

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Michael Hickingbottom,
Appellant-Plaintiff,

v.

Mark A. Bates, et al.,
Appellees-Defendants,

April 8, 2021

Court of Appeals Case No.
20A-CT-2168

Appeal from the Lake Superior
Court

The Honorable Kristina C. Kantar,
Judge

Trial Court Cause No.
45D04-1911-CT-1169

Robb, Judge.

Case Summary and Issue

[1] Michael Hickingbottom, pro se, filed a complaint against Lake County Public Defender Mark Bates in his official capacity and the Lake County Appellate Public Defender Division.¹ However, the trial court dismissed Hickingbottom's complaint for failure to state a claim upon which relief could be granted. Hickingbottom now appeals, raising several issues for our review, of which we find the following restated issue dispositive: whether the trial court erred by

¹ Hickingbottom also brought claims against Governor Eric Holcomb and Judge Clarence Murray; however, in his response to Murray and Holcomb's joint motion to dismiss, Hickingbottom agreed that "Judge Murray possesses Judicial Immunity that Precludes Liability[.]" Brief of Appellees Judge Murray and Governor Holcomb at 5, and "Holcomb has no connection with this suit[.]" *id.* at 6. Further, Hickingbottom does not challenge the trial court's dismissal of his claims against Holcomb and Murray on appeal. Hickingbottom also included claims against Sheriff Oscar Martinez; however, Sheriff Martinez was dismissed without prejudice for lack of service.

dismissing Hickingbottom's complaint for failure to state a claim on which relief can be granted.² Concluding the dismissal was proper, we affirm.

Facts and Procedural History

[2] On October 15, 2004, Hickingbottom was convicted of murder following a jury trial at which he was represented by Lake County Public Defender Teresa Hollandsworth. On direct appeal Hickingbottom was represented by Lake County Public Defender Bates, who raised issues related to admission of evidence, evidence of sudden heat, and Hickingbottom's sentence. A panel of this court affirmed his conviction, *Hickingbottom v. State*, No. 45A03-0502-CR-77 (Ind. Ct. App. Feb. 8, 2006), *trans. denied*, and on April 19, 2006, our supreme court denied Hickingbottom's petition to transfer, *see* Appellee's Appendix, Volume 2 at 14. Subsequently, Hickingbottom, pro se, filed a petition for post-conviction relief alleging that he received ineffective assistance of trial counsel. The post-conviction court denied Hickingbottom's petition, and this court affirmed. *Hickingbottom v. State*, No. 45A05-0705-PC-243 (Ind. Ct. App. July 11, 2008), *trans. denied*.

[3] On December 10, 2019, Hickingbottom filed a 42 U.S. Code section 1983 ("Section 1983") complaint alleging that Bates, in his official capacity, and the

² The trial court concluded that Hickingbottom's claims against both Bates and the Appellate Public Defender's Office were duplicative. However, we need not address this because Hickingbottom fails to present facts to support a Section 1983 claim against either party.

Appellate Public Defender Division violated his Sixth, Eighth, and Fourteenth Amendment rights. Specifically, he alleged his right to a “full and fair direct appeal” was “doomed/sabotaged” because Bates failed to raise ineffective assistance of trial counsel on direct appeal due to an Appellate Public Defender Division policy precluding public defenders from asserting such claims when trial counsel was also a Lake County Public Defender. Appellant’s Appellate Brief at 7. Subsequently, Bates and the Appellate Public Defenders Division filed a Joint Motion to Dismiss. On April 15, 2020, the trial court granted the joint motion, finding that claims against Bates and the Lake County Appellate Public Defenders Division were barred by the statute of limitations. Hickingbottom now appeals.

Discussion and Decision

I. Standard of Review

[4] We review a trial court’s ruling on a Trial Rule 12(B)(6) motion using a de novo standard. *Lei Shi v. Cecilia Yi*, 921 N.E.2d 31, 36 (Ind. Ct. App. 2010). This means that we give no deference to the trial court’s decision. *Id.* We consider the complaint and reasonable inferences therefrom in the light most favorable to plaintiff. *Id.* at 37. We stand in the shoes of the trial court and must determine if the trial court erred in its application of the law. *Godby v. Whitehead*, 837 N.E.2d 146, 149 (Ind. Ct. App. 2005), *trans. denied*. The trial court’s grant of a motion to dismiss is proper if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of

circumstances. *Id.* In making this determination, we look only to the complaint and may not resort to any other evidence in the record. *Id.*

II. Failure to State a Claim

- [5] Hickingbottom argues that the trial court’s dismissal of his complaint “on the grounds of a statute of limitation violation was an abuse of discretion[.]” Appellant’s Br. at 9. A motion to dismiss for failure to state a claim on which relief may be granted may be an appropriate means of raising the statute of limitations. *Matter of Carroll’s Estate*, 436 N.E.2d 864, 865 (Ind. Ct. App. 1982). When the complaint shows on its face that the statute of limitations has run, the defendant may file a Trial Rule 12(B)(6) motion. *Nichols v. Amax Coal Co.*, 490 N.E.2d 754, 755 (Ind. 1986).
- [6] Hickingbottom alleged that due to a conflict of interest, Bates could not raise a claim of ineffective assistance of trial counsel on direct appeal and that this violated his Fourteenth, Eighth, and Sixth Amendment rights. Claims brought in Indiana under Section 1983 are subject to Indiana’s two-year statute of limitations for personal injury actions. *See Delacruz v. Wittig*, 42 N.E.3d 557, 559 (Ind. Ct. App. 2015), *trans. denied*; *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 894 (7th Cir. 2001) (“Indiana’s two-year statute of limitations . . . is applicable to all causes of action brought in Indiana under 42 U.S.C. § 1983.”).
- [7] Although Indiana law determines the applicable statute of limitations, federal law determines when a Section 1983 claim accrues. *Sellars v. Perry*, 80 F.3d 243,

245 (7th Cir. 1996). The statute of limitations on a Section 1983 claim begins to run when “the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.” *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008) (quoting *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987)).

[8] Hickingbottom argues that the statute of limitations on his claim did not begin to run until February 21, 2019, because that is when he discovered his alleged injury. Hickingbottom’s complaint alleges that on that date, he received a letter from Chief Public Defender Marce Gonzales, Jr. stating, “Bates could not ethically (because of a conflict of interest created by both working for the same office) raise the issue of Ineffective Assistance of Counsel as a challenge to [trial counsel’s] representation of you.” Appellant’s Br. at 9. Because we accept as true facts alleged in the complaint when reviewing a Trial Rule 12(B)(6) motion to dismiss, we accept Hickingbottom’s allegations as to the timeline for purposes of the statute of limitations. Hickingbottom did not discover any alleged injury until February 21, 2019, and therefore filed his Section 1983 claim within the two-year window. *Snodderly*, 239 F.3d at 894.

[9] However, we may affirm on any basis in the record, *Ward v. Carter*, 90 N.E.3d 660, 662 (Ind. 2018), *cert. denied*, 139 S.Ct. 240 (2018), and in reviewing Hickingbottom’s complaint de novo we conclude that he fails to state any facts that would support a claim for Section 1983 relief. Under Section 1983, a government official who, while acting under color of state law, deprives an individual of constitutionally protected rights may be subject to personal

liability for civil damages. *Eversole v. Steele*, 59 F.3d 710, 717 (7th Cir. 1995). Hickingbottom is required to show: (1) a deprivation of a federally protected right; and (2) the defendant's conduct caused the deprivation. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 559 (1st Cir. 1989). Hickingbottom claims that he was deprived of his right to a full and fair direct appeal. *See* Appellant's Br. at 14. We disagree.

[10] Bates' failure to raise ineffective assistance of trial counsel on direct appeal did not deprive Hickingbottom of any rights because if not raised on direct appeal, a claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding. *Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), *cert. denied*, 528 U.S. 861 (1999). And Hickingbottom did in fact file a petition for post-conviction relief claiming ineffective assistance of trial counsel, which was denied, and the denial was affirmed by this court in 2008. *See Hickingbottom v. State*, No. 45A05-0705-PC-243 at *1 (Ind. Ct. App. July 11, 2008). Further, a defendant who chooses to raise a claim of ineffective assistance of trial counsel on direct appeal is foreclosed from relitigating that claim. *Woods*, 701 N.E.2d at 1220. The defendant is even precluded from alleging different grounds of ineffective assistance on post-conviction relief after raising the issue on direct appeal. *Morris v. State*, 466 N.E.2d 13, 14 (Ind. 1984) ("Notwithstanding the fact that petitioner gave several additional examples of his counsel's alleged ineffectiveness during the post-conviction hearing, a consideration of the ineffectiveness issue would constitute review of an issue already decided on

direct appeal.”). Therefore, this court generally cautions against raising ineffective assistance of trial counsel on direct appeal.

[11] We conclude that, regardless of any policy of the Lake County Public Defender’s Office, Hickingbottom was not deprived of his right to bring a claim of ineffective assistance of trial counsel because the claim was available to him on post-conviction relief. To the extent he alleges additional claims of ineffective assistance of trial counsel remain unraised, that is the result of his own oversight on post-conviction relief, not Bates’ failure on direct appeal. Therefore, his complaint states no facts on which he could succeed in his Section 1983 claim against Bates and the Lake County Appellate Public Defender Division.

Conclusion

[12] We conclude that Hickingbottom’s complaint states no facts on which he could succeed in his Section 1983 claim; therefore, the trial court did not err in granting the motion to dismiss for failure to state a claim. Accordingly, we affirm.

[13] Affirmed.

Bailey, J., and May, J., concur.