

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000972-MR

BRENTON WOMBLES

APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 08-CI-00476

T.J. JACKSON; RUTH JACKSON;
AND NORMA JEAN WOMBLES

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, STUMBO, AND VANMETER, JUDGES.

STUMBO, JUDGE: Brenton Wombles appeals, *pro se*, from a Clay Circuit Court order dismissing his complaint against his grandfather, T.J. Jackson, his grandmother, Ruth Jackson, and his mother, Norma Jean Wombles, based upon Brenton's failure to file his complaint within the statutorily prescribed time. Following a careful review of Brenton's brief and the record, we affirm.

On November 19, 2008, when Brenton was twenty-two years old, he filed a civil complaint in the Clay Circuit Court seeking \$10 million dollars in damages for abuse and neglect that he experienced as a child.¹ On February 31, 2009, Brenton filed an amended complaint in which he specifically claimed that his grandfather, T.J., repeatedly beat him and that his grandmother, Ruth, did nothing to stop the abuse. His amended complaint also alleges that his mother, Norma Jean, abandoned Brenton and forced him to live with his grandparents despite knowing that T.J. was violent.

On March 9, 2009, Brenton filed an affidavit for a warning order based upon his inability to locate the defendants. The trial court appointed a warning order attorney. On April 15, 2009, the warning order attorney filed a report that he had mailed letters to each defendant's last known address and that the letters had not been returned. On behalf of the defendants, the warning order attorney asserted a statute of limitations defense and requested that the trial court dismiss the cases against the defendants.

On May 13, 2009, the trial court dismissed Brenton's complaint. The order provided: "It appears to the court that this action was filed too late to be heard and should have been filed within 1 year from the 18th birthday of the

¹ Kentucky Revised Statute(s) (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. KRS 413.170(1) extends the limitations period if the plaintiff was an infant or of unsound mind when the cause of action occurred. After the disability is removed, the limitation period begins to run. In the case at hand, the statutory period began to run when Brenton was no longer an infant, on his 18th birthday.

plaintiff. The plaintiff admits within the pleading that he is now 22 years of age and for that reason, this action is hereby dismissed.”

On appeal, Brenton makes the following claims: (1) the trial court violated his due process rights by failing to update him or the record during the pendency of his case; (2) the warning order attorney violated his duty by asserting a defense for the defendants; (3) the warning order attorney’s status as an assistant county attorney created a conflict of interest; and (4) the trial court erred by dismissing his complaint without giving him a fair opportunity to respond. We shall discuss each argument in turn.

First, despite Brenton’s claim that he had a right to communication from the trial court, nothing in Kentucky law requires courts to continuously update parties. To the contrary, Kentucky Code of Judicial Conduct, Canon 3(B)(7) prohibits the trial court from communicating with the parties off the record by stating:

A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law. With regard to a pending or impending proceeding, a judge shall not initiate, permit, or consider ex parte communications with attorneys and shall not initiate, encourage or consider ex parte communications with parties

Although Brenton filed various motions and documents during the four months that his case was pending, none of those filings appear to have required immediate action by the trial court given that the defendants had not yet been served. Had the court immediately ruled upon Brenton’s motions to amend,

without giving the defendants a reasonable opportunity to participate, the defendants' due process rights would have been placed in jeopardy. "The fundamental requirement of due process is the opportunity to be heard . . . 'at a meaningful time and in a meaningful manner.'" *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). Given the short period of time that this case was pending, we find no error in the trial court's failure to rule upon Brenton's motions or update him concerning the status of his case.

Second, Brenton makes various claims concerning the impropriety of the warning order attorney's appointment and the scope of the attorney's representation. Brenton claims that an assistant county attorney is prohibited from being named as a warning order attorney. However, Kentucky law clearly provides that "[t]he county attorney shall not be prohibited from engaging in the private practice of law." KRS 15.765 (4). We see no inherent conflict of interest between this case and the attorney's assistant county attorney position.

Brenton also argues that the warning order attorney cannot provide a defense on behalf of the named defendants because they have not hired him. This argument flies in the face of the rule providing for the appointment of warning order attorneys and is without merit. Kentucky Rule(s) of Civil Procedure (CR) 4.07(2) requires the warning order attorney to report to the court if he or she cannot inform the defendant of the pending action and "make a defense by answer if he can." Here, the warning order attorney performed his duty as required by the rule.

Brenton claims that the Rules of Professional Conduct prohibit warning order attorneys from asserting a defense until all of the defendants sign waivers. This claim is also unfounded. A waiver requirement normally arises when there is a conflict among the parties being represented. Rules of Professional Conduct 3.130(1.7). Brenton did not claim that a conflict of interest existed among the defendants. The warning order attorney did not have sufficient information to determine that a potential conflict requiring a waiver existed. Therefore, there is no basis in Brenton's claim that a waiver was required.

Further, if counsel was required to obtain a waiver, the issue would be more appropriately raised by the defendants rather than the plaintiff. Despite Brenton's claims, the warning order attorney had no obligation to him. The trial court's order clearly provided,

Clint Harris . . . a regular practicing attorney of this Court, is appointed to correspond with the Defendant, and to inform him/her by mail concerning the pendency and nature of this action, and to file his/her report in the Clerk's office of this Court within fifty (50) days after the date of this Order.

Nothing in the order indicates that a conflict of interest may exist.

Finally, Brenton claims that the trial court prematurely dismissed his complaint without giving him an opportunity to respond. As previously mentioned, due process, at its minimum, requires that each party receive a reasonable opportunity to be heard. *Lynch v. Lynch*, 737 S.W.2d 184, 186 (Ky. App. 1987).

Even if it is appropriate for the trial court to enter a summary judgment on its own motion, the trial court's failure to afford the appellant the most basic procedural protections, notice of its intention and an opportunity to respond, is unjustifiable, constitutionally defective, and requires reversal.

Storer Communications of Jefferson Co., Inc. v. Oldham Co. Bd. Of Educ., 850 S.W.2d 340, 342 (Ky. App. 1993). Brenton, however, had many opportunities to respond to the report before the trial court ordered the dismissal.

Our review of the record indicates that the report was filed on April 15, 2009. A copy of the report was mailed to Brenton on the same date. On April 24, 2009, Brenton filed a motion to add a plaintiff to the complaint but did not address the report. Given that the trial court entered its order of dismissal on May 12, 2009, Brenton had a reasonable amount of time to respond.

We must note that, on appeal, Brenton does not argue that his complaint was filed within the statutorily prescribed time period nor does he allege that the statute of limitations was tolled in any way.

Accordingly, we affirm the Clay Circuit Court order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brenton Wombles, *Pro Se*
LaGrange, Kentucky

NO BRIEF FILED FOR
APPELLEES.