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IN THE COURT OF APPEALS OF INDIANA

Lee Evans Dunigan,
Appellant-Defendant,

v.

Tippecanoe County Public Defender's Office,
Appellee-Plaintiff.

April 28, 2022

Court of Appeals Case No. 21A-CT-678

Appeal from the Tippecanoe Circuit Court

The Honorable Benjamin Diener, Special Judge

Trial Court Cause No. 79C01-2005-CT-90

Kirsch, Senior Judge.

Statement of the Case

[1] Lee Evans Dunigan chose to represent himself at trial where he faced a charge of Level 1 felony child molesting. *See Dunigan v. State*, No. 20A-CR-1301, 2021 WL 5575248, (Ind. Ct. App. Nov. 13, 2021). He was convicted in a bench trial

and sentenced to forty-two years executed in the Department of Correction. *Id.* at *1. After his conviction, Dunigan filed separate lawsuits against various persons, the State of Indiana, other entities, judges involved in the criminal case, the police, the prosecutors, the Tippecanoe County Public Defender's Office (TCPDO), and several attorneys appointed to represent him in pre-trial proceedings before the court allowed him to proceed pro se at trial.[1] The present case involving TCPDO is one of several of those cases that was screened pursuant to Indiana Code section 34-58-1-2 (2004) (Screening of Offender Litigation), and in particular was dismissed for failure to state a claim upon which relief may be granted and for bringing an action against a defendant who was immune from suit. After several post-dismissal motions and responses were filed, Dunigan now appeals from the court's order denying his motion to correct error and order in favor of TCPDO. We affirm.

Issue

[2] The following restated issue is before the Court: Did the court err by denying Dunigan's motion to correct error that challenged the dismissal of Dunigan's complaint against TCPDO for failure to state a claim upon which relief may be

[1] *See e.g.*, *Lee Evans Dunigan v. Tippecanoe Cnty. Sheriff's Dept.*, 79C01-2004-CT-70; *Lee Evans Dunigan v. State of Indiana*, 79C01-2004-CT-71; *Lee Evans Dunigan v. Quality Corr. Care*, 79C01-2004-CT-72; *Lee Evans Dunigan v. W. Lafayette Police Dep't*, 79C01-2004-CT-73; *Lee Evans Dunigan v. Emerson and Manahan*, 79C01-2005-CT-89; *Lee Evans Dunigan v. Tippecanoe Cnty. Pub. Def.*, 79C01-2005-CT-90; and *Lee Evans Dunigan v. Tippecanoe Super. Ct. 5*, 79C01-2005-CT-91.

granted and for bringing suit against a defendant who is immune from suit under Indiana Code section 34-13-3-3 (2020) (ITCA)?

Facts and Procedural History

[3] The State brought charges of Level 1 felony child molesting against Dunigan on October 18, 2018. The TCPDO was appointed to represent him the following day. Next, Dunigan chose to represent himself at trial and the court granted his request. After a bench trial, he was found guilty as charged and was sentenced to forty-two years executed in the DOC. *See Dunigan*, 2021 WL 5575248.

[4] Dunigan filed his Amended Complaint against TCPDO on June 22, 2020, asserting twenty-two counts, alleging that TCPDO allowed police, prosecutorial, and judicial misconduct, among other things. Additionally, Dunigan had filed fifteen other complaints related to his arrest, trial, and conviction. Those cases were consolidated and reviewed under the statutory offender screening process. *See* Ind. Code § 34-58-1-2. After reviewing the allegations, the court concluded that Dunigan's complaint against TCPDO did not survive the offender screening process because it failed "to state a claim upon which relief may be granted and/or [sought] relief from a defendant who is immune from suit under I.C. 34-13-3-3." Appellant's App. Vol. 1, p. 16; Appellant's App. Vol. 2, p. 24.[2]

[2] Dunigan has submitted two appendices only one of which is numbered. We will refer to the unnumbered volume as Appellant's App. Vol. 2.

[5] Next, Dunigan filed a response to the court's order, contending that the court erred by dismissing his claim. He also moved for a change of venue and alleged conflicts of interest against certain Tippecanoe County Circuit Court judges with respect to each of the complaints he had filed. In response, the court denied the request for a change of venue but granted Dunigan's request for a change of judge as to each of his cases. The court explained that "a Special Judge will be appointed" and that the court "would take no further action on [Dunigan's] request to reconsider the June 29, 2020 order or any other requests made in [Dunigan's] July 23, 2020 filing." Appellee's App. Vol. 2, p. 160. TCPDO responded to what was treated as Dunigan's motion to correct error, objecting to the portion of the motion challenging the court's dismissal of the claims against it.

[6] On December 2, 2020, the Supreme Court appointed a special judge. On December 16, 2020 and again on January 8, 2021, Dunigan moved for a change of judge and change of venue in each of his cases. A few days later, the special judge denied Dunigan's request for a change of judge but granted his motion for change of venue in each of his cases. After Dunigan failed to comply with Indiana Trial Rule 76(D)'s venue striking provisions, both the Tippecanoe Circuit Court and the special judge retained jurisdiction of this case. On March 31, 2021, the special judge entered his order denying Dunigan's motion and entering judgment in favor of TCPDO.

Discussion and Decision

[7] Dunigan appeals from the court's order denying his motion to correct error, which challenged the dismissal of his claim against the TCPDO. The dismissal of his complaint was done pursuant to the screening process codified in Indiana Code section 34-58-1-2. Under that section and the preceding section of the statute, when an offender files a complaint or petition, the court must docket the case and then screen the claim, or make the determination whether it may proceed. *Taylor v. Finnan*, 955 N.E.2d 785, 787 (Ind. Ct. App. 2011), *trans. denied.* A claim may not proceed if it is frivolous, is not a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from liability for such relief. Ind. Code § 34-58-1-2. A claim will be deemed frivolous if it is made primarily to harass a person or lacks an arguable basis in law or fact. *Id.* If the court determines that a claim may not proceed, the court must enter an order explaining why it cannot proceed and stating whether there are any remaining claims that may proceed. *See* Ind. Code § 34-58-1-3 (2004). The court did just that here, concluding that while a few of Dunigan's claims survived the screening process, his claim against TCPDO did not for the reasons previously set out. *See* Appellant's App. Vol. 1, p. 18; Appellant's App. Vol. 2, p. 24.

[8] Next, in reviewing the dismissal of an offender's complaint pursuant to Indiana Code section 34-58-1-2, we employ a de novo standard of review. *Taylor*, 955 N.E.2d at 787. Like the trial court, we look only to the well-pleaded facts contained in the complaint or petition. *Id.* Further, we determine whether the

complaint or petition contains allegations concerning all the material elements necessary to sustain a recovery under some viable legal theory. *Id.*

[9] TCPDO makes a compelling argument that Dunigan has waived appellate review of his claims by failing to comply with our Appellate Rules. *See* Appellee's Br. pp. 15-17. After all, we have consistently held that pro se litigants are held to the same legal standards as licensed attorneys. *See Lowrance v. State*, 64 N.E.3d 935, 938 (Ind. Ct. App. 2016), *trans. denied.* Dunigan's briefs fall short of what is required for competent appellate advocacy. However, we decline to find waiver here, in preference of deciding the case on the merits whenever possible and giving Dunigan his day in court. *See Omni Ins. Group v. Poage*, 966 N.E.2d 750, 753 (Ind. Ct. App. 2012), *trans. denied*; *Allstate Ins. Co. v. Love*, 944 N.E.2d 47, 52 (Ind. Ct. App. 2011), *trans. denied*.

[10] That said, Dunigan has not provided any argument or case law contrary to the court's determination, demonstrating that TCPDO is not immune from tort liability under the ITCA or that his Amended Complaint states a claim against TCPDO upon which relief can be granted such that a reversal is warranted.

[11] Here, the court concluded that (1) Dunigan is an offender as defined by Indiana Code section 34-6-2-89 (2004), and (2) his claims against TCPDO seek monetary relief from TCPDO, which is immune from liability for such relief, and fail to state a claim upon which relief can be granted. *See* Appellant's App. Vol. 2, pp. 12-18.

[12] The ITCA provides in pertinent part as follows:

> (a) A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:
>
> * * * *
>
> (6) The initiation of a judicial or an administrative proceeding.
>
> (7) The performance of a discretionary function; however, the provision of medical or optical care as provided in IC 34-6-2-38 shall be considered as a ministerial act.
>
> * * * *
>
> (10) The act or omission of anyone other than the governmental entity or the governmental entity's employee.

Ind. Code § 34-13-3-3.

[13] A public defender's office has been held to be a political subdivision and governmental entity entitled to the protection afforded by the ITCA. *See Myers v. Maxson*, 51 N.E.3d 1267, 1274 (Ind. Ct. App. 2016); *see also Wright v. Elston*, 701 N.E.2d 1227, 1233 (Ind. Ct. App. 1998) ("This statute extends immunity under the Indiana Tort Claims Act to attorneys employed by a governmental entity, whether as an employee or as an independent contractor.").

[14] Here, Dunigan's complaint alleges that TCPDO allowed the West Lafayette Police Department, the prosecutors, the courts, and the judges to violate his constitutional rights. *See* Appellee's App. Vol. 2, pp. 93-150. In his briefs, Dunigan describes the conduct of the police, the prosecutors, the courts, and the judges, *see* Appellant's Br. pp. 18 (police seized Blackberry); 19 (police allegedly planted evidence); 20, 21 (State allegedly prosecuted a boilerplate and incomplete and uncorrected affidavit of probable cause). He has filed separate

complaints against each of these entities. The well-pleaded facts as respects TCPDO, however, do not establish that the police, the prosecutors, the courts, or the judges were employed by TCPDO or that TCPDO exercised control over them. Consequently, TCPDO is immune from suit under Indiana Code section 34-13-3-3(10) for those allegations.

[15] Next, Dunigan claims a loss resulting from the initiation of proceedings against him. He claims that misconduct by police, prosecutors, and judges, which was allowed by TCDPO, led to the filing and prosecution of false charges against him and a wrongful conviction. Appellant's Brief pp. 16, 18-20; Appellee's App. Vol. 2, pp. 93-150. Indiana Code section 34-13-3-3(6) (2004) provides immunity from suit to TCDPO for such claims, as Subsection 6 explicitly provides immunity from suit relating to the initiation of judicial or administrative proceedings to government entities or employees acting within the scope of the employee's employment. *See Stone v. Wright,* 133 N.E.3d 210, 218 (Ind. Ct. App. 2019) (city and police chief immune from claims of creating a false affidavit and malicious prosecution under judicial proceeding immunity); *see also, Anderson v. Weatherford*, 714 N.E.2d 181, 185-86 (Ind. Ct. App. 1999), *trans. denied*.

[16] TCPDO argues that it is also entitled to immunity from Dunigan's claims under another subsection of the ITCA, Subsection 10. Subsection 10 provides immunity to a governmental entity or an employee acting within the scope of the employee's employment for the performance of a discretionary function. Attorneys are included in the definition of employee or public employee. Ind.

Code § 34-6-2-38 (2009). In *Wright*, we held that this "statute extends immunity under the Indiana Tort Claims Act to attorneys employed by a governmental entity, whether as an employee or as an independent contractor." 701 N.E.2d at 1223. We noted that though doctors and optometrists were also included in Indiana Code section 34-6-2-38's definition of employee or public employee, their acts were described as ministerial, while those of attorneys were not. *Id.; see also* Ind. Code § 34-13-3-3(7). It logically follows that because lawyers' actions were not described as ministerial, then they must be discretionary. This logic finds support in the holdings of courts in other states confronted with the same issue. *See, e.g.*, *Laughlin v. Perry*, 604 S.W.3d 621, 630 (Mo. 2020) (public defenders immune from suit for discretionary acts); *Dziubak v. Mott*, 503 N.W.2d 771 (Minn. 1993) (same). We conclude that the court's dismissal is supported by this section of the ITCA as well.

[17] Despite the dispositive resolution of the appeal on immunity grounds, the second ground given by the court for dismissing Dunigan's claims against it is that the complaint fails to state a claim upon which relief may be granted. We turn once more to the well-pleaded facts in the complaint.

[18] Dunigan says that the TCPDO acted through its employees, Shay Hughes and David Shircliff, and "allowed" the police, the prosecutor, and the court to act in ways that violated his constitutional rights. *See* Appellant's Br. p. 11; *see also* Appellee's App. Vol. 2, pp. 102, 127-129, 132, 134, 145, 150. Dunigan does not allege that the police, prosecutor, and the court are employed by TCPDO, nor that TCPDO has a right or duty to control these other entities and individuals.

See, e.g., *Klobuchar v. Purdue University*, 553 N.E.2d 169, 173 (Ind. Ct. App. 1990) (entity had no duty to control the conduct of individual with whom it had no relationship). Additionally, the conduct of the police, the prosecutor, and the court that Dunigan complains violated his constitutional rights occurred prior to TCPDO's representation of him. *See* Appellant's Br. pp. 18-21 (911 call and DNA evidence omitted in "boiler plate" probable cause affidavit; unlawful seizure of his phone; police planted evidence). The court correctly concluded that there is no cognizable claim by Dunigan against TCPDO for its alleged failure to control the conduct of individuals who were not its employees, *see Klobuchar*, 553 N.E.2d at 173, and dismissed his complaint.

[19] Giving Dunigan's Amended Complaint the benefit of further appellate review, we look to see if he has alleged a cognizable claim for legal malpractice against TCPDO. To prevail on a legal malpractice claim, a plaintiff must establish: (1) employment of the attorney and/or firm (duty); (2) failure of the attorney and/or firm to exercise ordinary skill and knowledge (breach); (3) proximate cause (causation); and (4) loss to the plaintiff (damages). *Gates v. O'Connor*, 111 N.E.3d 215, 223-24 (Ind. Ct. App. 2018), *trans. denied.* To establish causation, Dunigan must show that the outcome of the underlying litigation would have been more favorable but for the attorney's negligence. *See Beal v. Blinn*, 9 N.E.3d 694, 700 (Ind. Ct. App. 2014), *trans. denied*.

[20] The well-pleaded facts of Dunigan's Amended Complaint focus on the false statements or omissions in the probable cause affidavit filed on October 3, 2018, tampering with evidence by a police officer that allegedly occurred around

October 1, 2018, and the allegedly unlawful October 1, 2018, seizure of his Blackberry. *See* Appellant's Br. p. 11; Appellee's App. Vol. 2, pp. 45, 49, 51, 94, 108, 115. TCPDO was assigned to Dunigan's case on October 19, 2018. Shay Hughes represented Dunigan until May 2019 and David Shircliff represented him only for his sentencing. Dunigan did not plead any specific act that Shay Hughes or David Shircliff did or failed to do as his attorney after they were appointed and during their representation of him. His complaint does not allege that TCPDO failed to use reasonable care in his defense while its employees represented him during his case or that any such failure proximately caused his conviction or led to a less favorable outcome of his case. *See Clary v. Lite Machines Corp.*, 850 N.E.2d 423, 430-31 (Ind. Ct. App. 2006) (client's burden to prove that but for attorney's failure to research and argue, plaintiff would have received a greater damages award). As such, Dunigan failed to state a claim for legal malpractice against TCPDO. The court's order is supported on these grounds as well.

[21] As a final matter, we address Dunigan's assertion that TCPDO violated his constitutional rights under the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution. *See* Appellant's Br. pp. 8, 11, 19. Further, he likewise turns to federal case law on qualified immunity for federal or state officials under 42 U.S.C § 1983. To be successful in bringing a section 1983 claim, Dunigan would have to plead facts alleging that the person who committed the wrongful conduct was "acting under color of state law." *See Crouch v. State*, 147 N.E.3d 1026, 1030 (Ind. Ct. App. 2020).

[22] Dunigan does argue that "qualified immunity" does not apply, but the cases he cites discuss a state actor's liability for constitutional violations under 42 U.S.C. § 1983. Appellant's Brief p. 16. Because Dunigan has not fully developed his "qualified immunity" argument, we do not address it here. However, we discuss the § 1983 claims next.

[23] In *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), the United States Supreme Court held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." So, to the extent the Amended Complaint might allege a § 1983 claim, it fails here because the TCPDO was not acting under color of state law.

[24] Additionally, in *Heck v. Humphrey*, 512 U.S. 477, 485-87 (1994), the United States Supreme Court held that to recover damages for an allegedly unconstitutional conviction or imprisonment under § 1983, the plaintiff must show that the "conviction or sentence has been reversed on direct appeal, expunged by executive order declared invalid by a state tribunal authorized to make such determination or called into question by a federal court's issuance of a writ of habeas corpus." *See also Scruggs v. Allen Cnty./City of Fort Wayne*, 829 N.E.2d 1049, 1051 (Ind. Ct. App. 2005) (observing that § 1983 plaintiff's conviction had not been overturned). The record is clear that Dunigan's conviction was not overturned. *See Dunigan*, 2021 WL 5575248 (dismissing appeal). Dunigan has not stated a § 1983 claim upon which relief may be granted.

[25] Upon completing our de novo review of the trial court's denial of Dunigan's motion to correct error based on the court's dismissal of his claims against TCPDO via the offender screening process, we find no error.

Conclusion

[26] Based on the foregoing, we affirm the court's denial of Dunigan's motion to correct error based on the dismissal of his complaint against TCPDO.

[27] Affirmed.

Vaidik, J., and Brown, J., concur.