

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000035-MR

JOSEPH HARDEN, by and through his next
friend and father, ROGER HARDEN APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 01-CI-02381

KENTUCKY HIGH SCHOOL
ATHLETIC ASSOCIATION APPELLEE

AND NO. 2002-CA-001939-MR

JOSEPH HARDEN, by and through his next
friend and father, ROGER HARDEN APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
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ACTION NO. 01-CI-02381

KENTUCKY HIGH SCHOOL
ATHLETIC ASSOCIATION APPELLEE

OPINION AND ORDER
DISMISSING APPEAL NOS. 2002-CA-000035-MR
AND 2002-CA-001939-MR

BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: Joseph Harden, by and through his next friend and father, Roger Harden (collectively referred to as "Harden"), brings Appeal No. 2002-CA-000035-MR from a December 7, 2001, Opinion and Order and Appeal No. 2002-CA-001939-MR from an August 19, 2002, Amended Order of the Fayette Circuit Court. We dismiss.

Joseph Harden was in the tenth grade and attended Lexington Catholic High School in the fall of 2000. He played basketball that school year while enrolled at Lexington Catholic. On January 16, 2001, Joseph was diagnosed with Attention Deficient Hyperactivity Disorder (ADHD), Inattentive type. Thereafter, on January 25, 2001, Joseph transferred to Henry Clay High School where special education was available for children with ADHD.

On February 28, 2001, the Commissioner of the Kentucky High School Athletics Association (KHSAA) found Joseph ineligible to participate in interscholastic athletics for one year from the date of transfer from Lexington Catholic to Henry Clay, pursuant to KHSAA Bylaw 6, Section 1. Harden appealed the Commissioner's decision to a hearing officer. At a hearing on April 16, 2001, the hearing officer recommended overruling the Commissioner's determination and finding Joseph immediately eligible to participate in interscholastic athletics at Henry

Clay. The matter was then referred to KHSAA's Board of Control, which reversed the recommendation of the hearing officer. On May 25, 2001, the Board of Control concluded that Joseph was ineligible to play for one year from the date of transfer pursuant to the applicable KHSAA Bylaw.

On June 22, 2001, Harden filed a Complaint in the Fayette Circuit Court against the Kentucky State Board for Elementary and Secondary Education and KHSAA. Therein, Harden alleged that the decision of KHSAA Board of Control was arbitrary and capricious and that KHSAA discriminated against Joseph upon the basis of his disability by refusing to provide him reasonable accommodations and by prohibiting him from participating in basketball at Henry Clay. Harden sought a temporary and permanent injunction to enjoin enforcement of the KHSAA Board of Control's order prohibiting him from playing interscholastic basketball at Henry Clay for a period of one year from the date of transfer. Harden also asserted a claim for compensatory and punitive damages, including attorney's fees.

On October 19, 2001, the Fayette Circuit Court entered an Opinion and Order concluding:

The question at issue is whether Joseph Harden's transfer to Henry Clay High School so that he could exercise his right to be schooled under a 504 plan preempts application of the Transfer Rule. To do so,

Harden would have to establish that he had no choice but to go to a school with a 504 program. Given that his IEP indicates that he has good social skills, is intelligent, in excellent physical condition and needs only individual attention with his homework, preferential seating, extra test time if needed, and a special place and time for work at home, the Board's findings that the circumstances creating the ineligibility were within the control of the parties is neither arbitrary nor capricious and is supported by substantial evidence.

The circuit court determined that the Board of Control's decision that Joseph was ineligible to play interscholastic basketball at Henry Clay for a period of one year was supported by substantial evidence of probative value and, therefore, not arbitrary or capricious. There remain additional issues in the Fayette Circuit Court for adjudication that are not before this Court. These issues surround Harden's claim of discrimination under the Kentucky Civil Rights Act (Kentucky Revised Statutes (KRS) Chapter 344)) and claim for damages, including punitive damages, associated therewith. The October 19, 2001, Opinion and Order did not include Ky. R. Civ. P. (CR) 54.02 language.

On December 7, 2001, the circuit court entered an Amended Order which "amended" the October 19, 2001, Opinion and Order to include the following CR 54.02 language: "it is a final and appealable order, there being no just cause for delay."

On December 28, 2001, Harden filed a Notice of Appeal with this Court (Appeal No. 2002-CA-000035-MR). Therein, Harden

specifically stated that the appeal was taken from the December 6, 2001, Opinion and Order. Thereafter, on January 3, 2002, Harden filed an Amended Notice of Appeal which designated the Opinion and Order appealed from as dated December 7, 2001.

On January 30, 2002, KHSAA filed a motion to dismiss Appeal No. 2002-CA-000035-MR. KHSAA argued that the period of Joseph's ineligibility had expired, thus rendering the appeal moot. By order dated February 19, 2002, this Court denied that motion.

On May 24, 2002, Harden filed a motion for relief from judgment under CR 60.02 in the Fayette Circuit Court. Harden requested that the circuit court vacate its October 19, 2001, Opinion and Order. On August 19, 2002, the circuit court entered an Amended Order that denied Harden's motion under CR 60.02.

On September 17, 2002, Harden filed a Notice of Appeal with this Court from the August 19, 2002, Amended Order (Appeal No. 2002-CA-001939-MR). This Court then ordered Appeal Nos. 2002-CA-000035-MR and 2002-CA-001939-MR consolidated by order entered October 30, 2002. Subsequently, KHSAA filed a motion to dismiss Appeal Nos. 2002-CA-000035-MR and 2002-CA-001939-MR. KHSAA again argued that the appeals were moot as the ineligibility period had expired. In support thereof, KHSAA cited to the recent Court of Appeals opinion of Kentucky High

School Athletic Association v. Davis, Ky. App., 77 S.W.3d 596 (2002). By order entered February 7, 2003, this Court denied KHSAA's motion to dismiss.¹

Although we have previously ruled that the instant appeals are not moot, we are compelled to reconsider such rulings as the issues presented in these appeals have now been fully briefed and the complete record is presently before us. Upon consideration of the whole, we are of the opinion that the above appeals should be dismissed as moot.²

As judicial power may constitutionally extend only to justiciable controversies, an appellate court is generally without jurisdiction to reach the merits of a moot appeal. See Kentucky High School Athletics Association v. Runyon, Ky., 920 S.W.2d 525 (1996); Associated Industries of Kentucky v. Commonwealth, Ky., 912 S.W.2d 947 (1995); Black v. Elkhorn Coal Corporation, 233 Ky. 588, 26 S.W.2d 481 (1930); Kentucky High School Athletic Association v. Davis, Ky. App., 77 S.W.3d 596 (2002). This is regarded as the prohibition against advisory opinions. An appeal is recognized as moot "when it is no longer 'live' or when the parties lack a legally cognizable interest in

¹ It should be noted that when motion panels of this Court consider motions during the pendency of an appeal, the record below generally is not before the panel. Accordingly, the panels would not have been aware of the proceedings below that were pending during the appeal.

² Harden asserts that this Court may not reach the issue of mootness because Kentucky High School Athletic Association failed to file a cross-appeal raising such issue. The issue of mootness, however, goes to the jurisdiction of the Court and may be raised *sua sponte*.

the outcome. . . ." 5 Am. Jur. 2d Appellate Review § 640 (1995).

Appeal No. 2002-CA-000035-MR was taken from an October 19, 2001, order of the circuit court affirming the Board of Control's imposition of the ineligibility period. The appeal focuses upon whether there was substantial evidence to support the Board of Control's decision to impose the ineligibility period. Appeal No. 2002-CA-001939-MR was taken from the circuit court's order denying Harden's CR 60.02 motion to vacate the October 19, 2001, order.

It is undisputed that Joseph's period of ineligibility has expired and that Joseph may freely play interscholastic athletics at Henry Clay.³ As was the situation in Davis, 77 S.W.3d 596, we likewise cannot grant relief of any kind as the period of ineligibility has passed. Harden, however, argues that the appeals are not moot:

The finding of ineligibility clearly stigmatizes Appellant, and subjects him to whatever findings are inherent in the decision of the Board of Control with respect to those reasons the Board of Control offered as those it believed actually prompted Joseph Harden's transfer to HCHS as opposed to Appellant's diagnosis of disability and Judge Karem's findings that he had a right to pursue an education commensurate with that diagnosis, a decision outside of his control. Therefore, the determination of eligibility is precisely

³ Presumably, Joseph has now graduated from high school or otherwise did play basketball after the one year ineligibility period expired.

what Appellant Harden, [sic] seeks regardless of whether the time has passed within which he could have played basketball had he been declared eligible pursuant to the original determination by the KHSAA Board of Control.

Harden's Reply Brief at 4. We must reject Harden's argument.

We simply do not believe that a determination of pure eligibility is a legally cognizable interest so as to create a justiciable controversy for a decision upon the merits.

The effect of this Court granting Harden a favorable ruling on the moot eligibility issue would be simply to punish KHSAA or set an example for future eligibility cases. However, every eligibility case is different and must be adjudicated upon the facts presented. Additionally, Harden's discrimination and damage claims are still pending before the circuit court, and he will have a sufficient remedy if he prevails on the merits.⁴

It is hereby ORDERED that Appeal Nos. 2002-CA-000035-MR and 2002-CA-001939-MR are DISMISSED as moot.

VANMETER, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ENTERED: April 30, 2004

/s/ Jeff S. Taylor
JUDGE, COURT OF APPEALS

⁴ The dismissal of these appeals should have no effect on the proceedings below.

JOHNSON, JUDGE, CONCURRING: I concur with the Majority Opinion because this Court is required to follow the Supreme Court precedent of KHSAA v. Runyon.^{5 6} However, I believe Runyon incorrectly decided the question of mootness, and I would follow the reasoning of the Supreme Court in Lexington Herald-Leader Co., Inc. v. Meigs.⁷

In Brown v. Baumer,⁸ the Court noted that one exception to the mootness doctrine is "where the question is of public interest." Certainly, the vast participation in high school athletics demonstrates that the issue of a student athlete's eligibility is a question of public interest. Furthermore, the very nature of the limited duration of a sport's season and an athlete's eligibility causes such disputes to be "'capable of repetition, yet evading review.'"⁹ We need to look no further than Runyon and Kentucky High School Athletic Association v. Davis,¹⁰ as well as this Court's dockets to see that such cases are regularly litigated at the appellate level. For the appellate courts to continue to choose to evade review of these

⁵ Ky., 920 S.W.2d 525 (1996).

⁶ SCR 1.030(8)(a).

⁷ Ky., 660 S.W.2d 658, 661 (1983).

⁸ 301 Ky. 315, 322, 191 S.W.2d 235, 238 (1946)).

⁹ Meigs, *supra* at 661 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982)).

¹⁰ Ky.App., 77 S.W.3d 596 (2002).

cases under a misguided application of the mootness doctrine will only result in inconsistent results from various circuit courts across the state. The KHSAA's procedures have been seriously challenged in numerous cases for lacking basic due process. These important questions should be addressed by our Supreme Court to give the KHSAA, future student athletes, and the trial courts appropriate precedent to follow.

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