MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kevin L. Martin,

Appellant-Plaintiff,

v.

State of Indiana, Richard Brown, and Michael Ellis,

Appellees-Defendants.

July 22, 2021

Court of Appeals Cause No. 21A-CT-66

Appeal from the Sullivan Circuit Court

The Honorable Robert A. Pell, Special Judge

Trial Court Cause No. 77C01-2005-CT-241

Brown, Judge.

[1] Kevin L. Martin appeals the trial court's dismissal of his complaint. We affirm.

Facts and Procedural History

[2] On May 28, 2020, Martin filed a "notice to the court" under cause number 77C01-2005-CT-241 in the Sullivan Circuit Court ("Cause No. 241"), which was captioned "Kevin L. Martin v[.] Michael Ellis Et al" and stated "Information for count perjury IC 35-44-1-21 1 level 6 Felony" and that Martin would "request a copy from the southern district the Exhibits to prove my allege [sic] that Michael Ellis comm[i]t perjury and I will send you the relevant evidence," and requested the court to "meaningfully pursue th[e] charge against Michael Ellis."[1] Appellees' Appendix Volume II at 2-3. Martin attached a Memorandum in Support of Defendants' Motion For Summary Judgment in the federal case *Martin v. Brown*, No. 2:19-CV-298-JRS-DLP (S.D. Ind.) (the "federal lawsuit"),[2] which argued that the procedural due process claim brought by Martin in that case failed because he had not been deprived of a liberty interest as a consequence of a disciplinary sanction that had since been dismissed, and that no liberty interest was implicated because Martin had

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[1] On appeal, the Appellees assert:

> It is unclear why Richard Brown became a defendant in this case. Martin does not mention Brown in his "notice to court," Appellee[s'] App. 2-4, but Brown was served with process, so the State appeared and moved to dismiss any claim against him.

Appellees' Brief at 16.

[2] The defendants' motion for summary judgment in the federal lawsuit indicates that Martin brought First Amendment retaliation claims and Fourteenth Amendment due process claims against certain defendants, including Richard Brown. Martin asserts that the claim involved a § 1983 claim, and he does not include a copy of his complaint in the federal lawsuit.

served no disciplinary time. A Declaration of Michael Ellis was attached to the Memorandum and stated Ellis was employed by the Indiana Department of Correction and able to view Martin's conduct summary and sanction detail and that, though Martin was assessed disciplinary restrictive housing as a result of an August 28, 2018 conduct report, he did not serve the time.

[3] On July 20, 2020, the Appellees filed a motion to dismiss in Cause No. 241 arguing that Martin failed to state a claim upon which relief could be granted. The Appellees attached a memorandum in support of its motion arguing that Martin did not have a private right of action for civil enforcement of perjury under Indiana's criminal code, failed to plead in accordance with the Indiana Tort Claims Act, failed to allege any facts against defendant Richard Brown, and, to the extent he was pleading a claim under federal law, failed to allege compliance with the Prison Litigation Reform Act's exhaustion requirement.

[4] An August 6, 2020 entry in the chronological case summary states that no filing fee or waiver had been submitted, and the Appellees filed a motion to stay based on Martin's status as a restricted filer. The court granted the Appellees' motion and ordered Martin to "pay the pending filing fee for this action within 60 days" and warned him "that if he does not pay such fees or file a voluntary dismissal, he risks this case being dismissed for failure to prosecute," and Martin appealed the stay to this Court under cause number 20A-CT-1746 ("Cause No. 1746"). Appellees' Appendix Volume II at 51-52.

[5] On December 29, 2020, the trial court granted the Appellees' motion to dismiss Martin's complaint, which Martin appealed.[3] This Court later consolidated Martin's appeal under Cause No. 1746 with the appeal under this cause number.

Discussion

[6] Martin is proceeding *pro se*. It is well settled that *pro se* litigants are held to the same standards as licensed attorneys and are required to follow procedural rules. *Martin v. Hunt*, 130 N.E.3d 135, 136-137 (Ind. Ct. App. 2019) (citing *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*).

[7] Martin claims the trial court erred in granting the motion to dismiss based on his assertion that Ellis's declaration "was untrue," and he argues that alleged evidence would prove a "charge against []Ellis under IC code 35-44-21 Perjury Act."[4] Appellant's Brief at 10-11.

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[3] Martin has filed several cases which have been dismissed. *See Martin v. Hunt*, 130 N.E.3d 135, 137-138 (Ind. Ct. App. 2019) (affirming dismissal of complaint and collecting cases initiated by Martin) (citing *Martin v. Gilbert*, *et al.*, No. 18A-CT-2095 (Ind. Ct. App. June 5, 2019) (dismissed action as frivolous), *trans. denied*; *Martin v. Brown, et al.*, No. 18A-CT-2940 (Ind. Ct. App. March 15, 2019) (affirmed dismissal on violations of rules of appellate procedure), *trans. denied*; *Martin v. Howe, et al.*, No. 18A-CT-680 (Ind. Ct. App. November 14, 2018) (dismissal of appeal and noting failure to make cogent argument), *trans. denied*; *Martin v. Kawecki, et. al*, 71C01-1711-CT-508 (Ind. Ct. App. May 17, 2018) (trial court dismissed complaint for failure to state a claim upon which relief could be granted); *Martin v. Sanford, et al.*, 71C01-1711-CT-523 (Ind. Ct. App. December 18, 2017) (trial court dismissed action for failure to state a claim upon which relief could be granted)).

[4] In his appellant's brief, Martin cites "IC code 35-44-21," Appellant's Brief at 11, and in his "notice to the court," he cited "IC 35-44-1-21." Appellees' Appendix Volume II at 2. While the Ind. Code chapter and statute do not exist, Ind. Code § 35-44.1-2-1 is titled "Perjury" and provides that a person who "makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true," or "has knowingly made two (2) or more material statements, in a proceeding before a court or grand

[8] To the extent Martin does not present cogent argument, the issues or assertions he attempts to present are waived. *See Martin*, 130 N.E.3d at 137-138 (finding Martin did not provide cogent argument or cite relevant precedent which resulted in waiver of the issues he attempted to present and affirming the dismissal of his complaint).

[9] A motion to dismiss pursuant to Ind. Trial Rule 12(B)(6) tests the legal sufficiency of the complaint. *Price v. Ind. Dep't of Child Servs.*, 80 N.E.3d 170, 173 (Ind. 2017). The rule requires that we accept as true the facts alleged in the complaint. *Id.* We review 12(B)(6) motions de novo. *Id.* We will affirm a dismissal if the decision is sustainable on any basis in the record. *Id.*

[10] As it relates to Brown, we note that, while the notice pleading provision of Ind. Trial Rule 8(A) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," a plaintiff must still plead the operative facts necessary to set forth an actionable claim. *See Trail v. Boys and Girls Clubs of Northwest Ind.*, 845 N.E.2d 130, 135 (Ind. 2006) (citing *Miller v. Mem. Hosp. of South Bend, Inc.*, 679 N.E.2d 1329 (Ind. 1997)). Martin did not mention Brown in his initial "notice to the court," Appellees' Appendix Volume II at 2; rather Brown's name appears only in the attached Memorandum in Support of Defendants' Motion For Summary Judgment in the federal lawsuit, which indicates Martin sued Brown "because he has 'oversight' of Wabash Valley

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jury, which are inconsistent to the degree that one (1) of them is necessarily false," commits perjury, a level 6 felony.

Correctional Facility" and Martin "believe[d] Brown was 'responsible for the ultimate care custody and control of the facility." *Id.* at 18. We additionally note that Brown is also absent from the argument section of Martin's appellant's brief.

[11] Furthermore, to the extent that Martin's "notice to the court" argues a state law violation by Ellis – namely, that Ellis perjured himself – we note that the Appellees, in their earlier memorandum in support of the motion to dismiss, characterized Martin's claim as one under the Indiana Tort Claims Act, or Ind. Code § 34-13-3-1 *et seq.* While Martin does not cite to the statute, we note that it provides that a lawsuit filed against a public employee personally must allege that an act or omission of the employee that causes a loss is not only criminal, but also "clearly outside the scope of the employee's employment," "malicious," "willful and wanton," and "calculated to benefit the employee personally," and must also contain a reasonable factual basis supporting the allegations. Ind. Code § 34-13-3-5(c). Martin does not assert that Ellis's actions were clearly outside the scope of his employment, malicious, willful and wanton, or calculated to benefit him personally, and his allegations otherwise lacked a factual basis. Moreover, we note that Indiana is unable to prosecute or punish acts of perjury before a federal court. *See Smith v. King*, 716 N.E.2d 963, 967 (Ind. Ct. App. 1999) ("[T]he power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had.") (quoting *Thomas v. Loney*, 134 U.S. 372, 375, 10 S. Ct. 584, 585 (U.S. 1890)), *aff'd on reh'g*, *trans. denied*. *Accord* 60A AM. JUR.

2d Perjury, § 39 (2021) ("The giving of false testimony in a proceeding authorized or required by federal law is a crime against the United States, and state courts cannot assume jurisdiction since the power to punish a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had.") (internal citation removed) (citing *Caha v. U.S.*, 152 U.S. 211, 14 S. Ct. 513 (1894)).

[12] For the foregoing reasons, we affirm the dismissal of Martin's complaint.[5]

[13] Affirmed.

Bradford, C.J., and Vaidik, J., concur.

[5] As we affirm the dismissal of Martin's complaint, we need not reach the issue of whether the trial court erred in granting the motion to stay. *See Larkin v. State*, 43 N.E.3d 1281, 1286 (Ind. Ct. App. 2015) ("An issue is deemed moot when it is no longer 'live' or when the parties lack a legally cognizable interest in the outcome of its resolution.") (quoting *Jones v. State*, 847 N.E.2d 190, 200 (Ind. Ct. App. 2006), *trans. denied*), *reh'g denied*.