

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001251-MR

JAMES HARRISON

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 10-CI-00895

HON. KAREN CONRAD

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; COMBS, JUDGE; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: James Harrison, an inmate at the Eastern

Kentucky Correctional Complex in West Liberty, Kentucky, appeals from the

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580. Senior Judge Lambert authored this opinion prior to the completion of his senior judge service effective November 2, 2012. Release of the opinion was delayed by administrative handling.

dismissal of his 42 U.S.C. § 1983 (Section 1983) lawsuit against Oldham Circuit Court Judge Karen Conrad. Harrison filed suit after Judge Conrad denied his requests to proceed *in forma pauperis* in four other civil actions he wished to file in Oldham Circuit Court and instead required him to pay reduced civil filing fees pursuant to KRS 453.190 and 454.410. Harrison contends that dismissal of his Section 1983 action was erroneous because Judge Conrad's actions impeded his access to the courts and violated his constitutional rights. However, after careful review, we believe dismissal of this appeal is merited on grounds of mootness.

Facts and Procedural History

The four civil suits that led to the underlying Section 1983 action were filed in the Oldham Circuit Court within days of each other in May and June 2010. The suits all presented a variety of complaints against the Luther Lockett Correctional Complex and a number of its employees.² Harrison filed affidavits of indigency in each of the four actions and requested that he be allowed to proceed *in forma pauperis* so that the filing fees for each suit would be waived. However, Judge Conrad denied Harrison's requests for *in forma pauperis* status and instead reduced the filing fees in each case to an amount ranging between \$40 and \$45. The standard minimum filing fee for a circuit court complaint was \$115, not including additional jury, administrative, and other costs. Harrison was ordered to

² Three of the complaints named LLCC Warden Clark Taylor and Captain Daniel King as defendants. Tara Wilkins, a postal tech, and Lieutenant Tim Forgey were each named as defendants in two of the complaints.

submit the reduced filing fees within 45 days or face dismissal of his actions pursuant to KRS 454.410(3).

Harrison did not pay the reduced filing fees within the 45 days allotted to him and did not request additional time to pay the fees. He also did not file immediate appeals from the denials of his requests for *in forma pauperis* status. As a result, Judge Conrad dismissed all four of his civil actions. Three of the actions were dismissed on August 11, 2010, and the fourth was dismissed on August 17, 2010.³

On August 25, 2010, Harrison filed a Section 1983 civil complaint against Judge Conrad. In the complaint, Harrison sought declaratory and injunctive relief and damages⁴ on the grounds that Judge Conrad's denials of his requests for *in forma pauperis* status had denied him access to the courts and had otherwise violated his constitutional rights. Harrison also claimed that Judge Conrad was attempting to extort him and that she had acted beyond her jurisdictional authority in denying his requests.

³ Harrison contends on appeal that his actions were not actually dismissed until August 24, August 30, and September 14, 2010, and that his Section 1983 complaint was filed on August 22, 2010. However, the record reflects that his complaint was actually filed on August 25, 2010. Moreover, the complaint itself acknowledges that the actions were dismissed on August 11 and August 17, 2010. Consequently, it is apparent that Harrison's Section 1983 action was filed after his other four civil suits were dismissed.

⁴ Harrison notes that his complaint only sought damages "if applicable" and that he was unsure at the time of filing whether he was legally entitled to such because he is a *pro se* litigant. He subsequently conceded that he was not entitled to damages and that dismissal of that particular claim was proper. On appeal, Harrison stresses that the aim of his complaint was to obtain injunctive relief.

In the meantime, and in particular relevance to this appeal, Harrison requested that he be allowed to proceed *in forma pauperis* on direct appeal with respect to the dismissals of his four civil complaints. These requests were denied on September 22, 2010, and on November 16, 2010, Judge Conrad dismissed Harrison's direct appeals for failure to pay the ordered filing fees. On November 23, 2010, Harrison appealed the denials of his requests to prosecute his appeals *in forma pauperis* pursuant to *Gabbard v. Lair*, 528 S.W.2d 675 (Ky. 1975). However, on March 14, 2011, this Court dismissed all of those appeals because Harrison had failed to timely file notices of appeal from the orders denying his motions to proceed *in forma pauperis*. Harrison sought discretionary review before the Supreme Court of Kentucky, but his petitions were denied on August 17, 2011.

On April 26, 2011, Judge Conrad moved to dismiss Harrison's Section 1983 action. She argued that the decision to grant or deny *in forma pauperis* status to an inmate rested within a judge's discretion and that she was entitled to judicial immunity since her decision was made while she was acting in her capacity as a judicial officer. Judge Conrad also argued that Harrison's complaint was frivolous under KRS 454.405(1).⁵ In response, Harrison effectively abandoned any claims other than the one for injunctive relief and argued that pursuant to *Pulliam v. Allen*, 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565

⁵ KRS 454.405(1) provides, in relevant part: "At any time, and upon its own motion or on motion of a party, a court may dismiss a civil action brought by an inmate or on behalf of an inmate if satisfied that the action is malicious or harassing or if satisfied that the action is legally without merit or factually frivolous...."

(1984), judicial immunity was not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity. *Id.*, 466 U.S. at 541-42, 104 S. Ct. at 1981. He also suggested that the Section 1983 action had become moot in light of the fact that the underlying civil cases had been dismissed and appeals from those dismissals had been taken before injunctive relief was considered.

On May 6, 2011, the Special Judge chosen to preside over the Section 1983 action entered an order of dismissal on the grounds urged by Judge Conrad. Harrison subsequently filed a motion to reconsider and again argued that since he was seeking injunctive relief, dismissal on the basis of judicial immunity was not warranted. However, on June 23, 2011, the Special Judge reaffirmed his earlier ruling. This appeal followed.

Analysis

In considering this appeal, the question of whether the issues presented are moot is of immediate and apparent concern. “It is a generally accepted rule, and a rule of this Court that an appeal will be dismissed where, due to subsequent events, the circumstances have changed so as to make the determination of the question unnecessary.” *Sharp v. Robinson*, 388 S.W.2d 121, 121 (Ky. 1965); *see also Medical Vision Group, P.S.C. v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008), *citing Brown v. Baumer*, 301 Ky. 315, 321, 191 S.W.2d 235, 238 (Ky. 1945). This is because “[u]nless there is ‘an actual case or controversy,’ this Court has no jurisdiction to hear an issue and is prohibited from producing mere advisory opinions.” *Philpot*, 261 S.W.3d at 491, *citing Commonwealth v.*

Hughes, 873 S.W.2d 828, 829 (Ky. 1994) & Ky. Const. § 110; *see also Louisville/Jefferson County Metro Government v. Metro Louisville Hospitality Coalition, Inc.*, 297 S.W.3d 42, 44 (Ky. App. 2009).

Harrison's direct appeals from Judge Conrad's denials of his requests for *in forma pauperis status* in the four underlying civil actions were dismissed and his petitions for discretionary review rejected. This effectively disposed of those actions. As a result, even if Harrison were to prevail in the present appeal, any prospective injunctive relief afforded by that victory would be meaningless since the cases intended to be affected by that relief are now final. Therefore, we believe that any opinion by this Court on the substantive issues presented by the parties would be entirely advisory in nature. Under the circumstances, we must conclude that the controversy before us is moot and no longer justiciable. Therefore, dismissal of this appeal is required due to a lack of jurisdiction. *Windstream Kentucky West, LLC v. Kentucky Public Service Com'n*, 362 S.W.3d 357, 360 (Ky. App. 2012).⁶

Conclusion

For reasons set forth herein it is ORDERED that Appeal No. 2011-CA-001251-MR is DISMISSED as moot.

ALL CONCUR.

⁶ It is perhaps arguable that this Court should nonetheless consider the question of whether the Special Judge erred in finding that Harrison's Section 1983 action was "frivolous" under KRS 454.405(1). However, we believe that any disposition of that question would necessarily require us to delve into the substantive merits of the action. Therefore, we decline to consider it further.

ENTERED: November 9, 2012

/s/ Joseph L. Lambert
SENIOR JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

James Harrison, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Nicole H. Pang
Assistant Attorney General
Frankfort, Kentucky