

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

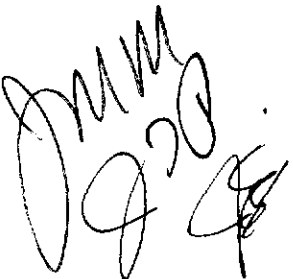
2012 CA 1473

DENNIS W. HOLMES

VERSUS

LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

Judgment Rendered: MAR 28 2013



APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 606,148

THE HONORABLE TIMOTHY E. KELLEY, JUDGE

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Pettigrew, J. concurs

McDonald, J.

Appellant, Dennis W. Holmes, appeals the dismissal by the district court of his claim for review of an Administrative Law Judge decision. For the following reasons, we affirm.

Holmes was convicted of the crime of sexual penetration of a minor in New Mexico in October 1988. He was sentenced to a term of eighteen years, followed by a two-year parole term. New Mexico law requires registration of sexual offenders; however, when Holmes was released from prison he moved to Louisiana without registering.

Louisiana law has specific statutes regarding the registration of sexual offenders, including out-of-state offenders who relocate to Louisiana. La. R.S. 15:540, et seq. The matters are handled by the Louisiana Bureau of Criminal Identification and Information through the State Sex Offender and Child Predator Registry. La. R.S. 15:542.1.5. It is undisputed that on April 26, 2010, and March 10, 2011, Holmes was sent notice of the requirement that he register as a sexual offender under Louisiana law. The notice further explained the classification system as applied to Holmes and advised that he was determined to be a tier III sex offender. The registration process required him to renew his registration in person every three months for the rest of his life.

Holmes submitted a written request for an administrative hearing of his classification. On August 10, 2011, a hearing on Holmes' tier classification was held and a "Decision and Order" was issued and served on Holmes' counsel of record on September 12, 2011.¹ The Administrative Law Judge (ALJ) found that Holmes was convicted by a jury of the felony crime of Criminal Sexual Penetration of a Minor. Holmes admitted that he digitally penetrated the minor's vagina, but

¹ Hearings are heard in accordance with the Louisiana Administrative Procedure Act, La. R.S. 49:950, et seq.

denied the use of force. The minor was the daughter of his live-in girl friend. The ALJ reviewed the information on the New Mexico case and determined the comparable Louisiana law to be Sexual Battery of a Person Under the Age of Thirteen. La. R.S. 14:43.1(C)(2). Pursuant to La. R.S. 15:541, La. R.S. 14.43(C)(2) is an aggravated offense.

On October 11, 2011, Holmes filed a "Petition for Appeal" with the Division of Administrative Law (DOAL). The petition was treated as a request for rehearing, as the (DOAL) has no jurisdiction to grant or deny an appeal. An order denying the rehearing request as untimely² was mailed to Holmes' counsel of record on October 19, 2011.

Also on October 19, 2011, Holmes filed a request for judicial review in the Nineteenth Judicial District. In response to the petition for judicial review, the Department of Public Safety and Corrections filed an exception raising the objection of no cause of action. The hearing on the peremptory exception was held on April 2, 2012, with the court rendering judgment sustaining the peremptory exception based on preemption. Judgment was signed April 11, 2012. A subsequent judgment was signed by the district court on October 11, 2012, in order for the district court to grant the peremptory exception using the required decretal language to dismiss Holmes' claim. Holmes appeals that judgment, which is the subject of the appeal before this court.

Persons adversely affected by decisions in an adjudicatory proceeding have the right to judicial review. See La. R.S. 49:964(A)(1). At the time of Holmes' classification as a tier III sex offender, the procedure for filing a judicial review of an administrative decision, set forth in La. R.S. 49:964(B) provided as follows:

Proceedings for review may be instituted by filing a petition in the district court of the parish in which the agency is located within thirty

² Louisiana R.S. 49:959 requires requests for rehearing to be filed within ten days of the entry of the decision.

days after mailing of notice of the final decision by the agency or, if a rehearing is requested, within thirty days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record.³

As noted, Holmes' petition was filed in district court on October 19, 2011, more than thirty days after the decision he sought to appeal. DPSC, relying on the Supreme Court decision in *Naghi v. Brenner*, 2008-2527, p. 6 (La. 6/26/09), 17 So.3d 919, 923, argued that a period is peremptive when a statute creates a right of action and stipulates the delay within which the right of action may be executed. Once the delay expires, the cause of action no longer exists. Therefore, DPSC's answer to the petition was to file an exception of no cause of action.

Holmes argued that because there is a presumption of judicial review, in equity, his appeal should have been sent to the district court. However, the district court noted that matters are routinely dismissed for failing to do something within the appropriate time delays. It would be unfair to litigants who were dismissed because they were untimely to allow Holmes' untimely filing with the district court to be accepted because it had been timely filed with the DOAL, who had no jurisdiction to hear an appeal.

The court, upon considering the pre-trial memoranda, argument of counsel, law, and evidence, ordered that the peremptory exception based on preemption be granted in favor of DPSC, and against Holmes, dismissing his petition for review of ALJ's decision with prejudice. Finding no error, the decision is affirmed.⁴ Costs are assessed against appellant, Dennis W. Holmes.

AFFIRMED. MOTION TO SUPPLEMENT DENIED.

³ La. R.S. 49:964 was amended by La. Acts 2012, No. 289, § 1, eff. May 25, 2012, changing the word "mailing" to "transmittal."

⁴ Along with the appeal, Holmes filed a motion to supplement the record which was referred to this panel on December 14, 2012. Because the record already contains the exhibits he requested in his motion, we deny the motion as moot.