

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002996-MR

SHERILL HARSTON

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 97-CI-01569

KENTUCKY STATE PAROLE BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, EMBERTON AND GUIDUGLI, JUDGES

EMBERTON, JUDGE This is an appeal from an order of the Franklin Circuit Court dismissing Sherill Harston's petition for a writ of mandamus seeking, inter alia, an order declaring that he is immediately eligible for parole consideration. We affirm.

In December 1978 Harston was convicted of various offenses and sentenced to 124 years imprisonment. Harston first appeared before the parole board in January 1985. At the conclusion of the hearing the parole board deferred Harston for

eight years. In 1993 Harston was again before the board and received a deferment of six years. In August 1997 Harston filed for reconsideration of the deferment. The board denied the request.

In October 1997 Harston filed a petition for a writ of mandamus. Harston maintained that he is entitled to an immediate parole consideration because of alleged ex post facto violations. More specifically he argued that his eight-year 1985 deferment was impermissible because, at the time of his conviction, the maximum deferment under the applicable Kentucky Parole Board regulations was six years. Harston also alleged that pursuant to the reconsideration rules in effect in 1993 he should be eligible for reconsideration every 30 months; however, Harston does not raise this issue on appeal and we accordingly do not address it. Prior to the appellee's answer, the trial court, sua sponte dismissed the petition and fined Harston \$20.00 pursuant to KRS 454.405, holding that the petition was legally without merit. This appeal followed.

The trial court, citing Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L. Ed. 254 (1985), held that the claims surrounding the 1985 deferment were barred by the statute of limitations.¹ Since this action was not filed pursuant to 42

¹ Wilson, supra, established that the statute of limitations for 42 U.S.C. §. 1983 claims is governed by the forum state's personal injury statute of limitations. While the appellant's petition was styled as a writ of mandamus, the trial court, apparently, treated his filing as a § 1983 claim. While never specifically approved, trial courts have

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U.S.C. § 1983, the one-year statute of limitations under Wilson may not apply. Nevertheless, we agree with the trial court that appellant's claim is time barred. There is a five-year statute of limitations applicable to an action for an injury to the rights of a plaintiff, not arising on contract, and not otherwise enumerated in KRS Chapter 413. KRS 413.120(6). Thus, at best, appellant was entitled to a five-year period in which to commence his action from the time his cause of action accrued.

Any cause of action relating to the Board's 1985 deferment accrued in 1985. A cause of action accrues when a party "knows or has reason to know of the injury that is the basis of his cause of action." Sevier v. Turner, 742 F.2d 262, 273 (6th Cir 1984). The "exercise of reasonable diligence" toward the discovery of such an injury is required on behalf of individuals who wish to use it as the basis for a cause of action. Id. In evaluating an individual case, courts "look to the event that should have alerted the typical lay person to protect his or her rights." Kuhle Bros., Inc. v. County of Geauga, 103 F.3d 516, 520 (6th Cir. 1997). (quoting Dixon v. Anderson, 928 F.2d 212, 215 (6th Cir. 1991)).

(...continued)

treated complaints against the parole board as an action under 42 U.S.C. § 1983. See eg. Belcher v. Parole Bd., Ky. App., 917 S.W.2d 584 (1996). Under Kentucky law, the applicable statute of limitations for a § 1983 claim is governed by KRS 413.140(1)(a). Collard v. Kentucky Board of Nursing, 896 F.2d 179, 182 (6th Cir. 1990). The statute establishes a one year statute of limitations for § 1983 claims.

Harston's 1985 eight-year deferral is an event which should have alerted the typical lay person of reasonable diligence to make necessary inquiries to learn the status of his rights. Hence, Harston's cause of action arose in 1985, and his 1997 petition relating to the 1985 deferment was time barred.

The judgment of the trial court is affirmed.

ALL CONCUR

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