate in the program before becoming eligible for parole.

Fassett at *5. Considering only the issue it contrived, the Court determined “section 822.2(1)(e) does not apply to [Fassett] and he cannot avail himself of postconviction review.” *Fassett* at *6. The Court then noted that “without any administrative process to review, we are left with a record devoid of evidence.” *Fassett* at *7. Again, going far beyond the issue actually raised in the district court, the Court concluded:

We hold decisions regarding the timing of inmates' participation in the SOTP is an agency action falling within discretion of the department of corrections and board of parole, and conclude chapter 17A is therefore the appropriate vehicle for Fassett's complaint regarding the fact he has not yet been allowed to participate.

Fassett at *7.

The decision in *Fassett* is merely dictum as it pertains to Iowa Code § 822.2(e) and cannot justify transfer of this case to the Iowa Court of Appeals or provide any authority on the merits.

In *Pettit*,

[A]n inmate filed a judicial review petition under Iowa Code

chapter 17A (2015) seeking court review of a sex offender treatment program (SOTP) classification hearing. The Iowa Department of Corrections (IDOC) moved to dismiss the petition claiming judicial review was unavailable under chapter 17A.

Pettit v. Iowa Dep't of Corr., No. 16-0582, 2017 WL 728124, at *1 (Iowa Feb. 24, 2017). Summarizing its decision, the Iowa Supreme Court stated:

We find that SOTP classification is part of the disciplinary procedure because it would lead to a loss of the accrual of earned time if the inmate does not comply. In light of our conclusion that the SOTP classification is part of the disciplinary procedure, it is not a contested case subject to chapter 17A. We further find a SOTP classification hearing is not other agency action. Accordingly, an inmate must file a postconviction-relief action under section 822.2(f) to obtain review by the courts of a SOTP classification.

Therefore, the court had no authority to hear the judicial review petition filed by Pettit and the district court erred in overruling IDOC's motion to dismiss. Consequently, we vacate the judgment of the district court and remand the case back to the district court to enter an order dismissing Pettit's petition for judicial review.

Pettit at *6.

So, we have a Catch-22. *Pettit* holds SOTP *classification* is part of the disciplinary procedure and may only be contested in a postconviction action pursuant to Iowa Code § 822.2(f), while *Fassett* holds the *timing* of SOTP may not be contested in a postconviction

action pursuant to Iowa Code § 822.2(e).

But, as noted by the State, *Pettit* recognized “[s]ection 822.2(e) may also apply because Pettit had undergone a specific program at Newton that he objected to and was claiming he was “unlawfully held in . . . other restraint.” Appellee Brief p. 11 (citing *Pettit* at *9-10 fn. 4).

The State provides no explanation as to why SOTP *classification* may be contested in a postconviction action, but SOTP *timing* may not. The State offers no explanation as to why participation in a specific program may constitute unlawful restraint, but delaying participation in a specific program does not. The State is unable to provide such explanations, because any attempt to do so defies logic.

If SOTP classification is part of the disciplinary process (as the Iowa Supreme Court has determined), then the timing of SOTP must also be part of the disciplinary process. If participation in SOTP over objection can subject an inmate to unlawful restraint, then delay in allowing participation in SOTP can also subject an inmate to unlawful restraint. The failure to provide SOTP when an inmate is ready, willing and able to participate is in effect nothing more than a disciplinary action that results in the prolonged and unlawful restraint of an inmate.

CONCLUSION

The Applicant has stated a claim that is cognizable under Iowa Code § 822.2(1)(e). For the reasons set forth above and in Appellant's Brief, this case should be remanded to the district court for an evidentiary hearing on the Applicant's claim.

Respectfully submitted,

/s/ Unes J. Booth

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ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Appellant's Final Reply Brief was \$2.20 for copy expense, and that amount has been paid in full by the Booth Law Firm.

/s/ Unes J. Booth
Unes J. Booth, Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P.6.903(1)(g)(1) because this brief contains 1,159 words, excluding the parts of the brief exempted by Iowa R. App. P.6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P.6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X6 in 14 point Georgia.

/s/ Unes J. Booth
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