

RENDERED: October 31, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000331-MR

MICHAEL RAY SMITH

APPELLANT

APPEAL FROM BOYLE CIRCUIT COURT
v. HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 02-CI-00464

KEVIN NESBITT; RICHARD BOTTOMS;
WILLIAM BILL STEVENS; CINDY
CORCORAN; AND ANN LAMB¹

APPELLEES

OPINION

AFFIRMING

** **

BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

¹ We note that the circuit court clerk treated a *pro se* "Brief for Plaintiff-Appellant" Smith filed on February 14, 2003, as the notice of appeal in this case and that Smith did not file an actual notice of appeal in which he listed each appellee pursuant to CR 73.03. In the caption of his document treated as the notice of appeal, he denominated "Kevin Nesbitt et al." as the Defendants-Appellees, but nowhere in the caption or in the body of the "brief" did he indicate who was included in the "et al." portion. However, we have reviewed the record and because we recognize that Smith is proceeding without counsel, we shall treat the five individuals Smith listed in his complaint as the appellees only for purposes of this appeal.

GUIDUGLI, JUDGE. Michael Ray Smith (hereinafter "Smith"), proceeding *pro se*, has appealed from the Boyle Circuit Court's January 16, 2003, Opinion and Order dismissing his complaint for damages against a Commonwealth's Attorney, an Assistant Commonwealth's Attorney, and Assistant County Attorney, a detective and a child support worker (hereinafter, collectively "defendants" or "appellees"). The main issue below and before this Court is whether immunity barred Smith's claim. Having reviewed the parties' briefs, the record, and the applicable case law, and having concluded that Smith's claim is barred, we affirm.

On November 1, 2002, Smith filed a complaint in the Boyle Circuit Court alleging malicious prosecution, a violation of his civil rights, and false arrest. He named five defendants in both their individual and official capacities: Kevin Nesbitt, an Assistant County Attorney; Richard Bottoms, an Assistant Commonwealth's Attorney; William Bill Stevens, the Commonwealth's Attorney; Cindy Corcoran, a detective; and Ann Lamb, a child support worker. He demanded \$25,000 in damages from each defendant in his or her individual capacity, and \$13,000,000 in damages from each defendant in his or her official capacity. In the complaint, he offered to accept an out-of-court settlement within ten days for \$8,000,000 from the defendants in their official capacities and for \$5000 from the

defendants in their individual capacities. Smith then filed his first motion requesting the circuit court to enter a judgment in his favor on November 11, 2002, and filed similar motions on November 27 and December 5, 2002. Smith then filed an amended complaint on January 3, 2003, alleging malpractice and professional misconduct charges against Bottoms. In this amended complaint, Smith also included a notice that Judge Peckler should recuse himself from the presiding over the suit due to his bias and conflict of interest as Smith had filed a judicial complaint against him.²

The basis of Smith's present suit is that he was maliciously prosecuted on a charge of flagrant nonsupport. On May 7, 1999, Boyle District Court Judge Darren W. Peckler entered a Judgment establishing that Smith was the natural father of Precious R. Coulter, and ordered Smith to pay \$32.83 per week in child support for the months that Peggy Coulter, Precious's mother (hereinafter "Coulter"), received AFDC benefits, to reimburse the Commonwealth for medical expenses incurred for her prenatal and delivery costs, and to pay for the cost of the blood test that established paternity. At Coulter's request, Smith would not need to pay any current child support once the AFDC benefits were terminated as she and Smith were

² In documents attached to the amended complaint, Smith likens his suit to one filed by a former Boyle County jail employee who had sued the county over his firing and settled his case for \$75,000.

living together and sharing childcare responsibilities. Coulter was to notify the Boyle County Attorney's Office when her AFDC benefits terminated and when she and Smith were no longer living together. On May 30, 2001, the Boyle County Grand Jury indicted Smith on one count of flagrant nonsupport when he failed to provide support for his minor child, Precious. The matter proceeded to trial on January 28, 2002, where the Boyle Circuit Court³ entered a directed verdict of acquittal, ruling that the Commonwealth failed to establish a case of flagrant nonsupport occurring after the entry of the 1999 judgment. Judge Peckler indicated that Smith should have been charged with contempt in a civil suit in order to collect the unpaid arrearages and fees, but not with a criminal prosecution. It is from this action that Smith alleged his malicious prosecution claim arose.

On November 25, 2002, the defendants filed a joint motion to dismiss Smith's complaint, arguing that the doctrine of sovereign immunity acted to bar suits against them in their official capacities. Furthermore, the prosecutors named in the complaint were absolutely protected by quasi-judicial immunity. As to Corcoran and Lamb, the defendants asserted that Smith failed to state a claim against them upon which relief could be granted. In any event, both Corcoran and Lamb would have qualified immunity from suit, and the prosecutors would also

³ Judge Peckler was the presiding judge in this circuit court criminal action, and is also the presiding judge in the present civil action.

have qualified immunity for any non-prosecutorial actions they might have taken. Lastly, the defendants argued that Smith could not establish a malicious prosecution action against them because there was probable cause to justify taking the case to the grand jury.

On January 16, 2003, the circuit court entered an Opinion and Order dismissing Smith's case as follows:

This matter having come before the Court January 8, 2003[,] on the defendants' motion to dismiss, and the Court having heard argument of counsel and being otherwise sufficiently advised, the Court finds and orders as follows:

FACTS

On May 7, 1999[,] a judgment was entered in Boyle District Court, Case No. 98-J-00196, providing that Michael Ray Smith's current obligation to pay child support would terminate once AFDC benefits being paid to the custodial parent of Mr. Smith's child terminated, and would resume if AFDC benefits began again. Benefits continued to be paid to the custodial parent for the child until August 1999, then resumed in October 1999 through July 2000, and were paid again from March 2001 until June 2001. The Cabinet for Families and Children [has] no record of Mr. Smith having ever paid child support (affidavit of Julia A. Jones).

Michael Ray Smith was prosecuted in the court for flagrant non support in case no. 01-CR-00057, which was dismissed with prejudice January 29, 2002. Mr. Smith filed this suit against the Commonwealth's Attorney Richard Bottoms, Assistant Commonwealth's Attorney William Bill

Stevens, Cindy Corcoran, an employee of the Commonwealth Attorney's office, Assistant County Attorney Kevin Nesbitt, and Ann Lamb, a former employee of the Boyle County Attorney's Office. Mr. Smith's suit alleges malicious prosecution, false arrest and violation of his civil rights. Mr. Smith's allegation is based on his claiming that he notified the defendants that he was living with his child and her mother and they were sharing child care responsibilities, but that the defendants prosecuted him anyway. Mr. Smith also alleges Kevin Nesbitt maliciously prosecuted him in a child support case before Boyle District Court. Mr. Smith seeks monetary damages against the defendants in both their individual and official capacities.

OPINION

I. OFFICIAL CAPACITY SUITS ARE BARRED BY SOVEREIGN IMMUNITY.

Mr. Smith's suit against the defendants in their official capacities must be dismissed because it is barred by sovereign immunity. "The absolute immunity from suit afforded to the state also extends to public officials sued in their representative (official) capacities, when the state is the real party against which relief in such cases is sought." *Yanero v. Davis*, Ky., 65 S.W.3d 510, 518 (2001).

II. SUIT AGAINST THE PROSECUTORS IS BARRED BY ABSOLUTE QUASI-JUDICIAL IMMUNITY.

Mr. Smith's suit against Kevin Nesbitt, Richard Bottoms and William Bill Stevens is barred by absolute quasi-judicial immunity and must also be dismissed. "[S]o long as a prosecutor acts within the scope of the duties imposed by law, quasi-judicial immunity is available, but otherwise it is not." *McCollum v. Garrett*, Ky., 880 S.W.2d 530, 434 (1994).

It is clearly within a prosecutor's scope of duties to present evidence to a grand jury, to prosecute an indicted criminal defendant and to prosecute contempt charges. Mr. Smith's arrest on a warrant issued by this court was pursuant to his indictment by the grand jury; since the prosecutors have absolute quasi-judicial immunity for presenting the case to the grand jury, they are also absolutely immune for any consequences of that indictment, such as Mr. Smith's arrest. Because all of the acts Mr. Smith alleges Kevin Nesbitt, Richard Bottoms and William Bill Stevens engaged in are within the scope of their prosecutorial duties, the suit against them is barred and Mr. Smith cannot recover monetary damages against them.

III. CORCORAN AND LAMB ARE PROTECTED BY ABSOLUTE QUASI-JUDICIAL IMMUNITY.

Corcoran, an employee of the Commonwealth's Attorney, and Ann Lamb, who was an employee of the Boyle County Attorney, are also protected by quasi-judicial immunity, thus Mr. Smith's suit against them must also be dismissed. In *Horn v. Commonwealth of Kentucky, Ky.*, 916 S.W.2d 173 (1996), a court designated worker acting within the scope of her employment under the direction of a judge of the court was held to be protected by quasi-judicial immunity. *Id.* at 176. Similarly, Corcoran and Lamb were acting within the scope of their employment under the direction of the Commonwealth's Attorney and the Boyle County Attorney, respectively, thus they are also protected by the same quasi-judicial immunity the prosecutors enjoy.

IV. THE DEFENDANTS HAVE QUALIFIED IMMUNITY.

Even if the defendants did not have absolute quasi-judicial immunity, they would

be protected by qualified immunity, requiring dismissal of Mr. Smith's suit.

[W]hen sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion or judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority.

Yanero, supra at 522 (Citations omitted).

When engaged in a discretionary function, public officers and employees are immune from suit for mere negligence; the plaintiff must show bad faith on the part of the public official or employee:

Thus, in the context of qualified official immunity, "bad faith" can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position, *i.e.*, objective unreasonableness; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.

Id. at 523.

Simply because Mr. Smith was acquitted of the charge against him does not prove the defendants maliciously prosecuted him. The defendants only needed sufficient evidence to establish probable cause to believe a crime had been committed to justify taking the case to the grand jury, whereas a conviction requires proof beyond a reasonable doubt. The record shows that after Mr. Smith was ordered on May 07 1999 to repay the AFDC benefits, such benefits continued to be paid to the custodial parent for the care of his child. During this entire period of time there is no record that Mr. Smith paid any child support.

KRS 530.050(2) provides in part as follows:

A person is guilty of flagrant nonsupport when he persistently fails to provide support which he can reasonably provide and which he knows he has a duty to provide by virtue of a court or administrative order to a minor . . . and the failure results in: . . . (c) The dependent having been placed in destitute circumstances. For the purposes of this paragraph, it shall be prima facie evidence that dependent has been placed in destitute circumstances if the dependent is a recipient of public assistance as defined in KRS 205.010.

Mr. Smith knew from the May 7, 1999[,] order of the Boyle District Court that he had a duty to provide support, the dependent child continued to receive public assistance after May 7, 1999, and Mr. Smith did not make any payments to the Cabinet for Families and Children to reimburse the public assistance being paid for the child.

This is clearly sufficient grounds to establish probable cause to believe Mr. Smith committed the felony of flagrant nonsupport, even though he was acquitted at trial.

In regards to the Boyle District Court case, the May 7, 1999[,] order requires Mr. Smith to repay the public assistance benefits which had been paid for the dependent child up to that date, and medical expenses incurred for prenatal and birthing expenses for his child. Mr. Smith has failed to do so, fully justifying Kevin Nesbitt in proceeding with contempt charges against him, even without considering the fact that Mr. Smith has failed to reimburse the Cabinet for Families and Children for public assistance paid since May 7, 1999.

The defendants have not violated a clearly established right, nor is there any evidence that they acted with a corrupt motive. Thus they have qualified immunity from suit for monetary damages.

ORDER

It is hereby ordered that this matter is DISMISSED WITH PREJUDICE.

This appeal followed.

On appeal, Smith argues that Judge Peckler should have recused himself due to his conflict of interest and his prejudice against Smith. Furthermore, he asserts that the appellees should not be protected by any type of immunity and that he is entitled to compensation because he could not have committed the crime of flagrant nonsupport. On the other hand, the appellees continue to argue as they did below that each of

them is protected by a form of immunity, either absolute or qualified.

For purposes of this appeal, we shall presume that the defendants made their motion to dismiss pursuant to CR 12.02(a) and (f), for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. The Kentucky Supreme Court addressed the treatment to be afforded to such motions to dismiss as follows:

The defendants moved to dismiss the complaint "because it fails to state a cause of action or a claim against these defendants upon which relief can be granted." CR 12.02(6). For the purpose of testing the sufficiency of the complaint the pleading must not be construed against the pleader and the allegations must be accepted as true. "(The) court should not dismiss unless it appears the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim." Ewell v. Central City, Ky., 340 S.W.2d 479 (1960); Heuer v. Loop, 198 F. Supp. 546 (1961) D.C.Ind. Since the adoption of the civil rules liberality and simplicity in pleadings is the style in Kentucky. Johnson v. Coleman, Ky., 288 S.W.2d 348 (1956). Only a concise statement of facts is required (CR 8.01) because the "complaint need only give fair notice of a cause of action and the relief sought." Security Trust Co. v. Dabney, Ky., 372 S.W.2d 401 (1963); 6 Kentucky Practice, Clay, 128.

Pike v. George, Ky., 434 S.W.2d 626, 627 (1968). See also Gall v. Scroggy, Ky.App., 725 S.W.2d 867 (1987).

Even with the allegations in Smith's complaint accepted as true, Smith could not have prevailed under any circumstance. Immunity protected each of the defendants, as the circuit court properly held in its Opinion and Order. Because the circuit court sufficiently addressed and correctly ruled on this issue, there is no need for this Court to address the issue any further, other than to hold that the circuit court did not commit any error in dismissing Smith's claim.

As to the issue regarding recusal, Smith apparently never made a formal motion for Judge Peckler to voluntarily recuse himself, and never made a formal request with the Kentucky Supreme Court to disqualify Judge Peckler. In any event, there is no ruling in the record for this Court to review. We note, as an aside, that the "notices" Smith made regarding Judge Peckler's bias and prejudice were more in the nature of settlement demands, because any mention Smith made of recusal was coupled with a demand that the defendants settle the case for a sum of money by a particular date.

For the foregoing reasons, the Boyle Circuit Court's January 16, 2003, Opinion and Order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael R. Smith
Danville, KY

BRIEF FOR APPELLEE:

Stuart W. Cobb
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