MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Kevin Martin,
Appellant-Petitioner,

v.

Caseworker Ross, et al.,
Appellee-Respondent.

November 18, 2021

Court of Appeals Case No. 21A-PL-1139

Appeal from the Madison Circuit Court

The Honorable Angela G. Warner Sims, Judge

Trial Court Cause No. 48C01-2101-PL-6

Bailey, Judge.

Case Summary

[1] Kevin Martin ("Martin") appeals the trial court's order dismissing his complaint for failure to state a claim upon which relief can be granted, pursuant to Indiana Trial Rule 12(B)(6). The only issue he raises is whether the trial court erred when it granted the motion to dismiss filed by "Caseworker Ross" ("Ross") and the other named defendants[1] (collectively, "Defendants/Appellees").

[2] We affirm.

Facts and Procedural History

[3] On January 13, 2021, Martin—a prisoner housed in the Indiana Department of Correction ("DOC")—filed a document purporting to be a civil complaint (hereinafter, "Complaint") against Defendants/Appellees. The pro se Complaint was captioned, "Count I: property defined I.C. 35-41-1-23 A level 6 Felony." Complaint at 1. The Complaint stated defendants Ross, Robertson, and Reagle

> did knowingly or intentionally form a []campaign of harassment against Martin by tamper [sic] with his property mean [sic] legal

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[1] Like Ross, the other named defendants are all alleged to be State employees or associated with the State. The other named defendants are Christina Conyers ("Conyers"), Warden Dennis Reagle ("Reagle"), "Law Library [sic] Robertson" ("Robertson"), and "mailroom chambers." Complaint at 1 (located in trial court record, available via Odyssey). We note that Martin failed to include a copy of the Complaint in his appellate appendix. Furthermore, although the State in its brief cites to "DOC App.[,]" we find no Appellee Appendix in the appellate record.

> material not get [sic] mail out by this Defendant's [sic] or E-File to the court,[] while the said official was engaged in the official's []official duty[,] contrary to the form of the statutes in such cases made and provided by IC 35-41-1-23 (A)(2) and (b) … and also (13)(b) property is that []of another person if the other person has a possessory or proprietary interest in it, even if an accused person also has an interest in that property[.]

Id. at 1-2 (quotation marks omitted).

[4] Two documents purporting to be Martin's "Affidavit[s]" and signed by him were attached to the Complaint. *Id*. at 3. The first document stated in relevant part:

> (1) Affiant herein is an investigators [sic] for the department of this defendants [sic] refuse at Pendleton Correction[al] Facility to mail out or E-mail Martin['s] legal material out of retaliation and perhaps mail mean [sic] legal mail be [sic] lost with intent and place [sic] bug in my Kosher trey [sic] food.
>
> (2) Affiant attaches a copy of his blank form that was place[d] in caseworker Ross['s] hand mean [sic] report as probable cause for the above stated offenses.

Id. The second document stated in relevant part:

> (1) Law Library refuse [sic] to provide the summons to issue this probable cause to filed [sic] charge, name Robertson intent [sic] without no [sic] justification or excuse to commit a wrongful act. speak for itself here. [sic]
>
> (2) Martin['s] only request is that he be afforded equal protection of the law as would be afforded his more affluent

> counterparts[. I]t is the duty of this court to follow the letter of the law and it's [sic] members have taken an oath to uphold the IC – code 35-41-1-23 [sic] win [sic] it broke by this defendants [sic] and it is incumbent upon this court to meaningfully address claim [sic] presented and to render the appropriate decision in accordance to [sic] the IC – code 35-41-1-23 [sic] and its provisions[.]

Id. at 5-6. Martin attached to the Complaint and Affidavits instructions for filing a Form 1040 tax document, a legal notice regarding Coronavirus Aid, Relief, and Economic Security Act (a/k/a CARES Act), and a blank Form 1040.

[5] On February 11, 2021, Defendants/Appellees filed a motion to dismiss the Complaint for failure "to plead any factual basis to support a … finding of liability pursuant to 42 U.S.C. § 1983 or state law." Motion to Dismiss, "Martin – MTD.pdf" (located in trial court record, available via Odyssey).[2] Defendants/Appellees also filed a supporting memorandum asserting the Complaint should be dismissed because (1) there is no private right of action for civil enforcement of a criminal law, (2) the Complaint failed to comply with the pleading requirements of the Indiana Tort Claims Act, and (3) Martin failed to exhaust his administrative remedies before filing a federal claim as required

[2] We note that Martin also failed to include in the appellate appendix the motion to dismiss and memorandum in support.

under the Prison Litigation Reform Act. On May 6, 2021, the trial court granted Defendants/Appellees' motion to dismiss. This appeal ensued.

Discussion and Decision

Standard of Review

[6] Martin appeals the trial court order granting the motion to dismiss his claims.

> A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. *Magic Circle Corp. v. Crowe Horwath, LLP*, 72 N.E.3d 919, 922 (Ind. Ct. App. 2017). Our review of a trial court's grant or denial of a motion based on Indiana Trial Rule 12(B)(6) is de novo. *Id*. When reviewing a motion to dismiss, we view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the nonmovant's favor. *Id*. Motions to dismiss are properly granted only "when the allegations present no possible set of facts upon which the complainant can recover." *Id*. at 922-23 (quotations omitted).

CRIT Corp. v. Wilkinson, 92 N.E.3d 662, 666 (Ind. Ct. App. 2018) (footnote omitted); *see also Abdul-Wadood v. Batchelor*, 865 N.E.2d 621, 624-25 (Ind. Ct. App. 2007) (noting that, when we review a complaint, "we accept as true the well-pleaded facts in the complaint and determine whether the complaint ... contains allegations concerning all of the material elements necessary to sustain a recovery under some viable legal theory (internal quotations and citation omitted)), *trans. denied*.

Waiver

[7] Martin brings this appeal pro se.

> It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Twin Lakes Reg'l Sewer Dist. v. Teumer*, 992 N.E.2d 744, 747 (Ind. Ct. App. 2013). This means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so. *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004).

Lowrance v. State, 64 N.E.3d 935, 938 (Ind. Ct. App. 2016), *trans. denied*.[3]

[8] The Indiana Appellate Rules contain the requirements for appellate appendices and briefs. Appellate Rule 50 requires the appellant to include in his appendix any documents from the trial court that are necessary for resolution, or important for consideration, of the issues on appeal or otherwise relied upon in the appellant's brief. Ind. Appellate Rule 50(A)(f)-(h). "Appellants who fail to include the materials necessary for our review risk waiver of the affected issues or dismissal of the appeal." *Cavallo v. Allied Physicians of Michiana, LLC*, 42 N.E.3d 995, 999 n.1 (Ind. Ct. App. 2015). Furthermore, on appeal we cannot consider material in the appendix that was not part of the record before the trial

[3] Thus, Martin's contention that allegations of a pro se complaint are held to a less stringent standard than formal pleadings drafted by lawyers is erroneous. *See* Martin Br. at 14 (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (addressing the *federal* standard for pro se complaints)); *see also Keith v. Mendus*, 661 N.E.2d 26, 34-35 (Ind. Ct. App. 1996) (quoting *Rickels v. Herr*, 638 N.E.2d 1280, 1283 (Ind. Ct. App. 1994)) (noting the federal rules of procedure do not control in state court), *trans. denied*.

court. App. R. 50(A); *see also, e.g., Wilhoite v. State*, 7 N.E.3d 350, 355 (Ind. Ct. App. 2014).

[9] Appellate Rule 46(A)(6)(a) requires that an appellant brief's statement of facts must "be supported by page references to the Record on Appeal or Appendix." When a party refers to facts without citation to the record in support, "we need not consider those facts." *Reed v. City of Evansville*, 956 N.E.2d 684, 688 n.1 (Ind. Ct. App. 2011), *trans. denied*. Appellate Rule 46(A)(8)(a) requires that each contention must be "supported by cogent reasoning [and] … citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on." When an appellant provides no cogent argument for a contention, that contention is waived. *See, e.g.*, *Burnell v. State*, 110 N.E.3d 1167, 1171 (Ind. Ct. App. 2018) (noting the presentation of the appellant's contentions must contain a clear showing of how the issues and contentions relate to the particular facts of the case under review, and we will not review undeveloped arguments). Similarly, when an appellant provides no citation to legal authority supporting his contentions, those contentions are waived. *E.g.*, *Shields v. Town of Perrysville*, 136 N.E.3d 309, 312 n.2 (Ind. Ct. App. 2019). Thus, under our Appellate Rules, "[i]t is not sufficient for the argument section that an appellant simply recites facts and makes conclusory statements without analysis or authoritative support." *Kishpaugh v. Odegard*, 17 N.E.3d 363, 373 n.3 (Ind. Ct. App. 2014). This rule "prevents the court from becoming an advocate when it is forced to search the entire record for evidence in support of [a party's] broad statements." *Lane Alan Schrader Trust v. Gilbert*, 974 N.E.2d

516, 521 (Ind. Ct. App. 2012) (citing *Keller v. State*, 549 N.E.2d 372, 373 (Ind. 1990)).

[10] Martin's appendix and brief are deficient in many ways. His appendix does not include a copy of the Complaint or the Motion to Dismiss. Those documents are necessary for the resolution of Martin's appeal challenging the dismissal of his claims. His failure to include those documents in his appendix or supplemental appendix could waive our review of his entire appeal. *Cavallo*, 42 N.E.3d at 999 n.1. Moreover, Martin's appendix includes documentation of a grievance and grievance response that were not part of the record in the trial court. We may not consider that documentation on appeal. *Wilhoite*, 7 N.E.3d at 355.

[11] Martin's brief is incomprehensible; it consists of grammatically incorrect and incomplete or run-on sentences. His Statement of Facts does not contain any citations to the record. The Argument portion of his brief contains no standard of review as required under Appellate Rule 46(A)(8)(b). Most significantly, his brief contains no logical, cogent reasoning, and he fails to cite relevant legal authority for his arguments. For example, Martin contends that he has an "equal protection right to file[] criminal charge[s] against [Defendants/Appellees] under IC 35-41-1-23." Martin Br. at 12. However, Martin does not explain how the Equal Protection clause of the federal constitution secures any such right. Further, Indiana Code Section 35-41-1-23 does not define a crime but merely the word "property," and, in any case, the cited statute was repealed effective July 1, 2012. P.L. 114-2012, Sec. 122; *see*

also Ind. Code § 35-31.5-2-253 (current version of statute). Martin has waived his arguments on appeal due to his failure to comply with the requirements of Appellate Rule 46(A).

[12] Furthermore, an appellant may not raise an argument or issue for the first time on appeal, and any such argument is waived. *See, e.g.*, *First Chicago Ins. Co. v. Collins*, 141 N.E.3d 54, 61 (Ind. Ct. App. 2020). Martin raises several arguments for the first time in this appeal. For example, Martin's brief lists the requirements that must be met in order to file a lawsuit against a government employee personally, one of which is an assertion that the act of the employee was "clearly outside the scope of the employee's employment." I.C. § 35-13-3-5(c)(2).[4] Yet Martin did not cite this statute or raise this argument in the trial court; in fact, Martin asserted in his Complaint that Ross, Robertson, and Regal were "engaged in [their] official … dut[ies]" and cited in support only the repealed statute defining property. Cause No. 48C01-2101-PL-6, "Civil Complaint," p. 1. Therefore, Martin's argument regarding Indiana Code Section 35-13-3-5 is waived. *See Collins*, 141 N.E.3d at 61. And Martin's contentions on appeal regarding "free [sic] of speech," Martin Br. at 8; "due process," *id*. at 12, 16-17; Article 1, Section 9 of the Indiana Constitution, *id*. at 15; Indiana Trial Rule 52, *id*. at 16; and Indiana Rule of Evidence 201(e), *id*. at

[4] While Martin's brief discusses the requirement of subsection (c) of the statute, he erroneously cites only subsection (b). Martin's Br. at 9.

17, are also waived, not only for his failure to make cogent argument on those points, but also due to his failure to raise them in the trial court.

Dismissal of Claims

[13] Although Martin's claims regarding equal protection, a state tort, and an alleged civil action to enforce a criminal law lack cogent argument and he failed to provide in his appendix a copy of his Complaint that is necessary for our review, we prefer to address appeals on their merits where possible. *See, e.g.*, *Butler v. State*, 140 N.E.3d 870, 874 n.1 (Ind. Ct. App. 2019), *trans. denied*. Moreover, we are able to access via Odyssey the necessary documents—i.e., the Complaint, Motion to Dismiss, and supporting memorandum—from the record of proceedings in the trial court. Therefore, waiver notwithstanding, we choose to address Martin's arguments that were arguably raised in the trial court below, i.e., his alleged civil action to enforce a criminal law, his state tort claim, and his equal protection claim.

[14] Martin's Complaint, like his appellate brief, is difficult to comprehend. The Complaint appears to assert a civil claim to enforce a criminal law.[5] However, such a claim does not exist in Indiana. Indiana Code Section 33-39-1-5 provides that prosecuting attorneys have the power to conduct all prosecutions

[5] Although the Complaint purports to bring "count I" under Indiana Code Section 35-41-1-23 and alleges that statute relates to "a level 6 Felony," Complaint at 1, that statute—which was repealed in 2012—does not describe a crime. Rather, as we previously noted, it defines the word "property" as used in the criminal code. I.C. § 35-41-1-23 (2012); *see also* I.C. § 35-31.5-2-253 (current version of the statute, also defining "property" as used in criminal code).

for crimes. *See also Johnson v. State*, 675 N.E.2d 678, 683 (Ind. 1996) (citation omitted) ("The determination as to who shall be prosecuted lies within the sole discretion of the prosecuting attorney."). Moreover, "where the legislature expressly provides for enforcement of a statute by means other than a private right of action, a private right of action will not be found." *Kimrey v. Donahue*, 861 N.E.2d 379, 382 (Ind. Ct. App. 2007) (citation omitted), *trans. denied*. There is no private right of action in Indiana to enforce criminal laws through civil proceedings. The trial court did not err in dismissing Martin's lawsuit on that ground.

[15] To the extent the Complaint's allegation of a "campaign of harassment" by Defendants/Appellees may be construed as a state tort claim, it must be dismissed for failure to comply with the pleading requirements of the Indiana Tort Claims Act ("the ITCA"), I.C. §§ 34-13-3-1 to -25. State tort claims for money damages against the State or its employees are barred unless those claims meet the requirements of the ITCA. *Id*. A civil claim under the ITCA may not be brought against a government employee who was acting within the scope of her employment. I.C. § 34-13-3-5(a). Nor may a civil claim be brought against a government employee *personally* unless the claim alleges

> that an act or omission of the employee that causes a loss is:
>
> (1) criminal;
>
> (2) clearly outside the scope of the employee's employment;

(3) malicious;

(4) willful and wanton; or

(5) calculated to benefit the employee personally.

I.C. § 34-13-3-5(c). In addition, any complaint against a government employee personally "must contain a reasonable factual basis supporting the allegations." *Id*. A complaint that fails to comply with the pleading requirements of Indiana Code Section 34-13-3-5(c) is barred. *Feldhake v. Buss*, 36 N.E.3d 1089, 1093 (Ind. Ct. App. 2015).

[16] Even if we construe Martin's complaint as *alleging* Defendants/Appellees' actions were criminal, the complaint does not state a reasonable factual basis supporting such an allegation; it does not even provide a citation to a crime, much less a description of the same. Nor does it assert any of the other grounds contained in Indiana Code Section 34-13-3-5(c). The Complaint states that the government employees' actions were taken while they were "engaged in [their] … official dut[ies]," and it does not allege or suggest that the actions were clearly outside the scope of the employees' employment. Complaint at 1. In addition, although Martin's appellate brief uses words like "malicious," "willful," and "wanton," the Complaint makes no such assertions. Martin's Br. at 10. And there is no allegation that Defendants/Appellees acted in a way calculated to benefit them personally.

[17] Similarly, the compliant does not even allege that Defendants/Appellees' actions caused Martin a loss, much less state a reasonable factual basis for the same. Because Martin failed to comply with the pleading requirements of Indiana Code Section 34-13-3-5(c), his tort claim—to the extent it exists—is barred. *Feldhake*, 36 N.E.3d at 1093. The trial court did not err in dismissing his lawsuit on that ground.

[18] Finally, we address Martin's purported federal Equal Protection claim. Even if we assume Martin brought such a claim pursuant to 42 U.S.C. § 1983[6]—which his Complaint does not reference at all—his Complaint must be dismissed for his failure to assert that he exhausted his administrative remedies as required by the Prison Litigation Reform Act ("the PLRA"), 42 U.S.C. § 1977e(a). Under the PLRA, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1977e (a). "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002). If a prisoner fails to allege that he exhausted administrative remedies before he files a claim under section 1983, the claim should be dismissed.

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[6] Section 1983 is the vehicle by which one may bring a civil action seeking redress for the deprivation, under color of state law, of a federal right, such as a federal constitutional claim. *Id.*

Abdul-Wadood, 865 N.E.2d at 624-25 (affirming the dismissal of a section 1983 complaint where the prisoner's complaint did not state "or even suggest, he pursued any administrative remedies prior to filing his action").

[19] As was the case in *Abdul-Wadood*, Martin's Complaint failed to "state, or even suggest," that he exhausted administrative procedures before filing his federal Equal Protection claim pursuant to 42 U.S.C. § 1983. 865 N.E.2d at 624. Therefore, the trial court did not err in dismissing his lawsuit on that basis.

Conclusion

[20] Martin has waived his appeal for failure to comply with Indiana Rules of Appellate Procedure 46(A) and 50. Waiver notwithstanding, the trial court did not err when it dismissed his lawsuit because he failed to state a claim upon which relief could be granted in that: (1) there is no cause of action in Indiana for a civil suit to enforce a criminal law, (2) to the extent he raised a state tort claim, he failed to comply with the pleading requirements of the ITCA, and (3) to the extent he raised a federal Equal Protection claim, he failed to allege that he exhausted his administrative remedies as required under the PLRA.

[21] Affirmed.

Crone, J., and Pyle, J., concur.