

No. 23-6052 ORIGINAL

In The

Supreme Court Of The United States

Supreme Court, U.S.
FILED

FILED

NOV 14 2023

OFFICE OF THE CLERK

LARRY BAILEY

181 BEN BAILEY ROAD

LONDON KY, 40744

PETITIONER

V.

WEST LAUREL WATER ASSOCIATION

1620 E. HAL ROGERS PARKWAY

LONDON KY, 40741

AND

KENTUCKY PUBLIC SERVICE COMMISSION

211 SOWER BOULEVARD

P O BOX 615

FRANKFORT KY 40602-0615

RESPONDENTS

4

5

6

7

8

ON PETITION FOR WRIT OF CERTIORARI TO

The Kentucky Supreme Court

2022-SC-0533

PETITION FOR WRIT OF CERTIORARI

Larry Bailey
Pro se
181 Ben Bailey Road
London Kentucky
40744
(606) 261-4761
workpaydie@gmail.com

QUESTIONS PRESENTED

20 1). Whether the Franklin Circuit Court violated my constitutional rights to due process
21 by denying my motion to proceed *in forma pauperis* IFP on notice of appeal. (Was I indigent
22 when filing the complaint, but not indigent for appeal?).

PARTIES TO THE PETITION

Petitioner:

26 | Larry Bailey

27 | 181 Ben Bailey Road

28 | London Kentucky, 40744

29 | Pro Se

30 Respondent1:

31 | West Laurel Water Association

32 1620 E. Hal Rogers Parkway

33 London Kentucky, 40741

34 | Represented by
35 | Larry G. Bryson, 318 W. Dixie Street London KY, 40741.

36 Respondent 2

37 Kentucky Public Service Commission

38 211 Sower Boulevard

39 P.O. Box 615

40 Frankfort Kentucky, 40602-0615

41 Represented by,

42 Nancy J. Vinsel, 211 Sowder Blvd

43 Frankfort Kentucky, 40601

RELATED CASES

*Larry Bailey v. Public Service Commission and West Laurel Water Association. No. 22-CI-00018. Franklin Circuit Court of Kentucky. Judgement entered, May 12th, 2022.

*Larry Bailey v. Public Service Commission and West Laurel Water Association. No. 27-CA-0758. Kentucky Court of Appeals. Judgement entered, September 19th, 2022.

*Larry Bailey v. Public Service Commission and West Laurel Water Association. No. 2022-SC-0533. Supreme Court of Kentucky. Judgement entered, August 16th, 2022.

CORPORATE DISCLOSURE STATEMENT

I am not a corporation and do not represent one.

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84

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101

102 **PETITION FOR A WRIT OF CERTIORARI**

103 **Comes Now**, pro se, Larry Bailey, asking this court to grant certiorari to decide whether
104 the Franklin County Kentucky Circuit Court violated my constitutional right to a trial by denying
105 my IFP on notice of appeal.

106

107 **OPINIONS BELOW**

108 There are no published opinions on this case.

109

110 **JURISDICTION**

111 Pursuant to 28 U.S.C.A. § 2101

112 On August 16th 2023 the Kentucky Supreme Court denied discretionary review of my
113 case. The deadline for filing this petition is November 14th 2023.

114

115 **CONSTITUTIONAL AND STATUTORY PROVISIONS**

116 The Due Process Clause of the 14th Amendment of the U.S. Constitution guarantees the
117 right to be heard in court. [N]or shall any State deprive any person of life, liberty, or property,
118 without due process of law; nor deny any person within its jurisdiction the equal protection of the
119 laws.

120 KRS § 453.190(2) a poor person is someone [U]nable to pay the costs and fees of the
121 proceeding in which he is involved without depriving himself or his dependents of the necessities
122 of life, including food, shelter, or clothing.

123 Kentucky rules of civil procedure CR 5.05(4) If accompanied by a motion for leave to
124 proceed in forma pauperis and a supporting affidavit, and made in good faith, any matter to be
125 filed under these rules, including appeals, shall be considered filed on the date it is tendered.

126 Page 420 of the Kentucky Circuit Court Clerks Handbook (current at the time of filing)

127 When you receive a complaint, petition, or other document, and the pleading is accompanied by
128 a motion for leave to proceed in forma pauperis, instead of the required filing fees, treat the
129 pauper motion as a filing fee for purposes of opening the case. [kentucky-circuit-court-clerks-
130 manual-3f4c9e.pdf (pdf4pro.com)].

131

132 **STATEMENT OF THE CASE**

133 On December 27th, 2021, I mailed a complaint/administrative appeal with IFP to the
134 Franklin Circuit Court which was received by the Clerk on January 3rd, 2022. (Appendix D page
135 3.) The Clerk gave the filings to the judge on that same day but failed to document it until April
136 1st, 2022. (Appendix D page 3). The filing was due on January 10th, 2022, but the judge held my
137 filings until January 14th, 2022, then granted my IFP. (Appendix D page 1). Although receiving
138 the filings (7) seven days before the due date the judge released them (4) four days after the due
139 date then **granted** my IFP. (Appendix D page 1). The Defendants filed a motion to dismiss
140 because my complaint was not filed on time. On February 16th we had a hearing and the judge
141 said he would consider the issue. On February 18th, 2022, I filed a petition to enter the tracking
142 information from the USPS registered mail proving the Clerk had received my complaint and
143 IFP on January 3rd. (Appendix D page 3 and Appendix F). Then on February 22nd 2022 the
144 Court dismissed my case for being filed late holding me responsible for the filing (Appendix F).
145 I filed a motion to reconsider, but the Court rejected it, ruling that I was still responsible for
146 ensuring the clerk performed her duties to file my complaint and that I had not provided proof
147 that the Clerk had received my complaint. (Appendix G).

148 Between December 27th, 2021 and January 14th 2022 I made several calls to the clerk and
149 was told it had not been received, even after it had been given to the judge. At that point the
150 clerk stated that when it did arrive, she would not file the complaint until the judge granted the
151 IFP. When I advised her of the statute, she replied that it did not apply to circuit courts, only to
152 appellate courts. And she did not file my case until the judge granted the IFP. (Appendix D page
153 1).

154 I filed a notice of appeal with IFP from the order dismissing my case in the Circuit Court.
155 However, the same judge who granted my initial IFP denied my second IFP on notice of appeal.
156 I filed a motion to reconsider or adjust the fee based on the sliding scale used by Kentucky
157 Courts. That motion was denied, ruling that taxpayers should not have to pay for the appeal.
158 (Appendix B). Pro se parties are not allowed to use the court's electronic docket to track their
159 case. At that time, I still did not know about the role played by the judge in holding my filings
160 past the deadline. That was not documented until April 1st, 2022. (Appendix D page 3).

161 I filed a *Gabbard* appeal in the Kentucky Court of Appeals. The Appellate Court
162 affirmed the Circuit Court's order then later denied my motion to reconsider. (Appendix A).

163 Then I filed a motion for discretionary review in the Kentucky Supreme Court which was
164 denied on August 16th 2023. (Appendix C).

165

166 **REASONS FOR GRANTING THE PETITION**

167 It is paramount to this petition to distinguish between my actual claim on notice of appeal
168 and the reason the Circuit Court denied my IFP. My notice of appeal was based on the Circuit
169 Court's dismissal of my case for being filed after the statutory deadline. However, the Circuit
170 Court denied my IFP based on the merits of the case. It should also be noted that in Kentucky

171 appeals on IFPs are not argued on appeal. The courts do not have to consider evidence presented
172 by the appellant.

173

174 **1. The Franklin Circuit Court erred when denied my IFP based on its opinion of the**
175 **merits of my case.**

176

177 1). The 14th Amendment to the U.S. Constitution forbids any state to deny to any person
178 the equal protection of the laws. And that all persons should be equally entitled to the
179 'prevention and redress of wrongs.' *Truax v. Corrigan*, 257 U.S. 312 (US. 1921). For poor
180 people who cannot afford the court's fees to access the courts we must rely on motions to
181 proceed *in forma pauperis*. The courts in Kentucky use a sliding scale of indigency, or if the
182 filer "Is unable to pay the costs and fees of the proceeding in which he is involved without
183 depriving himself or his dependents of the necessities of life, including food, shelter, or clothing"

184 in determining indigency for an IFP. KRS § 453.190(2). In my case the Circuit Court granted
185 my initial IFP for the complaint, then denied the second identical IFP on notice of appeal based
186 on its determination of the case merits.

187 Kentucky case law bars a court from denying an IFP based on its opinion of the merits
188 of the case.

189 "[A] trial court must allow a qualifying appellant to proceed on appeal in
190 forma pauperis, even when the trial court is of the opinion the appeal is
191 frivolous. Otherwise, the result would be the trial court deciding the appeal
192 for a poor person whereas a person paying the filing fee would have another
193 court, an appellate court, review the issue. *Windsor v. Com.*, 250 S.W.3d
194 306 (Ky. 2008).

195

196 Even if the case is frivolous the IFP should not be dismissed on the merits. *Peters v.*
197 *Peters*, 728 S.W.2d 541 (Ky. App. 1987).

198 In federal courts an IFP is granted or denied without the assistance of statutory guidelines
199 to determine who qualifies or does not qualify. An IFP can be denied by a federal court if the
200 court determines the case is not in good faith. 28 USCA § 1915(3). Even if Kentucky Courts had
201 the same authority, my case would have been in good faith because my notice of appeal
202 explained that my appeal was based on the Court's erroneous dismissal for being filed after the
203 filing deadline. That error is explained in the following section.

204

205 **The Circuit Court erred when it dismissed my case for being filed after the deadline.**

206 I mailed my complaint with the attached motion for IFP to the Franklin Circuit Court
207 Clerk and it was received and signed for, 11 days before the filing deadline. (Appendix D page
208 3). Pursuant to Kentucky law any pleading received with an IFP is to be filed upon its receipt by
209 the clerk. If accompanied by a motion for leave to proceed in forma pauperis and a supporting
210 affidavit, and made in good faith, any matter to be filed under these rules, including appeals,
211 shall be considered filed on the date it is tendered. CR 5.05(4). Pages 345-346 of the Kentucky
212 Circuit Court Clerks Handbook (current at the time of filing) says that when a clerk receives a
213 complaint, petition, or other document, and the pleading is accompanied by a motion to leave to
214 proceed In Forma Pauperis, instead of the required filing fees, treat the pauper motion as a filing
215 fee for purposes of opening the case. [kentucky-circuit-court-clerks-manual-3f4c9e.pdf
216 (pdf4pro.com)]. The Kentucky Supreme Court in *Nanny v. Smith*, 260 S.W.3d 815 (Ky. 2008)
217 opined that once a clerk has received a filing it is no longer the filer's responsibility to ensure the
218 clerk performs his/her duties. In that case the Appellant, Nanny, hand-delivered her complaint to

219 the clerk who filed it four days later and one day after the deadline. The court said, “Nanny
220 complied with the spirit of the law and should not be punished for the clerk's failure to promptly
221 perform official duties mandated by statute and court rule.” I took precautions to ensure that my
222 appeal was mailed in accordance with the rules. I undoubtedly complied with the spirit of the
223 law to ensure my appeal was timely filed. After the clerk signed for my appeal, I no longer had
224 the responsibility to file the pleading because it became her responsibility.

225 In *Commonwealth v. Opell*, 3 S.W.3d 747 (Ky. App. 1999) the commonwealth mailed a
226 notice of appeal to the clerk who received it two days before the filing deadline. However, the
227 clerk failed to file it until one day after the deadline. The court ruled that the pleading was
228 considered filed when it was received by the clerk, opining “that was all that was required”.
229 Further, the court opined that otherwise, the timeliness of filing would be under the control of the
230 clerk’s personnel instead of the filer. (The Supreme Court denied review of that case). The court
231 in *Opell* cites *U.S. v. Solly*, 545 F.2d 874, 876 (3rd Cir. 1976), supporting its contention that a
232 pleading is filed when it is received, not when it is filed by the clerk. When the clerk signed for
233 my appeal, it should have been considered filed and the clerk should have marked it filed for that
234 date. **Not 11 days later.**

235 As persuasive authority, the court in *Helton v. Jerry's Discount Inc.*, 2011 WL 6110208
236 (Ky. App. 2011) ruled that once a pleading has been received by a clerk it is his/her duty to
237 “promptly perform” his/her “required duties”. In that case the Appellant mailed her complaint
238 which was received by the clerk on the date of the filing deadline. However, the clerk failed to
239 file the pleading until two days after the deadline. That court said, “Helton had neither the
240 power nor the duty to ensure that the clerk perform official duties, she was prevented by
241 circumstances beyond her control from having' her complaint filed, and summons issued before

242 the statute of limitations expired.” Although I made frequent calls, I had no power to force the
243 clerk to file my appeal. I could not enter her office and assist her in filing the pleading. Beyond
244 making frequent calls there was absolutely nothing else I could do to ensure the clerk performed
245 her required duties.

Nonetheless, the Circuit Court ruled that it was my responsibility to ensure the case was filed on time. (Appendix F).

248

251 The Circuit Court's dismissal of my case was based on its judgment of the merits of my
252 case. That is barred by the Kentucky law. Even under federal law a court must weigh the causes
253 and merits of a case before they can dismiss an IFP on the merits of the case. My appeal was
254 based on an obvious clerical error which is not meritless. In my case the Court used a clerical
255 error to erroneously dismiss for a missed deadline. Then denied my IFP on notice of appeal to
256 ensure its dismissal would not be appealed. That was a misuse of its power and sets a dangerous
257 precedent because the Court of Appeals affirmed the action.

258

259 **There is no federal authority protecting indigent filers from potential abuse from**
260 **state courts that dismiss IFPs based on the merits of a case.**

261 Even states that have case law forbidding the practice of dismissing IFPs on the merits do
262 not have to enforce their own rule. Otherwise, like in my case, any state court in the country
263 could dismiss on any technicality and then deny an appeal to insure its ruling stands.

That is why this court should grant certiorari and give states guidance on the issue.

CONCLUSION

267 This Court should grant certiorari and make a ruling for state courts to follow on how or
268 if they can deny an IFP based on the merits of the case.

269 This court should also send the issue back to Kentucky Courts for reconsideration based
270 on this Court's ruling.

271

272 Respectfully filed,

273

274 | November 14th, 2023.

275

276

277

278

280

281

382

282

221

George H. C.

Larry Raymond Bailey
181 Ben Bailey Road
London KY, 40744