

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-001398-MR

JAMES NICK HARRISON

APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, JUDGE  
ACTION NO. 97-CI-00007

DOUG SAPP; JUDITH MORRIS;  
MICHAEL J. O'DEA;  
BRAD PERKINS; DAVID GILPIN;  
DAVID VANCE; RICHARD FULKS;  
STEVE CONWAY; BARBARA CONLEY;  
J. HAVENS; JUDD McCOWAN, and  
KEITH ELAM

APPELLEES

### OPINION

### VACATING AND REMANDING WITH DIRECTIONS

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BEFORE: BUCKINGHAM, KNOX, AND MILLER, JUDGES.

MILLER, JUDGE: James Nick Harrison (Harrison) brings this pro se appeal from a Morgan Circuit Court order dismissing his civil action for failing to pay a filing fee. We vacate and remand with directions.

On January 15, 1997, Harrison filed a civil action against various corrections officials. In compliance with

Kentucky Revised Statute (KRS) 454.410, Harrison filed a certified account balance statement and an affidavit of indigence stating that his inmate account was frozen by the Sixth Circuit Court of Appeals. On January, 16, the trial court issued an order requiring Harrison to pay a \$5.00 filing fee within 45 days or have the action dismissed. Harrison then filed an affidavit for waiver of fees and costs, due to special circumstances, and a document marked "insufficient funds." On March 3, 1997, Harrison filed a motion requesting a ruling on his motion. Finally, on March 20, 1997, the trial court dismissed Harrison's action for failing to pay the \$5.00 filing fee. This appeal followed.

Harrison first argues that KRS 454.410 violates separation of powers and is overbroad and vague. Both of his arguments are without merit.

According to Harrison, KRS 454.410 violates the separation of powers doctrine because it allows a defendant to become a party to an appeal before it has been served with the complaint. The statute permits courts to dismiss inmate actions if a filing fee is not paid. There is no provision, however, that addresses appellate procedure. It was Harrison himself who identified the parties on his notice of appeal. The separation of powers doctrine deals with the problem of one branch of government encroaching upon the powers of another. This court fails to see how the procedure of including parties, who have not yet been served, would violate the separation of powers doctrine.

Harrison contends that KRS 454.410 is overbroad and vague because it fails to provide the court with sufficient

guidance on the assessment of fees. The cases cited by Harrison concern overbreadth and vagueness of a criminal statute and are not applicable to a statute such as KRS 454.410.

Furthermore, the statute does provide sufficient guidance to the trial court. Initially, an inmate who commences an action must file a certified copy of his prison account statement for the six months preceding commencement of the action. KRS 454.410(1). Next, the court determines the amount of fees and costs due based upon the inmate's ability to pay. KRS 454.410(2). The fees and costs may range from a minimum of \$5.00 up to the full amount otherwise imposed by law. Id.

An inmate may move for a waiver of all court fees and costs by filing an affidavit of "special circumstances" explaining his inability to pay. KRS 454.410(4). If the court denies the motion to waive all fees and costs, it must notify the inmate in writing and give him at least 45 days in which to pay. Id. An inmate's failure to pay the fees and costs, or to have them waived, will result in dismissal of the case. Id.

The discretion given to the trial court is no more than that given courts for determining *in forma pauperis* in other cases. See, e.g., Alexander v. Carson Adult High School, 9 F.3d 1448 (9<sup>th</sup> Cir. 1993) (reviewing application of *in forma pauperis* for abuse of discretion). Thus, KRS 454.410 is not invalid for overbreadth or vagueness.

Harrison's final argument is that the trial court abused its discretion under KRS 454.410 in dismissing his case for failing to pay the filing fee. The record indicates that

Harrison fully complied with the requirements of KRS 454.410 by filing an inmate account statement and an affidavit of special circumstances. If true, Harrison's special circumstance of having his account frozen would seem sufficient to justify waiver of the fee under KRS 454.410(4). It appears, however, that the trial court did not believe Harrison's account was truly frozen and unavailable.

The trial court abused its discretion by dismissing Harrison's case without providing him an opportunity to present evidence in support of his special circumstance. KRS 454.410(3) requires only an affidavit in support of a motion to waive fees and does not address the use of supporting evidence. In the case *sub judice*, the court, according to the March 20 order, refused to waive the fee and dismissed the action because Harrison failed to offer proof, other than the insufficient funds document, that his account was, indeed, frozen. Thus, the first time Harrison was notified that his compliance with KRS 454.410(3) was not sufficient was in the court's order to dismiss.

On remand, the trial court should give Harrison sufficient opportunity to provide evidence in support of his claim that his account is frozen.

For the foregoing reasons, the order of the Morgan Circuit Court dismissing Harrison's civil action is vacated, and this cause is remanded for proceedings consistent with this opinion.

KNOX, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN PART AND DISSENTS IN PART  
BY SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I disagree with the majority opinion to the extent that it holds that the trial court abused its discretion by dismissing Harrison's case without providing him an opportunity to present evidence in support of his special circumstances. In my opinion, the trial court was within its discretion to deny the motion as it was based on a self-serving affidavit which was without documentation to support Harrison's statement that his inmate account had been frozen.

However, it appears to me that the trial court did not follow the statutory procedure set forth in KRS 454.410(4). As I read that statute, the trial court should have notified Harrison that the case would be dismissed if the \$5.00 filing was not paid within forty-five days after the date of the order denying the motion to waive the fee.<sup>1</sup> Instead, the trial court dismissed the action without giving Harrison time to submit the fee. I would reverse the order of the trial court and direct that Harrison be given forty-five days in which to pay the fee or else his complaint would be dismissed.

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<sup>1</sup> The trial court apparently entered an earlier order directing that a \$5.00 filing fee be paid within forty-five days of that order. However, the statute requires that the inmate be given forty-five days from the date of the order denying his motion for waiver of fees in which to pay the fee. This was not done.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES

James Nick Harrison, Pro Se  
Kentucky State Penitentiary  
Eddyville, KY