

RENDERED: OCTOBER 27, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000310-MR

RONALD LEE DAILEY

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 05-CI-00077

JOHN MOTLEY, WARDEN, EASTERN
KENTUCKY CORRECTIONAL COMPLEX

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY, JUDGE; PAISLEY,¹ SENIOR
JUDGE.

PAISLEY, SENIOR JUDGE: Ronald Dailey, *pro se*, appeals from the
circuit court's denial of his motion for reconsideration of its
ruling that Dailey's petition for habeas corpus was "factually
frivolous, malicious, or harassing." Because the motion is
barred by the doctrines of *res judicata* and the law of the case,
we affirm.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

In March 2004, Dailey was convicted of first-degree trafficking in a controlled substance and possession of drug paraphernalia. Prior to the sentencing phase, he entered into a plea bargain in which he agreed to plead guilty to persistent felony offender in the first degree in exchange for a total prison term of ten years.

On March 22, 2005, Dailey filed a *pro se* habeas corpus petition in the circuit court alleging that his incarceration on the persistent felony offender conviction was unconstitutional because he was not sentenced to a term of imprisonment on the underlying trafficking charge. Commonwealth v. Hayes, 734 S.W.2d 467 (Ky. 1987). With its response to the petition, the Commonwealth filed a copy of the judgment of conviction which, in direct contradiction of Dailey's assertion, set forth that he was sentenced as follows:

[T]en (10) years for Trafficking in a Controlled Substance in the First Degree (Cocaine); and twelve months for Illegal Possession of Drug Paraphernalia, to run concurrently for a total of TEN (10) YEARS UNDER Indictment No. 02CR1283; This ten year sentence is enhanced to TEN (10) YEARS by the PFO I conviction. . . .

Finding that the basis for Dailey's petition was clearly refuted by the record, the circuit court denied the relief sought. It further found that Dailey's petition was "factually frivolous, malicious, or harassing" because he

falsely alleged that the judgment did not impose a sentence for the underlying felony offense.

Undaunted by the circuit court's ruling, Dailey appealed to this court. In Dailey v. Motley, Case No. 2005-CA-002076, this court held that the issues raised could have been raised in either a direct appeal or in a collateral attack on the conviction. Dailey did not file a motion for discretionary review; he did, however, subsequently file a motion in the circuit court requesting that it reconsider its ruling that the petition for habeas corpus was "factually frivolous, malicious or harassing." The circuit court denied the motion and Dailey filed this appeal.

Because the circuit court had found Dailey's petition to be "factually frivolous, malicious, or harassing", pursuant to KRS 197.045(5)(a), he lost six months good time credit. This is, no doubt, the reason for his persistent pursuit of judicial relief. Reconciled with the denial of his habeas corpus petition, he now seeks to escape the consequences of filing the petition.

KRS 197.045(5)(a) provides that:

The Department of Corrections shall, by administrative regulation, specify the length of forfeiture of good time and the ability to earn good time in the future for those inmates who have civil actions dismissed because the court found the action

to be malicious, harassing, or factually frivolous.

The statute is a deterrent to the filing of vexatious lawsuits by inmates and, under limited circumstances, permits the Department of Corrections to impose penalties.

Notably, KRS 197.045(5)(a) has not been cited in a published case in this Commonwealth; in his reply brief, however, Dailey includes a 2000 agreed judgment entered in Hopkins v. Parker, Civil Action No. 4:98CV-184-M, United States District Court, Western District of Kentucky.² The pre-2000 version of the statute contained additional language to the effect that good time credit could be lost if the court was satisfied that the action was "legally without merit," which the parties, including the Kentucky Department of Corrections, agreed was unconstitutional. It was further agreed, however, that the remainder of the statute, including "factually frivolous, malicious, or harassing" as a basis for the loss of good time credit, was constitutional. Consistent with the agreed order, the statute was amended in 2000 and the "legally without merit" language was omitted. In this case, the basis for the circuit court's finding was based on Dailey's factual misrepresentations, a finding well within the current scope of the statute.

² An agreed judgment is not legal precedent. We discuss it only in the context that it is relevant to our discussion of the history of KRS 197.045(5)(a).

Dailey pleads that not only is the loss of good time credit an injustice to him but also a burden on the taxpayers who must pay for his extended incarceration. Because we affirm on other grounds, we do not reach the substance of Dailey's contentions.

The courts do not hold *pro se* litigants to the same standard as attorneys and some leniency is given toward compliance with procedural requirements. Commonwealth v. Miller, 416 S.W.2d 358 (Ky. 1967). However, there are procedural and substantive rules so embedded in our jurisprudence that even under the standard of leniency, they cannot be bent.

One such rule is that litigation cannot be endlessly pursued. As a result, the intertwined but distinct doctrines of res judicata, collateral estoppel and the law of the case have evolved. Res judicata precludes a litigant from litigating a fact or matter distinctly put in issue and directly determined by a court of competent jurisdiction. Barnett v. Commonwealth, 348 S.W.2d 834 (Ky. 1961). Collateral estoppel is a part of the concept of res judicata and prevents the relitigation of issues determined in a prior action. Gregory v. Commonwealth, 610 S.W.2d 598 (Ky. 1980). The law of the case doctrine precludes a litigant from relitigating any issue raised and decided in a

prior appeal. Williamson v. Commonwealth, 767 S.W.2d 323 (Ky. 1989).

Dailey's appeal from the circuit court's order denying his motion to reconsider an order that had been previously affirmed by this court brings into play all three of the above mentioned doctrines. The circuit court had previously found that the Appellant's petition for habeas corpus was "factually frivolous, malicious, or harassing," and such finding had been upheld by this court. Under the rules developed for the purpose of preventing perpetual litigation such as that pursued by Dailey, the circuit court properly denied the motion to reconsider its prior order.

The order of the Morgan Circuit Court is affirmed.

ALL CONCUR.

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