

RENDERED: February 4, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000246-MR

TRACY SMALLWOOD

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 97-CI-00105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, EMBERTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Tracy Smallwood appeals from the December 8, 1997 order of the Lyon Circuit Court which dismissed his declaratory judgment action as barred by the statute of limitations. Since we agree with the trial court's ruling, we affirm.

The incident giving rise to the disciplinary action against Smallwood occurred on April 8, 1996, when he was accused of assaulting a fellow inmate at the Kentucky State Penitentiary. KSP Warden Phillip Parker placed Smallwood in administrative segregation and filed an extraordinary occurrence report with the

Institutional Adjustment Committee. On May 31, 1996, the committee found Smallwood guilty of the assault and affirmed the warden's assignment of Smallwood to administrative segregation for a period of six months. The committee also required Smallwood to forfeit one year of his accumulated good time.¹

On July 16, 1997, Smallwood filed a petition for writ of habeas corpus, and a supporting affidavit in which he claimed that "[o]n July 30th [1996] the inmate who assaulted inmate Damon Smith came forward and admitted that he was the one who had assaulted inmate Damon Smith." Smith claimed in his petition "that he lost (11) months of [g]ood [t]ime credits" and therefore was being "illegally detained". On August 15, 1997, the trial court ordered that Smallwood's petition for writ of habeas corpus be converted into a petition for declaration of rights because he did not "state sufficient grounds for a Writ of Habeas Corpus insomuch that it does not appear even with the restorable good time he would be eligible for immediate release from custody." The trial court further ruled:

In order to protect [Smallwood] from being barred by the one year statute of limitations, the Court hereby converts this matter to a Declaration of Rights. It appears that certain incidents occurred in July of 1996 which may have given notice to [Smallwood] as to grounds which he may have to state a claim, and therefore, the one year statute of limitations for a Declaration of Rights would not have ran on July the 16th, the date that he filed this habeas.

¹The record reflects that Smallwood had only acquired eleven months of good-time credits at that time.

. . . [Smallwood] shall have forty-five (45) days to file a copy of his inmate account in order to determine what the amount of his filing fee will be. . . . Unless the required copy of the account is filed within forty-five (45) days from the date of this order, this action shall be dismissed.

Smallwood complied with the trial court's order. However, on November 17, 1997, the Commonwealth filed a motion to amend the order of August 15, 1997. The Commonwealth contended that while the trial court was correct in converting the action to a declaratory judgment petition, that since the disciplinary action ended on May 31, 1996, and Smallwood's petition was not filed until July 16, 1997, the declaratory judgment action was barred by the one-year statute of limitations. The trial court agreed and on December 8, 1997, amended its August 15, 1997 order and dismissed Smallwood's claim.

Smallwood's first argument on appeal is that he should be excused from his petition not being timely filed due to Warden Parker "slowing down" his research and preparation of his petition. In his brief, Smallwood claims that Warden Parker denied him access to the law library and did not allow him uninhibited access to inmate legal aide. However, this alleged reason for delay was not brought to the attention of the trial court when Smallwood filed his response to the Commonwealth's motion to amend. Therefore, this issue is not properly preserved for our review.²

²Heucker v. Clifton, Ky., 500 S.W.2d 398, 404 (1973).

We agree with the Commonwealth that Kentucky Revised Statutes (KRS) 413.140(1)(a) must be applied to Smallwood's claim:

(1) The following actions shall be commenced within one (1) year after the cause of action accrued:

(a) An action for an injury to the person of the plaintiff. . . .³

The final adjudication of the assault case occurred on May 31, 1996, and the petition was not filed until July 16, 1997. Clearly, when Smallwood filed his petition, it was after the one-year statute of limitations had expired.

Smallwood further claims that "he could not file no [sic] action until after March due to the fact that he was to go to Court on or about March 1997." Smallwood asserts that the last date to file his petition should have been the date the indictment against him was dismissed; but he fails to cite any legal authority for this position. We fail to see how Smallwood's pursuit of his civil claim on at least a limited basis would have prejudiced him in the pending criminal action. His position of denying any involvement in assaulting a fellow inmate would have been consistent in both the civil action and the criminal action. If Smallwood were concerned about being prejudiced in the criminal proceeding as a result of the civil

³ See also McSurley v. Hutchinson, 823 F.2d 1002, 1005 (6th Cir. 1987), cert. denied, 485 U.S. 934, 108 S.Ct. 1107, 99 L.Ed.2d 269 (1988); and Board of Trustees of the University of Kentucky v. Hayse, Ky., 782 S.W.2d 609, 613 (1990); cert. denied, 497 U.S. 1025, 110 S.Ct. 3273, 111 L.Ed.2d 783 (1990).

proceeding, he could have timely filed the civil proceeding and then asked that the matter be held in abeyance until the criminal proceeding was concluded.

Since the trial court did not err in dismissing Smallwood's declaratory judgment action, the order of the Lyon Circuit Court is affirmed.

ALL CONCUR.

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