

RENDERED: DECEMBER 12, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001679-MR

FREDERICK HARRIS

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT  
HONORABLE CLARENCE A. WOODALL, JUDGE  
ACTION NO. 07-CI-00135

JOEL DUNLAP; WILLIAM THOMAS;  
CHAD KNIGHT; TERRY HENDERSON;  
JAY JONES; RON YOUNGBLOOD; BILL  
GUNNING; CHERYL BENNETT; AND  
GLENN HAEBERLIN

APPELLEES

OPINION  
AFFIRMING IN PART AND REVERSING IN PART

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BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

MOORE, JUDGE: Fredrick Harris appeals from an order of the Lyon Circuit Court in which the trial court dismissed his petition for declaratory judgment as time-barred. On appeal, Harris avers, prior to filing his 2007 petition, he originally

filed his petition in 2005, but that petition was returned to him and eventually lost. Now, he argues his original 2005 petition tolled the statute of limitations. Agreeing that the statute of limitations was tolled, we affirm in part, reverse in part and remand.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Harris, while an inmate at the Kentucky State Penitentiary in Eddyville, Kentucky, was charged with numerous violations of the Department of Corrections Policies and Procedures. These various allegations were resolved during three separate disciplinary hearings before the penitentiary's adjustment committee. At the first hearing, the committee found Harris guilty of four violations. Harris appealed to the warden but, on November 7, 2003, the warden affirmed. At the second hearing, the committee found Harris guilty of one infraction. Harris appealed to the warden but, on December 23, 2003, the warden affirmed yet again. At the final hearing, the committee found Harris guilty of two additional violations. Harris appealed once more, but the warden affirmed the committee's decisions on January 7, 2004.

On January 4, 2005, Harris sent a petition for declaratory judgment to the Lyon Circuit Court. In his petition, Harris named numerous penitentiary personnel as defendants and made numerous claims for relief, including reversal of the committee's various disciplinary decisions. After Harris timely tendered his 2005 petition, the circuit clerk returned the petition without accepting the original nor issuing summonses, because Harris failed to include a sufficient number of

copies. The clerk instructed Harris to resubmit the petition with additional copies.

Harris claimed he did so on January 11, 2005.

Regardless, Harris's case stalled. In a letter from the Lyon Circuit Court to Harris, the court explained:

Justice Cunningham has passed along to me your letter and enclosed information so that I could check on the status of your case here in Lyon Circuit Court.

I am sorry to tell you that there is no active file on this matter and the Clerk has no documents from your previous filing, apparently having returned them to you, as you indicated.

My best suggestion is that if you wish to pursue this, you would simply have to start from scratch and file a new, original Petition for Declaratory Judgment. . . .

Following the trial court's advice, Harris filed a second petition on May 14, 2007, over three years after the warden resolved the last of Harris's appeals. The defendants promptly moved to dismiss Harris's 2007 petition, arguing it was filed outside the applicable statute of limitations found in Kentucky Revised Statute (KRS) 413.140(1)(k). The trial court granted the defendants' motion, dismissing Harris's 2007 petition. Subsequently, Harris appealed.

## **II. STANDARD OF REVIEW**

According to Kentucky Civil Rule of Procedure (CR) 12.03, if, on a motion to dismiss, the trial court considers matters outside the pleadings, then the

trial court must treat the motion as one for summary judgment. Because the Lyon Circuit Court considered matters outside the pleadings, it should have construed the defendants' motion as a motion for summary judgment.

“The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.”

*Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

### III. ANALYSIS

Citing very old caselaw, *i.e.*, *Day & Congleton Lumber Co. v. Mack*, 139 Ky. 587, 69 S.W. 712 (1902), *Commonwealth v. O'Bryan, Utley & Co.*, 153 Ky. 406, 155 S.W. 1126 (1913), and *Daniel v. Blankenship*, 177 Ky. 726, 198 S.W. 48 (1917), Harris argues his petition should have been considered filed when he tendered it to the Lyon Circuit Clerk in January 2005. Moreover, he contends his petition was filed within the one-year statute of limitations as he tendered it in good faith with the intention that summonses be issued.

In the trial court's order dismissing Harris's petition, it stated:

The Petitioner Frederick Harris apparently filed this action in January, 2005. His Pleadings are well-organized and easy to follow. He has objected to the dismissal on the Statute of Limitations defense because of his filing in January, 2005 and the apparent loss of his original Petition and any copies he may have submitted to the Lyon Circuit Clerk on or soon after January 22, 2005.

As admitted by the Petitioner, KRS 413.140(1)(k) and (7) is the one year Statute of Limitations applicable to prison

disciplinary proceedings. *See Million v. Raymer*, 139 S.W.3d 914 (Ky. 2004). . . .

The Petitioner candidly admits that the current filing is outside of the one year period but logically states the Statute of Limitations should not constitute a defense because he denies that the loss of [the 2005] documents was his fault.

KRS 413.250 provides:

An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action.

*Also see Gibson v. EPI Corp.*, 940 S.W.2d 912 (Ky. App. 1997).

A litigant is responsible for being sure that all appropriate steps have been taken and is presumed to know what the Statute of Limitations is. *See Pospisil v. Miller*, 343 S.W.2d 392 (Ky. 1961).

Despite the Petitioner's attempts to have his case filed in January, 2005, this action was not actually commenced as required until it was filed in May, 2007, and appropriate summonses were issued with that filing. The Petitioner apparently did not inquire about the status of this between January, 2005, and April, 2007.

At the time the trial court handed down its decision, it was following the existing caselaw. However, the Supreme Court has recently revisited the issue of when an action commences in light of the applicable statute of limitations in *Nanny v. Smith*, 260 S.W.3d 815 (Ky. 2008). In that case, the appellant decided to file a lawsuit against the appellee. According to the applicable statute of limitations, the appellant had until October 20, 2003, to file her action. The

appellant personally delivered the complaint to the circuit clerk's office on October 18, 2003; however, the clerk did not file the complaint and did not issue the required summons until October 21, 2003, one day after the statute of limitations had ran. *Id.* at 816. As a result, the circuit court dismissed the appellant's action.

*Id.*

Upon discretionary review, the Supreme Court held the following:

Once [the appellant] delivered the complaint, she could reasonably expect that the summons would be issued within the statutory period. At that point, [the appellant] had no further duty to ensure that the clerk issued the summons within the limitations period. CR 4.01 (“[u]pon the filing of the complaint . . . the clerk shall forthwith issue the required summons and, at the direction of the initiating party, either” serve the summons and complaint by mail or transfer the summons and complaint to an authorized person for delivery and service); KRS 30A.030(1); *Louisville & N.R. Co. v. Smith's Adm'r*, 10 Ky. L. Rptr. 514, 87 Ky. 501, 9 S.W. 493, 495 (1888) (“[I]t is the official duty of the clerk to issue the summons in accordance with law, and it is not incumbent upon the plaintiff to see that he issues it in accordance with law.”). Nor did [the appellant] have the power to compel the clerk to issue summons since, by statute, the clerk is under the supervision of the Chief Justice, not [the appellant] or her attorney. KRS 30A.010(2).

Because [the appellant] had neither the power nor the duty to ensure that the clerk perform official duties, she was prevented by circumstances beyond her control from having the summons issued in time. We believe that under these facts, [the appellant] should not be held responsible for such circumstances. *See Prewitt v. Caudill*, 250 Ky. 698, 63 S.W.2d 954, 958-59 (1933) (upholding the petitioner's right to maintain an election contest on the basis that he was prevented by circumstances beyond his control from having the

summons issued in time and that the delay in issuing the summons was due solely to the fault of the circuit clerk over whom the petitioner had no control).

\* \* \*

At all levels of the judicial process, promptness in filing is essential to the proper function of the court system. However, under the unique facts presented here, we are simply deeming done what should have been done per CR 4.01 by recognizing an equitable tolling of the statute of limitations. *Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005) (holding that equitable tolling is appropriate in circumstances that are beyond the party's control when the party has exercised due diligence and is clearly prejudiced).

\* \* \*

Nanny complied with the spirit of the law and should not be punished for the clerk's failure to promptly perform official duties mandated by statute and court rule.

*Id.* at 817-818.

While we acknowledge Harris failed to include a sufficient number of copies when he first tendered the 2005 petition to the circuit clerk, prompting the clerk to return the petition, this does not weigh against Harris as he was, and is, a *pro se* litigant. It is well established in the Commonwealth that the courts will not hold a *pro se* litigant to the same standard as legal counsel, treating the *pro se* litigant with leniency. *See Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Ky. 1967), and *Case v. Commonwealth*, 467 S.W.2d 367, 368 (Ky. 1971). Taking such leniency into consideration, we can find no meaningful distinction between the

facts in the present case and the facts in *Nanny*. Consequently, we find that case to be on point.

Like the appellant in *Nanny*, Harris delivered his complaint to the appropriate clerk within the timeframe of the applicable statute of limitations. However, the clerk refused the petition and never issued the necessary summonses to commence Harris's case. While Harris did not supply the correct number of copies of his petition, as a *pro se* litigant, he should have been treated more leniently. The failure to issue summonses was not Harris's fault; likewise, there is nothing in the record to suggest the loss of Harris's 2005 petition was his fault, either. Similarly, Harris had no control over the clerk's actions or, in this case, inaction. Thus, in light of *Nanny*, we conclude the statute of limitations was equitably tolled until the clerk issued the appropriate summonses in 2007.

Nevertheless, we note Harris's petition challenges the efficacy of several different appeals from the warden of the Kentucky State Penitentiary. The documents resolving these appeals were issued on three different dates: November 7, 2003; December 23, 2003; and January 7, 2004. The applicable statute of limitation is one year, and it commences to run on the date the warden resolves the appeal. KRS 413.140(1)(k) and (7). So, in order to challenge the November 7 appeals, Harris must have filed his petition within one year of that date. Likewise, to challenge the December 23 appeal, he was required to have filed his petition within a year of that date. He did neither. He filed his 2005 petition within a year



of the last appeals. Consequently, while the statute of limitations was equitably tolled, it was only tolled regarding the January 7 appeals.

For the foregoing reasons, the order of the Lyon Circuit Court dismissing Harris's petition is affirmed as to the November 7 and December 23 appeals but is reversed regarding the January 7 appeals and remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frederick Harris, *pro se*  
Eddyville, Kentucky

BRIEF FOR APPELLEE:

James D. Godsey  
Justice and Public Safety Cabinet  
Office of Legal Services  
Frankfort, Kentucky