

RENDERED: July 16, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court Of Appeals**

NO. 1998-CA-000459-MR

LEWIS COX

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
CIVIL ACTION NO. 97-CI-001500

LINDA FRANK
(Chairperson, Kentucky Parole Board)

APPELLEE

NO. 1998-CA-000538-MR

JOHN BRENTON PRESTON and
LEWIS COX

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
CIVIL ACTION NO. 97-CI-001500

LINDA FRANK,
Chairperson, Kentucky
Parole Board, and
MEMBERS, ET AL.

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: GARDNER, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge. John Brenton Preston and Lewis Cox appeal from
a Franklin Circuit Court order which dismissed their Petition for

a Writ of Mandamus and/or Petition for Declaratory Judgment in which they allege violations of their constitutional and statutory rights.

Preston and Cox are inmates confined at the Green River Correctional Complex. In the petition to the circuit court, Preston contended that his rights under the Kentucky Constitution and the United States Constitution were violated at an August 1994 parole revocation hearing. In an amendment to the petition, Preston alleged similar violations at a April 1996 parole hearing at which the Parole Board declined to reinstate him on parole.¹ Cox alleged that his constitutional rights were violated at his parole revocation hearing that commenced in August and ended in October 1995.² The gist of Preston's and Cox's claims is that the Board's procedure for determining parole revocation and eligibility is defective. This action was filed in Franklin Circuit Court on October 8, 1997. The circuit court dismissed the complaint on the basis that the claims asserted therein are barred by the one-year statute of limitations contained in Ky. Rev. Stat. (KRS) 413.140 (1) (a). This appeal followed.

¹ Preston met with the Parole Board on April 8, 1996, and was ordered to serve out a life sentence which was imposed in 1964 for armed robbery. In the interim, Preston had been released on parole six times, and his appearance before the Board in April 1996 was an attempt to obtain a seventh parole release. Not surprisingly, the Board concluded that Preston was a poor parole risk and listed several reasons for revoking his parole status.

² The basis of Cox's parole revocation was a charge of terroristic threatening brought by his spouse. The record does not reveal of what charge he was originally convicted. The Board ordered Cox to serve out his original ten-year sentence.

There is no specific statute of limitations for declaratory judgment actions under KRS Chapter 418. KRS 413.310 was applied to some lawsuits by prisoners, but it was repealed in 1990 by House Bill 318 (Chapter 176, Section 2). In repealing KRS 413.310, the General Assembly also amended KRS 44.110 to cover actions in the Board of Claims by prisoners for monetary damages and imposed a one-year statute of limitations. With the repeal of KRS 413.310, prisoners who file a 42 United States Code (U.S.C.) § 1983 violation of civil rights action are now governed by the one-year limitation contained in KRS 413.140(1)(a) for personal injury actions. Brown v. Wigginton, 981 F.2d 913 (6th Cir. 1992). See also Smith v. City of Glasgow, 809 F.Supp. 514 (W.D.Ky. 1993), and Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).

The Supreme Court has said that KRS 413.140(1)(a) governs claims under 42 U.S.C. § 1983. Board of Trustees of University of Kentucky v. Hayse, Ky., 782 S.W.2d 609, 613 (1989), cert. denied, 497 U.S. 1025, 110 S. Ct. 3273, 111 L. Ed. 2d 783 (1990), and 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 306 (1990). See also Collard v. Kentucky Board of Nursing, 896 F.2d 179 (6th Cir. 1990) (stating that KRS 413.140(1)(a) applies to a due process procedural challenge to administrative proceedings). In McSurely v. Hutchinson, 823 F.2d 1002 (6th Cir. 1987), cert. denied, 485 U.S. 934, 108 S. Ct. 1107, 99 L.Ed. 2d 269 (1988), which involved an allegation that an FBI agent violated plaintiff's civil rights with an unlawful surveillance, the Court found such a violation of rights

is an injury under KRS 413.140(1)(a), thus subject to the one-year statute of limitations.

Because this claim was filed pursuant to KRS 418.040, not 42 U.S.C. § 1983, we are not bound by any of the federal cases cited. We are of the opinion, however, based on an analysis of the federal cases cited above and the holding in Hayse, supra, that a prisoner's claim for violation of constitutional rights in a parole revocation hearing is governed by the one-year limitation imposed by KRS 413.140(1)(a). Preston's and Cox's claims regarding their revocation hearings are time barred because they brought suit on October 8, 1997, more than one year after they allegedly were harmed as a result of the parole board's actions.

Preston insists that KRS 413.270 saves his state claims from dismissal.³ Preston filed a federal lawsuit in July 1996 under 42 U.S.C. § 1983 alleging that his due process rights were violated because, in April 1996, he was not granted parole for the seventh time. KRS 413.270 provides that if an action is commenced in due time and in good faith in any court of this state (including a federal court), and it is adjudged that that court has no jurisdiction of the action, the plaintiff may within 90 days from the time of the judgment commence a new action in the proper court. KRS 413.270 only applies to an action in which it has been adjudged that the court has no jurisdiction of the action.

³ Since Cox was not a party to the federal lawsuit, he does not assert this claim.

In the case before us, the trial court properly noted that the United States Magistrate Judge, who issued the 27 page Report and Recommendation which was adopted by the District Court and which led to the ultimate dismissal of Preston's federal lawsuit with prejudice, recommended dismissal of the suit not because of a lack of jurisdiction, but because the federal claims were either without merit or his complaint failed to state a claim upon which relief could be granted. The federal claims have been adjudicated and thus are not addressable by this Court. Moreover, because Preston did not assert any claims arising from the August 1994 parole revocation hearing in the federal lawsuit, those claims were not "saved" by the timely filing of the federal lawsuit.

The only claim in the federal lawsuit not decided on its merits was the state claim asserted by Preston, that the Board factored in his homosexuality in rejecting his bid for parole in April 1996. Because this claim was not raised in the circuit court, we will not address it on appeal.

Preston and Cox also allege that newly enacted provisions of KRS 453.190, KRS 197.045 and KRS Chapter 454 are unconstitutional. These provisions enable Kentucky judges to dismiss a civil right claim initiated by a prisoner, sua sponte, if it is found to be malicious, harassing, legally without merit or factually frivolous. They also authorize disciplinary action to be taken against prisoners who file frivolous lawsuits, and they require an inmate seeking to commence an action without payment of the full filing fee to supply certain information to the court and pay at

least a partial filing fee. The circuit court dismissed this claim because Preston and Cox made no factual allegation that any of these provisions had been applied against either of them. Rather, Preston and Cox were complaining that Franklin Circuit Court had dismissed an action brought by another prisoner and fined him \$20.00 for his frivolous appeal. The trial court correctly determined that Preston and Cox lack standing to raise constitutional claims premised on an occurrence not applicable to them.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

John Brenton Preston, pro se
Lewis Cox, pro se
Central City, Kentucky

BRIEF FOR APPELLEES:

Keith Hardison
DEPARTMENT OF CORRECTIONS
Frankfort, Kentucky