

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002882-MR

DALE L. OWENS

APPELLANT

V. APPEAL FROM MORGAN CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, JUDGE  
ACTION NO. 97-CI-157

LINDA FRANK; and KENTUCKY  
STATE PAROLE BOARD

APPELLEES

### OPINION AFFIRMING

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BEFORE: GUDGEL, Chief Judge; COMBS and GARDNER, Judges.

GUDGEL, CHIEF JUDGE: This is a pro se appeal from an order entered by the Morgan Circuit Court dismissing appellant's action on the ground that it was barred by the applicable statute of limitations. For the reasons stated hereafter, we affirm.

Appellant was convicted of rape and burglary charges, and was sentenced in March 1977 to serve 105 years in prison. The state parole board reviewed appellant's case twenty years later. As stated in its letter of March 3, 1995, the board determined that appellant "must serve the remainder of [his] sentence."

Thirty months later, in September 1997, appellant filed this pro se action in the circuit court, seeking a declaration of rights, writ of mandamus, and injunctive relief. Appellant alleged that his constitutional rights were violated by the application of certain amended administrative regulations. However, the circuit court dismissed the action as barred by the applicable statute of limitations. This appeal followed.

The parties do not dispute that this action is governed by KRS 413.140(1)(a), which requires an action to be commenced "within one (1) year after the cause of action accrued." Instead, their dispute concerns the date on which the one-year limitations period began to run.

As noted above, parole was initially denied in March 1995. At that time, 501 KAR 1:030, Section 5(4) prohibited any request to reconsider a decision denying parole until thirty months from the board's "most recent action on the inmate." That wording was eliminated in May 1995, however, and was replaced with language requiring any request for review of a parole denial to be received by the parole board within twenty-one days after that "final disposition is made available to the inmate."

Appellant asserts that his constitutional rights were violated by the retroactive application of the May 1995 amended regulation, and that his September 1997 request for reconsideration of the denial of parole should have been governed by the version of the regulation which was in effect in March 1995, rather than by the regulation's amended version. Further,

he asserts that the one-year limitations period did not begin to run until the September 1997 expiration of the thirty-month period provided in the earlier version of the regulation, and that the trial court therefore erred by finding that this action was not timely when it was filed in September 1997. We disagree.

Although we have found no Kentucky cases which directly address the retroactive application of the amended regulation, a similar issue was addressed in Smith v. City of Glasgow, 809 F.Supp. 514 (W.D.Ky. 1992). There, the plaintiff's cause of action accrued in April 1989, at which time Kentucky law provided that his imprisonment tolled the running of the applicable one-year statute of limitations. However, the tolling statute was repealed in July 1990, and the plaintiff's action was filed in April 1991. The federal district court examined Kentucky precedents and concluded that after the repeal of a statute which tolls a limitations period, a plaintiff must be provided reasonable time in which to bring a claim. The court further concluded that in the circumstances before it, the one-year limitations period began to run on the effective date of the statute's repeal. Hence, the plaintiff's action was deemed timely since it was filed within nine months of the statute's repeal.

Applying the same approach to the instant proceeding, it is clear that appellant's action was not timely filed. The record shows that Section 5(4) of the regulation was amended two months after the initial denial of parole, but that appellant did

not file this action until more than two years after that amendment occurred. Consistent with the views expressed in Smith, supra, we conclude that appellant's claim was not brought within a reasonable time of the amended regulation's effective date, and that it therefore was not timely. Hence, the trial court did not err by dismissing appellant's claim as being barred by the one-year statute of limitations.

Given our conclusions to this point, we need not address the merits of appellant's remaining contentions.

The court's order is affirmed.

GARDNER, J., CONCURS.

COMBS, J., DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: Almost exactly thirty months after the denial of his parole by the state parole board, appellant filed his *pro se* action for a declaration of rights in circuit court. His action was wholly consistent with 501 KAR 1:030, § 5(4), which was the regulation in effect at the time of his denial. That regulation allowed no latitude as to time for filing for reconsideration and instead strictly prohibited his request for thirty months following the March 1995 action of the parole board.

The appellant did not tarry more than a year after the running of the 30-month period to file; under the statute in effect at the time of the denial of his parole, he was both timely and in compliance with the rigid dictates of the pertinent

regulation. Now his filing is being measured pursuant to the change in the regulation of May 1995, and he is essentially being penalized for complying with the regulation in effect at the time of his action. The result in this case is patently unfair.

I believe that the retroactive application of the new regulation, coupled with a one-year statute of limitations, is an unconstitutional denial of due process as applied to the unique circumstances of his case and that his claim should not have been dismissed as having been untimely filed. Consequently, I would vacate and remand for a hearing on the merits.

BRIEF FOR APPELLANT:

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West Liberty, KY

BRIEF FOR APPELLEES:

Keith Hardison  
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