

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000414-MR

PAUL WILLIAM LEWIS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 06-CI-01751

COMMONWEALTH OF KENTUCKY, ADMINISTRATIVE  
OFFICE OF THE COURTS; JUSTICE AND PUBLIC SAFETY  
CABINET, DEPARTMENT OF CORRECTIONS; AND  
DEPARTMENT OF PUBLIC ADVOCACY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

MOORE, JUDGE: In the present appeal, Paul William Lewis seeks relief from an opinion and order of the Franklin Circuit Court wherein the circuit court dismissed Lewis's appeal from the Board of Claims. Before this Court, Lewis argues that the statute

of limitations found in KRS<sup>1</sup> 44.110 was tolled and that *res judicata* did not bar his claim for negligent denial of counsel. Finding Lewis's claims to be meritless, we affirm.

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

The relevant facts of this appeal begin with Lewis's prosecution for robbery in the first degree in the latter part of 1989. While Lewis was on parole from a twenty-six-year prison sentence for prior felony convictions, he committed armed robbery in Harlan County, Kentucky. In August 1989, Lewis was arrested for the robbery charge, and his parole was subsequently revoked. While awaiting trial on the robbery charge, Lewis attempted to escape from the Harlan County Detention Center. After Lewis's failed escape attempt, he was indicted in late 1989.<sup>2</sup> Lewis went to trial on the robbery charge and was convicted on October 11, 1989. He was later sentenced to seventeen years' incarceration.

After being convicted for robbery, Lewis was transferred to the Luther Luckett Correctional Complex to serve out the remainder of his prior twenty-six-year sentence. Although Lewis was sent to Luther Luckett, the Harlan Circuit Court Clerk's Office failed to send to that facility, as required by KRS 431.215(1), two certified copies of the judgment of conviction and sentence regarding Lewis's robbery conviction.

Furthermore, while Lewis was incarcerated, no detainer regarding his pending escape charges was lodged against him. Later, in February 1992, Lewis finished serving his

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<sup>1</sup> Kentucky Revised Statute.

<sup>2</sup> Lewis was charged with attempted escape, possession of dangerous contraband and being a persistent felony offender (PFO) in the first degree. Hereinafter, these charges will be referred to as the "escape charges."

twenty-six-year sentence. Because the Harlan Circuit Clerk failed to forward a copy of the robbery conviction and because no detainer had been lodged against him, the Department of Corrections (DOC) released Lewis from its custody even though he had yet to begin serving the seventeen-year sentence for the robbery conviction.

After DOC released Lewis, he left the Commonwealth and went to Tennessee. According to Lewis, in March 1992, while there, he was arrested on a fugitive warrant regarding the escape charges. However, Lewis was subsequently released for lack of action by the Commonwealth. Thereafter, he left Tennessee for Mississippi where he lived for the next ten and one-half years. In 2002, Lewis returned to Tennessee where he was arrested again on a fugitive warrant from the Commonwealth. On August 1, 2002, Lewis was extradited back to Kentucky and, once more, found himself in the custody of the DOC serving his seventeen-year sentence for robbery and awaiting trial on the still pending felony charges from Harlan County.

After unsuccessfully seeking to avoid his seventeen-year sentence multiple times, Lewis finally achieved his quest when the Oldham Circuit Court issued a writ of habeas corpus, releasing Lewis from DOC's custody. The Oldham Circuit Court held that

pursuant to the November 4, 2005 telephone conference with both parties, and as argued by counsel, Simple Negligence did occur in the present case and that [Lewis] has served out his required sentence. The Court rules that [Lewis] is to receive day for day credit on his sentence for each day he was at liberty, pursuant to the *United States v. Martinez* [837 F.2d 861, 864 (9th Cir. 1988)] case. Further, both Counsels agree that Mr. Lewis has “served out” his time for the Harlan Circuit Court 17 year sentence, indictment no. 89-CR-073, after the above credit applied.

**THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED** that Mr. Paul William Lewis be released by the Department of Corrections immediately without further delay.

*Id.*

Being unsatisfied with simply eluding the seventeen-year prison sentence for which he was duly convicted, Lewis determined that he should profit from the Commonwealth's mistake. To that end, on July 25, 2006, he filed a complaint with the Board of Claims naming as respondents the following individuals and agencies of the Commonwealth: Governor Ernie Fletcher; the Administrative Office of the Courts (AOC); Paul F. Williams, Clerk of the Harlan Circuit Court; the Department of Corrections; John D. Rees, Commissioner of DOC; the Department of Public Advocacy (DPA); and Ernie Lewis, the Public Advocate and head of DPA. In Lewis's sixty-page complaint, he alleged a single act of gross negligence had occurred when the Harlan Circuit Clerk failed to send two certified copies of his robbery conviction to Luther Luckett, resulting in his erroneous release from custody. Based on this alleged act of negligence, Lewis claimed that he had been unlawfully imprisoned by DOC from July 28, 2002 until November 5, 2005, when the Oldham Circuit Court issued the writ of habeas corpus freeing him. In addition to the unlawful imprisonment claim, Lewis alleged that, during "the critical stages" of numerous criminal and civil proceedings, he had been negligently denied his right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. In Lewis's complaint, he never explained how the Harlan Clerk's allegedly negligent omission was causally

connected to the various “critical stages” in which he was allegedly denied counsel; however, he did claim that he was entitled to \$350,000.00 in compensation.

After Lewis filed his voluminous complaint, two of the respondents, Paul F. Williams, the Harlan Circuit Clerk, and AOC, moved the Board of Claims to dismiss Lewis's complaint. The Board of Claims dismissed Lewis's complaint in a brief order stated that

IT IS HEREBY ORDERED that this claim be and the same is hereby DISMISSED for the reason that the claim was not filed within one (1) year from the time the claim for relief accrued pursuant to KRS 44.110(1). The Claimant has failed to state a claim upon which relief may be granted. Therefore, the Board lacks jurisdiction to entertain this claim. Furthermore, the Board is without statutory authority to render awards for an allegation of wrongful incarceration, and the above-styled claim is hereby DISMISSED.

*Id.* at 275.

After the Board dismissed Lewis's complaint, Lewis appealed this matter to the Franklin Circuit Court pursuant to KRS 44.140. In response, DPA filed a motion to dismiss Lewis's appeal. Lewis replied to DPA's motion and claimed five acts of negligence, rather than one as he had originally claimed. According to Lewis, the first negligent act occurred when the Harlan Circuit Clerk failed to forward two certified copies of the robbery conviction to Luther Luckett, as he had alleged in his complaint before the Board. Lewis claimed that the second act occurred when “Harlan County officials” failed to lodge a detainer against him regarding the escape charges. Lewis asserted that the third negligent act occurred when “officials at Luther Luckett” released

him on February 1, 1992. According to Lewis, the fourth act occurred in 1992, while he was awaiting extradition in Tennessee, when “Kentucky officials” failed to appear. Finally, Lewis asserted that the fifth negligent act occurred on July 28, 2002, when “Kentucky officials” had him arrested as a fugitive, had him extradited to the Commonwealth and unlawfully imprisoned him for three and one-half years. According to Lewis, he did not learn of these allegedly negligent acts until he was released from prison in 2005. He reasoned, therefore, that the one-year statute of limitations set forth in KRS 44.110 did not begin to run until the Oldham Circuit Court issued the writ of habeas corpus in November 2005.

After the Franklin Circuit Court held a hearing regarding Lewis's appeal, it granted DPA's motion and dismissed Lewis's appeal. In the circuit court's opinion and order, it noted that the last allegedly negligent act occurred on July 28, 2002. The circuit court held that this incident happened outside the one-year statute of limitations found in KRS 44.110(1). However, citing *Commonwealth, Department of Housing, Buildings and Construction v. Collins*, 654 S.W.2d 608 (Ky. App. 1983), the court noted the one-year statute of limitations could be tolled. According to the court, in *Collins*, the plaintiff filed a complaint with the Board of Claims when the Department of Housing, Buildings and Construction halted the construction of plaintiff's house due to alleged violations of the plumbing code. The Franklin Circuit Court distinguished *Collins* from this present case noting that the *Collins* Court had ruled that the Housing Department's investigator had

not just erroneously halted construction but had acted outside the scope of his authority because the plumbing code did not apply to the plaintiff's home.

After distinguishing *Collins*, the circuit court noted that Lewis was arguing that he had suffered personal injury by being unlawfully imprisoned and, thus, was arguing that the discovery provision in KRS 44.110(3) applied. The court noted that unlawful imprisonment could rise to the level of personal injury but determined that this did not avail Lewis. Lewis argued that he did not discover his injury until November 2005 when the Oldham Circuit Court issued the writ that freed him. But the court noted KRS 44.110(3) provided that “no action for personal injury shall be commenced beyond two (2) years from the date on which the alleged negligent act or omission actually occurred.” The Franklin Circuit Court concluded that the last negligent act claimed by Lewis had occurred in 2002 more than four years before he filed his complaint with the Board of Claims. Thus, the circuit court concluded that Lewis's claim was time-barred.

Regarding Lewis's second claim, the circuit court stated that it appeared Lewis was claiming that he had received ineffective assistance of counsel. The court found that immediately after his robbery conviction Lewis raised this same claim in a motion for a new trial, that was denied. Furthermore, citing an unpublished opinion of the Court of Appeals, the circuit court noted that Lewis had raised his ineffective assistance of counsel claim in a 2005 cause of action filed against the Commonwealth. The circuit court held that Lewis's second claim was, therefore, barred by the doctrine of *res judicata*.

## II. STANDARD OF REVIEW

When this Court considers an appeal from the Franklin Circuit Court where the circuit court has reviewed a case from the Board of Claims, we are limited to reviewing “the matters subject to review by the Circuit Court and also errors of law arising in the Circuit Court and made reviewable by the Rules of Civil Procedure[.]” KRS 44.150.

## III. ANALYSIS

Regarding Lewis's first claim, unlawful imprisonment, he insists that his claim for unlawful imprisonment did not accrue until November 2005 when the Oldham Circuit Court issued the writ of habeas corpus. According to Lewis, that is when he learned of his injury.

Kentucky Revised Statute 44.110 sets forth the time frame of when a claim must be brought before the Board of Claims. The pertinent part of the statute reads

- (1) All claims must be filed with the Board of Claims within one (1) year from the time the claim for relief accrued.
- (3) The claim for relief for personal injury shall be deemed to accrue at the time the personal injury is first discovered by the claimant or in the exercise of reasonable care should have been discovered; however, no action for personal injury shall be commenced beyond two (2) years from the date on which the alleged negligent act or omission actually occurred.

KRS 44.110. Accordingly, a claimant has one year from the time his cause of action has accrued to file a complaint with the Board and, if the claimant is asserting a personal injury, his claim will be considered to have accrued “at the time the personal injury is



first discovered . . . or in the exercise of reasonable care should have been discovered[.]” KRS 44.110(3). Despite this discovery provision, all personal injury actions before the Board of Claims **must** be brought within “**two (2) years from the date on which the alleged negligent act or omission actually occurred.**” KRS 44.110(3) (emphasis added). In his complaint before the Board of Claims, Lewis earnestly insisted that only one negligent act had occurred when the Harlan Circuit Clerk failed to send two certified copies of the robbery conviction to the prison where he was incarcerated. This negligent omission happened sometime in 1990 after he was convicted for robbery. But, pursuant to KRS 44.110(3), Lewis had a maximum of two years from the date of the Harlan Circuit Clerk's allegedly negligent act in 1990 to file his claim. According to the record, Lewis did not file his claim with the Board until 2006, some sixteen years later. So, by operation of KRS 44.110(3), Lewis's claim was time-barred.

Before the circuit court, Lewis argued for the first time that five negligent acts had occurred instead of one, as he had previously claimed. Even though Lewis had failed to first present this argument to the Board, the circuit court addressed it. Because the circuit court addressed it, we will briefly address it as well. However, the result is the same as analyzed *supra*.

Lewis insisted that the fifth and final negligent act transpired on July 28, 2002. Using that date and applying KRS 44.110, Lewis had a maximum of two years from July 28, 2002, to file his claim; however, he did not file it until the summer of 2006.

Thus, even if he had based his claim on this last alleged act of negligence, it would still be time barred.

Additionally, Lewis relies on *Collins*, 654 S.W.2d 608, and argues that he was entitled to equitable tolling of the statute of limitations found in KRS 44.110 because his claim involved on-going litigation. We note first that Lewis's reliance on *Collins* is misplaced. *Collins* does not mention the doctrine of equitable tolling, so it does not support Lewis's argument. Moreover, as the circuit court correctly held, *Collins* is factually distinguishable from the present case.

Furthermore, Lewis claims that the one-year statute of limitations should have been tolled by equitable estoppel because of on-going litigation. The essential elements of equitable estoppel are: 1) false representations or concealment of material facts that have been calculated to convey an impression that the facts are different and inconsistent with the facts that the party later attempts to assert; 2) the intent that the other party should act upon the false representations; 3) actual or constructive knowledge of real facts; 4) lack of knowledge and inability of the party seeking the estoppel to ascertain the truth regarding the facts in question; 5) reliance by the party seeking the estoppel upon the false representations; and 6) the party seeking the estoppel acts upon the false representations which results in prejudice to the party seeking estoppel. *Gosney v. Glenn*, 163 S.W.3d 894, 899 (Ky. App. 2005). Lewis has failed to demonstrate any of the elements of equitable estoppel; thus, that doctrine affords him no relief.

Regarding Lewis's second claim, he argues that this claim was not for ineffective assistance of counsel but was for negligent denial of his Sixth Amendment right to counsel. Because his previously adjudicated claim was for ineffective assistance of counsel and his current claim is for denial of counsel, Lewis reasons that the doctrine of *res judicata* does not apply.

In Lewis's complaint before the Board of Claims, he claimed only one allegedly negligent act on the part of the Harlan Circuit Clerk. Lewis never explained how that alleged negligent act was causally connected to his second claim, yet he used it as the basis for his second claim. Because Lewis's denial of counsel claim is not a personal injury claim, the discovery provision of KRS 44.110(3), as discussed *supra*, does not apply. Thus, only KRS 44.110(1) applies. According to that section, “[a]ll claims must be filed with the Board of Claims within one (1) year from the time the claim for relief accrued.” However, Lewis did not file his complaint with the Board of Claims until 2006, nearly sixteen years after the allegedly negligent act had occurred in 1990. Therefore, Lewis's second claim is time-barred.

It is conceivable that, in Lewis's complaint before the Board, he meant to base his second claim on other allegedly negligent acts. Even if that were so, Lewis's claim would still be time barred. In his complaint, he listed numerous incidents that he claimed were examples of negligent denial of counsel. These incidents occurred in 1989 and 1990, more than a decade prior to Lewis's filing of his complaint before the Board of Claims. Thus, KRS 44.110 would still bar his denial of counsel claim.

In Lewis's complaint before the Board, he claimed that these incidents constituted negligent denial of counsel. However, Lewis used these same incidents as the basis for his prior claims of ineffective assistance of counsel. The fact that Lewis labeled these incidents “negligent denial of counsel” as opposed to “ineffective assistance of counsel” does not insulate his second claim from the application of *res judicata*.

*Res judicata* consists of two separate but closely related doctrines: claim preclusion and issue preclusion. *Jellinick v. Capitol Indemnity Corp.*, 210 S.W.3d 168, 171 (Ky. App. 2006). Claim preclusion bars a subsequent cause of action where there are identity of parties, identity of causes of action and a prior resolution of the action on its merits. *Id.* Issue preclusion bars parties from relitigating any issue that was actually litigated and finally resolved in a prior action. *Id.* Although Lewis labeled the incidents in his second claim “negligent denial of counsel,” he raised those incidents before and they were not only litigated but also decided. Thus, the doctrine of issue preclusion prohibits Lewis from raising them again.

Because none of the claims presented in Lewis's brief has merit, the opinion and order of the Franklin Circuit Court dismissing Lewis's appeal from the Board of Claims is affirmed.

ALL CONCUR.

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