

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Gennerro Grosso,
Appellant

v.

: No. 1991 C.D. 2008
: Submitted: January 9, 2009

Jeffrey A. Beard, Secretary of PA,
DOC, Louis S. Folino, Supt. of
SCI-Greene, Lt. R. Workman,
Security of SCI-Greene

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: January 28, 2009

Richard Gennerro Grosso (Grosso) appeals *pro se* from an order of the Court of Common Pleas of Greene County (trial court) granting the Department of Correction's (Department) motion to dismiss his complaint. We affirm for the reasons stated below.

Grosso is incarcerated at the State Correctional Institution at Greene. On December 15, 2005, he filed an action in replevin in this Court's original jurisdiction to recover personal property or damages for their value from prison personnel because he believed employees or officers of the Department had lost, stolen or destroyed his personal property. The Department and some of its

personnel¹ were named as defendants. The matter was transferred to the Court of Common Pleas of Greene County by order dated December 19, 2005. Grosso subsequently filed a petition with the trial court requesting *in forma pauperis* status which was granted on July 18, 2006. The Department filed preliminary objections in the nature of a demurrer which were overruled, and the Department then filed an answer to Grosso's complaint.

On December 26, 2007, the Department filed a motion for dismissal of Grosso's complaint arguing that Grosso had on more than three occasions filed prison conditions litigation which were dismissed pursuant to 42 Pa. C.S. §6602(f)(1), also known as the Prison Litigation Reform Act.² Grosso filed a responsive pleading conceding that he had previously lost three or more actions in state and federal court but argued that his complaint could not be dismissed once his *in forma pauperis* status had been granted pursuant to Pa. R.C.P. 240(j). By trial court order dated April 9, 2008, the Department's motion for dismissal was granted based on 42 Pa. C.S. §6602(f)(1) and Grosso's complaint was dismissed. This appeal by Grosso followed.³

¹ Also named as defendants were Department of Corrections Secretary Jeffrey A. Beard, SCI-Greene Superintendent Louis S. Folino, and Lieutenant R. Workman.

² The Department also filed a motion to stay proceedings pending disposition of its motion for dismissal. The motion to stay the proceeding was granted, and Grosso was ordered to respond to the motion to dismiss.

³ Our scope of review of the trial court's order denying *in forma pauperis* status is limited to determining whether the trial court abused its discretion or committed an error of law. *Thomas v. Holtz*, 707 A.2d 569 (Pa. Cmlwth. 1998).

Grosso again contends⁴ that once the trial court granted him *in forma pauperis* status on July 18, 2006, his complaint could not be dismissed pursuant to Pa. R.C.P. No. 240(j).⁵ This precise issue was raised and determined in *Corliss v. Varner*, 934 A.2d 748 (Pa. Cmwlth. 2007). In that case, the prisoner, Corliss, had filed a complaint alleging that prison personnel had negligently placed him in a cell with a cellmate who assaulted him. He applied to proceed *in forma pauperis* which was granted. The Department filed a petition to dismiss his complaint and *in forma pauperis* status because he had four previous civil actions that had been dismissed for failing to state a claim or were frivolous. The trial court dismissed his action pursuant to 42 Pa. C.S. §6602(f) and Corliss appealed.

On appeal, we cited *Grosso v. Love*, 667 A.2d 43 (Pa. Cmwlth. 1995), which disallowed the dismissal of a prisoner's complaint as frivolous under Pa. R.C.P. No. 240(j) explaining that such an event could only occur *before* the grant of *in forma pauperis* status. Pa. R.C.P. No. 240(j) provides:

⁴ Grosso argues that the dismissal of his case was not because it was frivolous as the Department contends and as required by 42 Pa. C.S. §6602((f)(1) because the Department never moved to dismiss it for that reason. However, our review of the record indicates that the Department clearly raised that in its motion and that was its sole reason for the dismissal. Additionally, Grosso also contends that the Department repeatedly responded in an untimely manner to his pleadings which he alerted the trial court to in his pleadings, but the trial court never addressed the Department's infractions in its orders or opinions. However, because this issue was not raised in his Concise Matters Complained of on Appeal to this Court, it is waived. *See* Pa. R.A.P. 302.

⁵ Without any specificity, Grosso also argues that the trial court violated his civil rights under Art. 5, §10(c) of the Pennsylvania Constitution and his rights under the 14th Amendment to the United States Constitution. However, because *Payne v. Department of Corrections*, 582 Pa. 375, 871 A.2d 795 (2005), held that dismissal of *in forma pauperis* status based on abusive litigation is not unconstitutional, and all challenges based on Art. 5, §10(c) fail, as do those based on the U.S. Constitution, this argument is without merit.

If, simultaneous with the commencement of an action or proceeding or the taking of an appeal, a party has filed a petition for leave to proceed in forma pauperis, the court prior to acting upon the petition may dismiss the action, proceeding or appeal if the allegation of poverty is untrue or if it is satisfied that the action, proceeding or appeal is frivolous. (Emphasis added.)

We then explained that the trial court had acted properly by dismissing Corliss' action under 42 Pa. C.S. §6602(f) which provides that the courts shall dismiss prison conditions litigation at any time if the court determines:

(f) Abusive litigation.-If the prisoner has previously filed prison conditions litigation and:

(1) three or more of these prior civil actions have been dismissed pursuant to subsection (e)(2) [the prison conditions litigation is frivolous or malicious or fails to state a claim upon which relief may be granted].

Because Corliss had filed more than three civil actions that were determined to be frivolous, we affirmed the trial court.

Similarly, in this case, Pa. R.C.P. No. 240(j) does not apply because Grosso did not file his action and request for *in forma pauperis* status before the trial court granted him that status. The trial court dismissed the complaint under 42 Pa. C.S. §6602(f)(1) stating that Grosso had at least two civil proceedings previously dismissed in its court for failure to state a claim for which relief could be granted: *Grosso v. Blaine*, A.D. No. 33 of 200 and *Grosso v. Stickman*, A.D. No. 1011 of 2003, *affd*, 1621 WDA 2004. Further, the Department had presented evidence with its motion to dismiss indicating that Grosso had filed prison

conditions litigation on three occasion that were each dismissed pursuant to 42 Pa. C.S. §6602(f)(1): *Grosso v. Shea*, CV-94-1772 (M.D. Pa.); *Grosso v. Mason*, CV-95-1355 (M.D. Pa.); and *Grosso v. Tressler*, CV-96-1194 (M.D. Pa.). Because Grosso conceded that he filed these three actions, the evidence supports the trial court's decision that Grosso had previously filed three or more civil actions regarding prison conditions that were determined to be either frivolous or failing to state a claim, and the trial court did not err by granting the Department's motion to dismiss his complaint.

Accordingly, the order of the trial court is affirmed.

DAN PELLEGRINI, JUDGE

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ORDER

AND NOW, this 28th day of January, 2009, the order of the Court of
Common Pleas of Greene County, dated April 9, 2008, is affirmed.

DAN PELLEGRINI, JUDGE