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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002398-MR

DOUG RUNYON — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 04-CI-02203

SERGEANT BELL; AND
OFFICER STEEKEN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

JOHNSON, JUDGE: Doug Runyon, pro se, has appealed from the order and judgment of the Kenton Circuit Court entered on October 7, 2004, which dismissed his civil action against Sergeant Bell and Officer Steeken.[1] Having concluded that this

[1] Sergeant Bell and Officer "Steeken" are both alleged to have been correctional officers at the Kenton County Detention Center. Their first names have not been provided in the record on appeal. Furthermore, it is apparent from the record that Officer "Steeken" was not served with the complaint and possibly does not exist or the officer's name was either misspelled or misunderstood by Runyon.

action is barred by the applicable statute of limitations, we affirm.

On August 24, 2003, while Runyon was incarcerated in the Kenton County Detention Center, he was assaulted by another inmate, Abraham Johnson.[2] Earlier that day, Johnson had accused Runyon of stealing from another inmate. According to Runyon, after Johnson had attacked him three times, he notified the correctional staff who separated them for one hour before placing them back in the same cell over Runyon's objections. Runyon claims that Johnson threatened him in front of the correctional officers. Johnson then assaulted Runyon again, injuring Runyon's jaw.[3] The correctional staff then placed Runyon in a cell by himself. Two days later, Runyon was taken to the detention center's medical room and x-rays were taken which revealed a fractured jaw. On August 27, 2003, Runyon was transported to the Northern Kentucky Oral and Maxillofacial Surgery Center where the diagnosis of a fractured jaw was confirmed.[4]

[2] In his complaint, Runyon alleged that Johnson assaulted him by "running, jumpkicking and hitting [him] in the back of the neck and jaw area, causing [his] jaw to be broken."

[3] Runyon claims that the correctional staff saw that his mouth had started to bleed.

[4] While Runyon claims that surgery was scheduled, it is unclear from the record whether Runyon underwent surgery to repair his fractured jaw.

Runyon filed a pro se civil complaint against the correctional officers who he claimed "failed to exercise the degree of skill expected of a reasonably competent correctional official to provide safety and security to prevent or protect" him from assault by another inmate. Runyon claims that he delivered his complaint to the prison authorities to be mailed on August 23, 2004, and Runyon signed the notice portion of the complaint, indicating that the complaint was mailed to the Kenton Circuit Court on August 23, 2004. The circuit clerk stamped the complaint as received and filed on August 25, 2004.

The correctional officers filed a motion to dismiss pursuant to CR[5] 12.02(a) and (f).[6] They claimed that Runyon had failed to comply with the statute of limitations as set out in KRS[7] 413.140(1)(a),[8] because he filed his complaint more than one

[5] Kentucky Rules of Civil Procedure.

[6] CR 12.02 states as follow:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (a) lack of jurisdiction over the subject matter, . . . (f) failure to state a claim upon which relief can be granted . . . .

[7] Kentucky Revised Statutes.

[8] KRS 413.140(1)(a) provides that an action for personal injury must be brought within one year from the date the cause of action accrued.

year from August 24, 2003, the date of the injury.[9] On October 7, 2004, the circuit court entered an order dismissing the personal injury claim against the officers,[10] as barred by the one-year statute of limitations in KRS 413.140(1)(a).[11] This appeal followed.

Runyon argues that he should not be penalized for his failure to timely file the complaint because he delivered it to the prison authorities for mailing on August 23, 2003. Further, while Runyon agrees that the one-year statute of limitations in KRS 413.140(1)(a) applies to this case, he argues that the statute was tolled by the "discovery rule." Runyon argues that he did not discover the injury until August 26, 2004, the date he was taken for x-rays, because that is when he learned "the true nature of his injury."

Following the filing of the parties' briefs in this case, our Supreme Court rendered Robertson v. Commonwealth,[12] on the issue of equitable tolling of a statute of limitations. The Supreme Court reversed this Court, which had held that an RCr[13] 11.42 motion which had been delivered to prison authorities to

[9] CR 3.01 states as follows: "A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith."

[10] The order did not dismiss the case against Johnson, but this is not relevant to the appeal.

[12] 177 S.W.3d 789 (Ky. 2005).

[13] Kentucky Rules of Criminal Procedure.

be mailed in a timely manner was still barred by the three-year statute of limitations because it was not filed by the circuit clerk until 14 days following the expiration of the limitations period. Citing a case from the Wisconsin Supreme Court, our Supreme Court stated as follows:

> Nichols[14] held that if the pro se petitioner has otherwise complied with all of the requisites for filing a petition, the deadline for such filing is tolled on the date the prisoner delivers the correctly addressed petition to the proper prison authorities for mailing.[15]

However, our Supreme Court declined to adopt a "prison mailbox rule,"[16] stating that "[p]erceiving the possibility of unforeseen mischief fostered by otherwise good intentions, we decline to adopt the fiction that 'filing' means delivery to prison authorities."[17]

We conclude that our Supreme Court's rationale in Roberts, in utilizing the equitable tolling rule is not applicable to this civil action before us. In Robertson, our Supreme Court stated as follows:

> Considering the similarities between 28 U.S.C.[18] § 2255 and RCr 11.42(10), and the

[14] State, ex rel. Nichols v. Litscher, 635 N.W.2d 292, 295 (Wis. 2001).

[15] Robertson, 177 S.W.3d at 791 (citing Nichols, 635 N.W.2d at 298-99).

[16] See Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988).

[17] Robertson, 177 S.W.3d at 791.

[18] United States Code.

> fact that the denial of a motion under RCr 11.42 often results in the filing of a habeas petition within the jurisdiction of the Sixth Circuit, we now adopt the Dunlap[19] test for determining whether equitable tolling is applicable to an otherwise limitation-barred RCr 11.42 motion.[20]

Thus, the use of equitable tolling in Robertson was an attempt to avoid a prisoner merely filing a case under the federal statutes, after he failed in seeking belated, post-conviction relief from a sentence of imprisonment in a state court. The application of the equitable tolling rule in this limited context of post-conviction relief due to the alleged denial of constitutionally effective counsel does not extend to a prisoner's filing of a civil complaint for personal injury.

Additionally, the limitations period in this case was not tolled by the discovery rule. A concise statement of the discovery rule is contained in Carroll v. Owens-Corning Fiberglas Corp.,[21] wherein our Supreme Court stated that "'[w]hen an injury does not manifest itself immediately, the cause of action should accrue not when the injury was initially inflicted, but when the plaintiff knew or should have known that he had been injured by the conduct of the tortfeasor.'"[22] In the

[19] Dunlap v. United States, 250 F.3d 1001 (6th Cir. 2001).

[20] Robertson, 177 S.W.3d at 792.

[21] 37 S.W.3d 699, 700 (Ky. 2000).

[22] Id. (quoting Louisville Trust Co. v. Johns-Manville Products Co., 580 S.W.2d 497, 500 (Ky. 1979)).

case before us, Runyon's assault-related injury manifested itself immediately. In reviewing Runyon's statements in the record, it is clear that he immediately knew that he had been injured by the assault, and the x-rays taken on August 26, 2003, and the diagnosis of a broken jaw only confirmed to a greater extent the seriousness of Runyon's injury.

For the foregoing reasons, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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