UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION -- LONDON

DERIC LOSTUTTER, *et al.*, **Plaintiffs,** **v.** **ANDY BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky,** **Defendant.**	**CIVIL ACTION NO. 6:18-277-KKC** **OPINION AND ORDER**

*** *** ***

This matter is before the Court on Plaintiffs' motion for reconsideration of the judgment pursuant to Federal Rule of Civil Procedure 59(e). (DE 57.) For the following reasons, Plaintiffs' motion is denied.[1]

I. Background[2]

On October 29, 2018, Plaintiff Deric Lostutter filed an action in this Court against the Commonwealth of Kentucky, seeking temporary and permanent injunctive relief. (DE 1.) Plaintiff amended the complaint four times, during which various parties were added and removed. (DE 10; DE 12; DE 28; DE 31.) Plaintiffs in the Fourth Amended Complaint (the operative pleading) are all disenfranchised residents of Kentucky with felony convictions who wish to register and vote in future elections. (DE 31 ¶¶ 7-8, 14-23.) Defendant Andy Beshear

[1] Plaintiffs also request an opportunity to present oral argument on the motion for reconsideration. (DE 57 at 6.) Because the motion has been comprehensively briefed and the parties' respective positions adequately presented, the Court finds that oral argument is unnecessary and therefore, denies Plaintiffs' request.

[2] This section largely adopts the facts as set forth in the Court's opinion dismissing the Plaintiffs' Fourth Amended Complaint. (DE 55.)

is the current Governor of Kentucky. However, at the time that the initial complaint was filed and subsequently amended, Matt Bevin was the Governor of Kentucky. (DE 1; DE 31.)

Plaintiffs bring this case pursuant to 42 U.S.C. § 1983, alleging that the Governor has violated their First Amendment rights. (DE 31 ¶ 6.) Specifically, Plaintiffs seek the following: a declaratory judgment that the state voting rights restoration system as "enshrined in" Section 145 of the Kentucky state constitution, Kentucky Revised Statute § 196.045, and Kentucky Revised Statute § 116.025 violate the First Amendment; a permanent injunction that enjoins the Governor "from subjecting Plaintiffs' right to vote to the unconstitutional arbitrary voting restoration scheme" under these provisions; and a permanent injunction that orders the Governor to replace the current system with one that is non-arbitrary and "restores the right to vote to felons based upon specific, neutral, objective, and uniform rules and/or criteria." (DE 31 at pp. 26-27.)

While Kentucky state law disenfranchises felons, the state's voting rights restoration system provides an avenue for felon re-enfranchisement. Section 145 of the Kentucky state constitution provides, in part:

> Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.

Ky. Const. § 145. Kentucky Revised Statute § 196.045 creates the administrative regulations for restoring civil rights to eligible felons. *See* Ky. Rev. Stat. Ann. § 196.045. Kentucky's Department of Corrections is charged with "promulgat[ing] administrative regulations . . . to implement a simplified process for the restoration of civil rights to eligible felony offenders." *Id.* § 196.045(1). Each month, the Department accordingly forwards information regarding "eligible felony offenders who have requested restoration of rights to the Office of the Governor for consideration of a partial pardon." *Id.* § 196.045(1)(e). Kentucky Revised

Statute § 116.025 incorporates Section 145 of the Kentucky state constitution into the state election code provision related to voter eligibility. *Id.* § 116.025 ("Every person . . . who is not disqualified under [Section 145 of the Constitution] or under any other statute. . . ").

During Matt Bevin's term as the Governor of Kentucky, his administration placed no restrictions on his discretion to grant or deny requests for felon re-enfranchisement. *See* Ky. Exec. Order No. 2015-052 (Dec. 22, 2015). Plaintiffs assert that this lack of criteria for determining re-enfranchisement gave the Governor "unfettered discretion," which rendered the process arbitrary and therefore, unconstitutional. (DE 31 ¶¶ 39-48.) But after the briefing for the parties' cross-motions for summary judgment closed, newly inaugurated Governor Andy Beshear signed an executive order that automatically restored the right to vote to a subset of individuals with felony convictions who previously did not have that right. Ky. Exec. Order No. 2019-003 (Dec. 12, 2019). Executive Order 2019-003 restored voting rights for "offenders convicted of crimes under Kentucky state law who have satisfied the terms of their probation, parole, or service of sentence . . . exclusive of restitution, fines, and any other court-ordered monetary conditions." *Id.* However, the Executive Order did not restore voting rights to those with pending felony charges or arrests, or those who have been convicted of certain state law crimes, under federal law, or under the law of another state. *Id.*

On August 14, 2020, this Court issued a decision ("August 14th decision") that dismissed Plaintiffs' claims as moot as a result of the Executive Order, concluding that Governor Beshear had "remedied the harm asserted" in the Fourth Amended Complaint "[b]y establishing non-arbitrary criteria for the restoration of voting rights." (DE 55 at 2.) The Court entered the corresponding judgment on that same day. (DE 56.) Plaintiffs subsequently brought the instant motion for reconsideration on August 31, 2020. (DE 57.)

II. Analysis

Pursuant to Federal Rule of Civil Procedure 59(e), a party must file a motion for reconsideration of the judgment "no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). The standard for a motion for reconsideration under Rule 59(e) is "necessarily high." *Hewitt v. W. & S. Fin. Grp. Flexibly Benefits Plan*, Civil Action No. 16-120-HRW, 2017 WL 2927472, at *1 (E.D. Ky. July 7, 2017). The moving party may not use a Rule 59(e) motion as a tool to "re-litigate issues the Court previously considered." *Id.* at *1. A court may only grant a Rule 59(e) motion if the moving party shows (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in the controlling law; or (4) a manifest injustice. *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (citations omitted).

Here, Plaintiffs' motion for reconsideration under Rule 59(e) is timely because they filed the motion on August 31, 2020, which was within 28 days after the entry of judgment on August 14, 2020. Therefore, the Court may consider Plaintiffs' motion. However, Plaintiffs' have not met their high burden to show that reconsideration is appropriate in these circumstances.

First, Plaintiffs claim that their First Amendment challenge to the arbitrariness of Kentucky's voting rights restoration system is not moot because Plaintiffs' voting rights were not automatically restored, and therefore, the restoration of their voting rights is still subject to the Governor's "purely discretionary decision." (DE 57 at 1-2.) Next, Plaintiffs argue that the Court failed to address how the Executive Order moots their claim related to the purported lack of reasonable, definite time limits for when the Governor must grant or deny voting rights restoration applications. (*Id.* at 5.) Plaintiffs thus maintain that the action is not moot on this ground. (*Id.*)

As to Plaintiffs' first argument, this Court concluded in its August 14th decision that "[e]ven if the [G]overnor maintains some discretion within the re-enfranchisement scheme to deny voting rights to these plaintiffs, their claims are nonetheless moot because their suit does not seek their own re-enfranchisement." (DE 55 at 8.) The Court further explained that Plaintiffs received the relief they sought because Plaintiffs sought "a non-arbitrary system for restoring the franchise to convicted felons that is guided by objective criteria," and "[t]he [G]overnor's discretion is no longer unfettered and absolute." (*Id.*) Contrary to Plaintiffs' second argument, the Court also found that the Executive Order mooted Plaintiffs' claim that the lack of reasonable, definite time limits for decisions on voting rights restoration applications violated the First Amendment, as the Executive Order took "immediate effect to re-enfranchise those who qualify for suffrage pursuant to its stated criteria." (*Id.* at 6 n.6.) Thus, Plaintiffs simply ask the Court to re-litigate issues that it has previously considered. *Hewitt*, 2017 WL 2927472, at *1. The Court may not properly grant Plaintiffs' motion for reconsideration on this ground. Since Plaintiffs' motion for reconsideration "merely quibbles with the Court's decision, the proper recourse is not a motion for reconsideration but instead an appeal to the Sixth Circuit." *Proctor v. GEICO Gen. Ins. Co.*, Case No. 5:17-CV-348-JMH-MAS, 2019 WL 1139483, at *2 (E.D. Ky. Mar. 12, 2019) (citation and quotation marks omitted).

To support their arguments, Plaintiffs reference the Eleventh Circuit's decision in *Hand v. DeSantis*, 946 F.3d 1272 (11th Cir. 2020) for the proposition that an action challenging a state's voting rights restoration system is not moot upon the creation of criteria for automatic restoration of voting rights if any plaintiffs still remain disenfranchised. (DE 59 at 6.) Plaintiffs then cite to a memorandum that the Eleventh Circuit presumably issued in advance of its decision in *Hand*. (*See* DE 59-1.) In the memorandum, the Court requested supplemental briefing from the parties regarding "whether all plaintiffs have now satisfied

outstanding court costs and fees" and that "[i]n the event that there are plaintiffs with outstanding court costs and fees, . . . whether the Executive Clemency Board takes the position that any plaintiffs in this case will continue to be disqualified from voting such that this appeal is not moot." (*Id.*) According to Plaintiffs, "the Court made clear that the appeal was not moot" if any plaintiffs were still disenfranchised. (DE 59 at 6.)

To extent that Plaintiffs' citation to *Hand* may be construed as an argument that the August 14th decision exhibited a clear error of law, that argument also fails. To establish a clear error of law, the moving party must show that the error was "so egregious that an appellate court could not affirm the district court's judgment." *United States v. Combs*, Criminal Action Nos. 6:04-54-DCR, 7:01-17-DCR, Civil Action No. 6:09-7069-DC, 2012 WL 4460745, at *1 (E.D. Ky. Sept. 26, 2012). Plaintiffs have not made such a showing here.

In *Hand*, a group of individuals with felony convictions similarly challenged Florida's voting rights restoration system. 946 F.3d 1272 at 1274. While the case was pending before the Eleventh Circuit, the Florida state constitution and the relevant Florida statutory scheme were amended to automatically restore voting rights for felons upon the completion of all terms of their sentences, excepting those convicted of committing certain enumerated crimes. *Id.* at 1274-1275. Because the plaintiffs were now able to seek restoration of their voting rights under the revised system, the Eleventh Circuit concluded that the case was moot because the Court of Appeals could no longer provide the plaintiffs with meaningful relief from the former re-enfranchisement system, and the plaintiffs no longer required relief under that system. *Id.* at 1275. Plaintiffs mischaracterize the ultimate holding in *Hand* because the Eleventh Circuit never explicitly stated that if the plaintiffs had remained disenfranchised under Florida's voting rights restoration system, the action would not have been moot. Indeed, *Hand* is entirely consistent with this Court's August 14th decision, which found that Plaintiffs' action was moot following similar changes in Kentucky's voting rights

restoration system. As in *Hand*, this Court also concluded that Plaintiffs no longer required relief under Kentucky's former re-enfranchisement system because that relief had been received. Therefore, the Court cannot discern any error of law made in dismissing Plaintiffs' case as moot, much less an error that rose to such a level as to necessitate the granting of this motion for reconsideration.

Moreover, this Court is not convinced that a mere statement in a *memorandum* inquiring about one party's stance on a particular issue holds the same dispositive weight as a *decision* issued by that very same court. And, in any event, Eleventh Circuit precedent is not binding on this Court. *See Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 278 (6th Cir. 2010); *see also Worldwide Equip. of TN, Inc. v. United States,* Civil No. 14-108-ART, 2016 WL 3355314, at *6 (E.D. Ky. June 15, 2016) ("None of these cases were decided by the Sixth Circuit or United States Supreme Court, however, and thus this Court is not bound by them.").

Further, Plaintiffs have not shown, nor have they attempted to argue, that newly discovered evidence, an intervening change in the controlling law, or a manifest injustice warrants a different result. The Court sees no basis for granting Plaintiffs' motion for reconsideration. *Cf. Hewitt*, 2017 WL 2927472, at *1 (denying motion for reconsideration where moving party did not "offer any new fact or law on which the Court may find reconsideration appropriate"). Accordingly, Plaintiffs' motion for reconsideration is denied.

III. Conclusion

The Court hereby ORDERS that Plaintiffs' motion for reconsideration of the judgment pursuant to Federal Rule of Civil Procedure 59(e) (DE 57) is DENIED.

Dated April 19, 2021

Karen K. Caldwell

KAREN K. CALDWELL
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF KENTUCKY