

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000323-MR

WILLIAM MORGAN

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 00-CI-00136

KENTUCKY DEPARTMENT OF
CORRECTIONS

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: Appellant William Morgan now appeals from the Lyon Circuit Court's denial of his motion for reconsideration of his petition for declaratory judgment and permanent injunction. We affirm.

In 1991, Appellant was incarcerated in the Eastern Kentucky Correctional Complex. That same year, Appellant was transferred to the Todd County Jail, and Appellee Kentucky Department of Corrections released Appellant into the custody of the Todd County Sheriff. Appellant escaped from the Todd County

Jail soon after his arrival, but was recaptured by the Todd County Sheriff.

Appellant was later convicted and sentenced to an additional ten years in prison for his escape attempt. He was sent to the state penitentiary, where Appellee imposed its own punishment on Appellant: revocation of two years worth of non-restorable statutory ~~A~~good time~~@~~earned by Appellant during his original incarceration.

Appellant decided to contest the forfeiture of his good time, filing a habeas corpus action before this court, which was dismissed on procedural grounds. Then, Appellant filed an RCr 11.42 motion in the Todd Circuit Court, which was denied and later affirmed by this court. Discretionary review was also denied by the Kentucky Supreme Court. Appellant also asked the warden of the state penitentiary to review the disciplinary report filed against him. His request was summarily denied. Finally, some nine years after the Appellee handed down its disciplinary sentence, Appellant pursued a declaratory judgment in the Todd Circuit Court, which was dismissed. This appeal follows.

Appellant argues that Appellee did not have the authority or the jurisdiction to impose a disciplinary sentence against him because at the time of his escape he was not in the Appellee's custody. Appellee believes, however, that Appellant's action is time-barred by a one-year statute of limitations. We

agree that the issue is time-barred, but the statute of limitations issue deserves discussion.

Appellant claims there is no statute of limitations on a declaratory judgment action, citing this court's decision in Washington v Commonwealth, No. 1998-CA-000650-MR. However, the Supreme Court accepted discretionary review of that case and subsequently dismissed it on other grounds, meanwhile ordering that this court's decision be depublished. Therefore, we will not consider the Washington case as precedent.

Appellee argues that while the declaratory judgment act, KRS¹ 418.040, does not set out a standard statute of limitations for all declaratory judgments, we are to look at the underlying theory of law to determine what statute of limitations to apply. Appellee claims that the law underlying Appellant's arguments is analogous to federal constitutional claims made under 42 U.S.C. 1983. Those types of claims are subject to state personal injury statutes of limitations, and in Kentucky, such legal action is barred after one year by KRS 413.140(1)(a). Brown v. Wigginton, 981 F.2d 913 (6th Cir. 1992), Board of Trustees of University of Kentucky v. Hayse, Ky., 782 S.W.2d 609, 613 (1989).

However, there is also a compelling argument to be made for the application of KRS 413.120(2) in this situation. That

¹Kentucky Revised Statutes.

law provides a five-year statute of limitations for A[a]n action upon liability created by statute, when no other time is fixed by statute creating the liability.@ Here, said statutory liability is imposed pursuant to KRS 196.030(1)(a) and 197.020(1) which mandate the policies and procedures followed by Appellee.

Which of these two statutes of limitations applies in declaratory judgment actions is an ongoing debate that will not be decided by this court in the case sub judice, however. The facts in this particular case establish that the disciplinary hearing in which Appellant's punishment was decided was held in 1991. This action was not filed until August of 2000, some nine years later. Clearly, both one-year and five-year statutes of limitations had passed before the action was filed, and so we agree with the trial court that Appellant's action is now time-barred.

Appellant argues that each time he sought review of his penalty his cause of action began anew, pursuant to Leonard v. Corrections Cabinet, Ky. App., 828 S.W.2d 668 (1992). We find this case to be distinguishable. In Leonard, the Appellant applied for a job but was told by his superiors on three separate occasions that he would not be considered for it because of a previous felony conviction. This court wrote that each time he was denied an opportunity to be considered for the job was a separate and distinct act, and thus the statute of limitations began to run after each act.

In this case, however, Appellant was not penalized on several separate occasions. He was penalized once, in a single hearing, and he unsuccessfully sought review of that penalty several times. These attempts do not represent distinct acts upon which a new limitations period would begin.

An action for injuries to a person accrues at the time such injury occurs. Clark v. Hauck Manufacturing, Ky., 910 S.W.2d 247 (1995). As such, we agree the limitations period began to run at the time of Appellant's injury, or the hearing in 1991. Appellant's claim, no matter what the proper statute of limitations, is now time-barred.

Based on the foregoing, we affirm the order of the Lyon Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

William Morgan, Pro Se
Central City, Kentucky

Rebecca Baylous
Frankfort, Kentucky