RENDERED: November 21, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0458-MR

ANTHONY BEAN — APPELLANT

V.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 97-CI-0015

WALTER CHAPLEAU — APPELLEE

OPINION

AFFIRMING

* * * * * * * * * * *

BEFORE: WILHOIT[1], CHIEF JUDGE; EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Anthony Bean, acting pro se, appeals an order of the Oldham Circuit Court entered February 10, 1997, dismissing his petition for declaratory judgment brought pursuant to KRS 418.040 for failure to bring the action within the statute of limitations period. We affirm.

Bean is an inmate at the Eastern Kentucky Correctional Complex (EKCC) in West Liberty, Kentucky. On December 5, 1995, Bean was found guilty by the prison Adjustment Committee of conspiring with a female staff member to smuggle marijuana into the prison. The Adjustment Committee's decision was based in part on confidential information not disclosed to Bean. The Adjustment Committee imposed penalties of ninety (90) days

[1] Chief Judge Wilhoit concurred in this opinion prior to his retirement effective November 15, 1997. Release of the opinion was delayed by normal administrative handling.

disciplinary segregation and ninety (90) days forfeiture of good time. Upon appeal, the prison warden, Walter Chapleau, concurred with the Adjustment Committee's decision. On January 15, 1997, Bean filed his petition for declaratory judgment alleging the disciplinary proceeding violated due process. On February 7, 1997, Chapleau filed a motion to dismiss based on KRS 413.140(1)(a), which provides a one-year statute of limitations for injury to a person. On February 10, 1997, the circuit court dismissed the petition as being time-barred under KRS 413.140(1)(a). This appeal followed.

The initial issue concerns the appropriate statute of limitations. Bean claims the procedure used by the Adjustment Committee violated his federal constitutional right to due process under the 14th Amendment. In Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), the United States Supreme Court stated that in order to achieve uniformity in handling federal claims under 42 U.S.C. § 1983, such claims should be treated as personal injury actions for purposes of applying the appropriate state statute of limitations. In Board of Trustees of University of Kentucky v. Hayse, Ky., 782 S.W.2d 609, 613 (1990), the Kentucky Supreme Court relied on Wilson in holding that KRS 413.140(1)(a) applies to claims under the federal constitution and § 1983. See also Collard v. Kentucky Board of Nursing, 896 F.2d 179 (6th Cir. 1990)(stating KRS 413.140(1)(a) applied to due process procedural challenge to administrative proceeding).

Although Bean's complaint was filed pursuant to the state declaratory judgment statute, KRS 418.040, rather than 42 U.S.C. § 1983, we believe KRS 413.140(1)(a) applies to this action. Challenges to procedural aspects of prison disciplinary proceedings may be cognizable under § 1983. See Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994); Sheldon v. Hundley, 83 F.3d 231 (8th Cir. 1996). In fact, in Brown v. Wigginton, 981 F.2d 913 (6th Cir. 1992), the Sixth Circuit Court of Appeals held that KRS 413.140(1)(a) applied to a § 1983 action by a Kentucky prison inmate against prison officials. A petition for a declaratory judgment pursuant to KRS 418.040 has become the procedural vehicle for prison inmates challenging prison disciplinary proceedings. See Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 355 (1997); Graham v. O'Dea, Ky. App., 876 S.W.2d 621 (1994). Thus, the circuit court properly held that KRS 413.140(1)(a) applied to Bean's petition.

The second issue involves whether the circuit court erred in holding that Bean's action was time-barred. An action for injuries to a person generally accrues at the time of the injury. See generally Clark v. Hauck Mfg. Co., Ky., 910 S.W.2d 247 (1995)(action for loss of consortium accrued at time of injury); Rigazio v. Archdiocese of Louisville, Ky. App., 853 S.W.2d 295 (1993)(action for sexual abuse accrued at time of acts of abuse). In Gartrell v. Gaylor, 981 F.2d 254 (5th Cir. 1993), involving a prisoner's suit alleging violations of procedural due

process, the court held that the action for injury accrued at the time of the disciplinary hearing, and not after the administrative appeal was denied. The court rejected Gartrell's argument that his claim did not accrue until the final administrative appeal was denied because he did not know whether the "injuries" he had to suffer - a loss of good time and solitary confinement - would remain in effect. The court stated, "The alleged 'injury' is not the punishment imposed, but the failure of prison officials to abide by established disciplinary or grievance procedures. (Citations omitted.) The injury occurs, if at all, when the procedures are disregarded or abused." Id. at 257. Therefore, Bean's cause of action accrued on December 5, 1995, when the Adjustment Committee hearing occurred, rather than on December 19, 1995, when the prison warden denied the administrative appeal.

Bean acknowledges that his petition, officially filed on January 15, 1997, fell outside the one-year statutory period. Bean argues, however, that the action should not have been dismissed for two reasons. First, he contends that he attempted to file the action on two occasions as early as October 1996, but his complaint was returned for technical errors in the pleading. Bean apparently is arguing that the January 1997 filing should relate back to the date of the attempted earlier filings. The record does not reveal the dates of any alleged attempted earlier filings or the defects in the documents. We note that Bean has not cited any case law, statute or procedural rule to support his

position. Nevertheless, an action does not "commence" until the filing of a complaint and the issuing of a summons. See KRS 413.250; CR 3; Transportation Cabinet, Dept. of Highways v. City of Campbellsville, Ky. App., 740 S.W.2d 162 (1987). Moreover, an action must be timely commenced within the limitations period. See Halderman v. Sanderson Forklifts Co., Ky. App., 818 S.W.2d 270, 272 (1991); Simpson v. Antrobus, 260 Ky. 641, 86 S.W.2d 544 (1935). As a result, Bean's defective attempted filings were not sufficient to trigger compliance with the statute of limitations.

Bean's second argument for not barring his action based on the statute of limitations involves tolling the limitations period. Bean states that he was unable to pursue his claims during the ninety (90) day period he was placed in disciplinary segregation; therefore, the limitations period should be tolled during that period. KRS 413.109(2) allows tolling of the limitations period for fraudulent activity or an "act or conduct which in point of fact misleads or deceives plaintiff and obstructs or prevents him from instituting his suit while he may do so." Rigazio, 853 S.W.2d at 297 (quoting Adams v. Ison, Ky., 249 S.W.2d 791, 792 (1952)). In addition, KRS 413.260 indicates that the limitations period should not run during a period of lawful restraint. KRS 413.260(1) states: "If the doing of an act necessary to save any right or benefit is restrained or suspended by injunction or other lawful restraint . . . the time covered by the . . . restraint . . . shall not be counted in the application of any statute of limitations." In interpreting this

statute, the court in Fannin v. Lewis, Ky., 254 S.W.2d 479, 481 (1952), indicated that the word "restrained" should not be given a broad meaning because statutes of limitation are intended to provide some peace to society. Consequently, statutes of limitation should not be evaded easily. Id. Once the statute of limitations is raised, the complainant has the burden of proof on the issue of tolling. Southeast Kentucky Baptist Hospital v. Gaylor, Ky., 756 S.W.2d 467, 469 (1988). The mere fact of incarceration is no longer a sufficient impediment to toll the statute of limitations. See Hardin v. Straub, 490 U. S. 541, 544, 109 S. Ct. 1998, 2003, 104 L. Ed. 2d 582 (1989)(state may reasonably decide there is no need to enact tolling statute for prisoners); Bailey v. Faulkner, 765 F.2d 102, 103 (7th Cir. 1985)(statutes extending limitations periods simply because of incarceration are "hopelessly archaic" in an era when prisoners have ready access to courts). In fact, in 1990, Kentucky repealed its general statute tolling the limitations period while a person was incarcerated. See former KRS 413.310; Brown v. Wigginton, 981 F.2d 913 (6th Cir. 1992).

In the case sub judice, Bean simply has not provided sufficient legal or factual support to justify application of tolling in this particular instance. There is no evidence that Bean was totally unable to pursue his action while in segregation, and he has not shown that prison officials acted fraudulently or mislead him. We believe that Bean has failed to

satisfy his burden of establishing that the one-year statute of limitations should be tolled.

In addition, Bean did not raise the issue of tolling before the trial court by way of a response to appellee's motion to dismiss or CR 59.05. This Court will not review an issue which appellant's brief did not identify by citation to the record showing where the issue was preserved for appeal. Elwell v. Stone, Ky. App., 799 S.W.2d 46 (1990); CR 76.12(4)(c)(iv). This issue was raised first in appellant's brief and was not presented to the circuit court. Generally, the Court of Appeals will not review issues not raised in or decided by the trial court. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225 (1989); Kaplon v. Chase, Ky. App., 690 S.W.2d 761 (1985).

For the foregoing reasons, we affirm the order of the Oldham Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Anthony Bean
West Liberty, Kentucky

NO BRIEF FOR APPELLEE