

RENDERED: January 15, 1999; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-001662-MR

CLIFFORD E. SMITH, JR.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 94-CI-001145

WILLIAM BARRETT and  
OTHER APPELLEES AS NAMED IN  
THE NOTICE OF APPEAL

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: GUIDUGLI, HUDDLESTON, AND KNOX, JUDGES.

KNOX, JUDGE: Appellant, Clifford E. Smith, Jr. (Smith), pro se, appeals a final order of the Franklin Circuit Court dismissing his complaint for lack of prosecution. Having reviewed the record and applicable law, we affirm the circuit court's order of dismissal.

Sometime during 1992, Smith filed a copious 275 page complaint in U.S. District Court seeking monetary damages from numerous participants in prior judicial proceedings, alleging, inter alia, violation of his constitutional rights and various statutory rights under state laws. The United States District Court dismissed Smith's case with prejudice, concluding that any

cause of action Smith may have lies in state court. Smith appealed and the Sixth Circuit Court of Appeals affirmed in an unpublished opinion on May 20, 1994.

On July 27, 1994, Smith filed the identical complaint in the Franklin Circuit Court, and further moved that the case be held in abeyance. This request, as explained to the court, was in order to preserve his cause of action in that he proclaimed a petition for writ of certiorari, to the United States Supreme Court, would be filed in his federal action on or before August 19, 1994. Based upon this representation, the circuit court granted Smith's motion and ordered that the defendants would not be required to file any responsive pleading or motions until at least twenty (20) days from the high Court's final action on the writ.

Commencing in February 1996, the various parties either moved the circuit court to dismiss the action for lack of prosecution or renewed an earlier motion for same. By order dated March 21, 1996, the court directed Smith to, inter alia, identify the date his petition for writ of certiorari was denied by the United States Supreme Court. That same day, Smith responded stating the ultimate date of denial was January 9, 1995. Based upon this representation, the circuit court opined that Smith had "failed to prosecute the matter in a reasonable time since no action was taken by [Smith] from the time of the dismissal of his writ to the United States Supreme Court until such time as a motion to dismiss was renoticed more than one year later," and, by final order dated July 30, 1996, dismissed the

entire action as authorized by CR 41.02.<sup>1</sup> On August 9, 1996, Smith filed a motion to alter, amend or vacate the July 30 order of dismissal. This motion was eventually denied on June 5, 1997.<sup>2</sup> This appeal ensued.

As a preliminary matter, we recognize that the parties have amply briefed their respective positions regarding the numerous issues in this matter and the merits, or lack thereof, of their positions. However, following our review of the record, we decline to discuss all arguments raised by way of briefs, in that we believe the circuit court correctly dismissed the case on purely procedural grounds.

One critical issue Smith raised in his appeal addresses the circuit court's reliance on January 9, 1995, as the date upon which the United States Supreme Court denied his writ of certiorari. Smith asserts he erroneously provided this date to the court in his response to the March 21, 1996, order. He argues the accurate date of denial as June 9, 1996, and therefore, he has not delayed in the prosecution of this action. We disagree.

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<sup>1</sup> The court's order addressed additional issues underlying this matter, including but not limited to judicial immunity and Smith's motion to amend his complaint, all of which were dismissed or denied in the order of July 30, 1996. Given the scope of this appeal and the legal grounds for affirming the circuit court's order, discussion of these corollary issues is unnecessary.

<sup>2</sup> For reasons that will be discussed, infra, this motion languished for nearly one (1) year, during which time Smith filed an abundance of discovery requests upon the respective defendants. It was only at such time that certain defendants filed objections to Smith's requests that the court ruled on the August 9, 1996, motion.

In Smith's motion to abate the state court action he assured the court the period of abatement would be no longer than that required for the United States Supreme Court to rule upon his petition for writ of certiorari, which would be filed "on or before August 19, 1994." The court order, entered August 16, 1994, recited that specific explanation and date as its reasoning for granting the request. In fact, Smith never properly filed a petition for writ of certiorari with the clerk of the United States Supreme Court. Rather, it was not until January 9, 1995, that Smith, albeit unsuccessfully, made the first attempt to file such a petition. CR 41.02(1) provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him." (Emphasis added).

A letter, of March 31, 1998, from the office of the United States Supreme Court Clerk, regarding the matter of Clifford E. Smith, Jr. v. William Barrett, et al, reveals:

Dear Mr. Smith:

This will confirm our conversation of this date regarding your petition for a certiorari originally submitted to this office in January of 1995. As a corrected petition was not received in this office within 60 days of the April 10, 1996 letter, or by June 9, 1996, the petition cannot be filed. Rule 14.5.<sup>3</sup>

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<sup>3</sup> Smith has rendered much discussion as January 9, 1995, operating as the date upon which the writ of certiorari was denied in either this or another unrelated case pursued by him in federal court. However, in view of the fact that no petition was ever acceptably filed with the United States Supreme Court Clerk in this case, the actual case/date debate is rendered completely irrelevant.

In other words, some two (2) years after having requested relief from the circuit court based upon the representation that a petition for writ of certiorari would be filed no later than August 19, 1994, Smith informs this Court the final action of the United States Supreme Court should be identified as June 9, 1996, the date Smith was notified that he was precluded from filing any such petition for failure to comply with that Court's requirement of perfecting same. We are not persuaded by this position.

In our opinion, Smith's conduct warranted dismissal under CR 41.02(1) for two reasons. First, Smith's actions amounted to failure to comply with an order of the court in that, not only did he delay in timely filing the petition as he had represented, but, moreover, he failed to ever produce a perfected petition meriting consideration. Additionally, Smith never communicated with the court the status of his federal action. Second, the result of this dalliance constituted a failure to prosecute in a reasonable time. As such, even though the circuit court was misguided by Smith that January 9, 1995, operated as the date the United States Supreme Court actually denied the writ of certiorari, it is our opinion the trial court, giving due consideration to the circumstances of the case before it, was well within the realm of CR 41.02(1) justifying dismissal. Furthermore, in light of the actual facts, we believe the order of dismissal would operate as an exercise of sound judicial discretion. Jenkins v. City of Lexington, Ky., 528 S.W.2d 729 (1975).

As an additional note, we have observed that Smith's

motion to vacate, alter or amend the July 30, 1996, order lacked both the notice of a hearing date and order of submission as required by the Franklin County local rules.<sup>4</sup> It has been said "that a motion without a notice is no motion at all." Carnahan v. Yocom, Ky., 526 S.W.2d 301, 304 (1975). As such, it is questionable as to whether this Court is vested with jurisdiction to consider the present appeal, in that the filing of a notice of appeal "within the prescribed time frame is still considered mandatory, and failure to do so is fatal to the action." Workers' Compensation Bd. v. Siler, Ky., 840 S.W.2d 812, 813 (1992) (citing CR 73.03(2); City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990); Rainwater v. Jasper & Jasper Mobile Homes, Inc., Ky. App., 810 S.W.2d 63 (1991)).

For the reasons stated herein, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:  
Clifford E. Smith, Jr., Pro Se  
Lexington, Kentucky

BRIEF FOR WILLIAM BARRETT,  
IRIS REED BARRETT, and OHIO  
FARMERS INSURANCE COMPANY:  
Richard M. Guarnieri  
Frankfort, Kentucky

BRIEF FOR PAUL FAURI:  
Robert T. Watson

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<sup>4</sup> Franklin County local rule 9 provides: "All motions except those not requiring a hearing must be noticed for a specific hearing date. Notices are not to be filed stating that they will be heard at the convenience of the court." Likewise, local rule 22 states: "No case shall be submitted for final judgment by the Court without an Order of Submission signed by the Judge and filed with the Clerk. This Order must be separate and apart from any previous Order . . . [and] is to be completed by the parties and delivered to the Clerk. The Clerk shall then deliver the record to be submitted to the Judge of the respective division."

Louisville, Kentucky

BRIEF FOR DR. JOHN A. GERGEN:

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