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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001929-MR

STEVEN M. JACOBI

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 15-CI-00032

F. LARRY HOLBERT

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DIXON AND NICKELL, JUDGES.

COMBS, JUDGE: Steven M. Jacobi appeals from an order of the Hardin Circuit Court dismissing his complaint for professional negligence against F. Larry Holbert, an attorney. After our review, we affirm.

In 2003, Holbert was an attorney with the Department of Public Advocacy (DPA), and he represented Jacobi in criminal proceedings instituted against him in Hardin County by the Commonwealth. In August 2003, Jacobi

submitted a motion to enter a guilty plea in two separate cases. The trial court accepted the guilty pleas, and in an order entered on September 2, 2003, Jacobi was found guilty of the charge of manufacturing methamphetamine (gun enhanced) with a sentence of twenty-years' imprisonment on one case. In the other case, he was found guilty of the charges of manufacturing methamphetamine, second offense, and possession of drug paraphernalia, second offense. He was sentenced to serve twenty-years' imprisonment on the manufacturing of methamphetamine charge and two-years' imprisonment on the drug paraphernalia charge -- with those sentences to run concurrently. The sentences in each case were to run consecutively for a total sentence of forty years. These sentences were probated for five years.

Two months later, Jacobi submitted to a random drug screen as a condition of his probation. He tested positive for amphetamines and opiates. He was tested again approximately one month later and was found positive for amphetamines, opiates, and another narcotic, propoxyphene. The probated sentences were revoked by order entered on February 20, 2004. Jacobi was ordered to serve the previously imposed and agreed upon sentence of forty-years' imprisonment.

Within a few months, Jacobi filed a motion to vacate the judgment pursuant to the provisions of CR¹ 60.02. The trial court denied relief, and he appealed to this Court. In that previous appeal, we held that Jacobi was not

¹ Kentucky Rules of Civil Procedure.

entitled to the extraordinary relief he sought pursuant to CR 60.02. We specifically declined to address the claims that he raised under the provisions of RCr² 11.42 because Jacobi had withdrawn those claims in the trial court.

In April 2007, Jacobi was informed that he was not eligible for parole after serving 20% of his forty-year sentence. Instead, he would be required to serve 85% of the sentence because he qualified as a violent offender pursuant to the provisions of KRS³ 439.3401.

In 2008, Jacobi filed another motion for post-conviction relief pursuant to the provisions of RCr 11.42 and CR 60.02. The trial court appointed counsel, who filed a memorandum of law to supplement the motion filed by Jacobi, *pro se*. Ultimately, the trial court denied the motion without conducting an evidentiary hearing.

With respect to that appeal, we held that Jacobi's claim (*i.e.*, of his trial counsel's gross misadvice or nonadvice concerning parole eligibility) **could** amount to ineffective assistance of counsel worthy of post-conviction relief. We remanded the matter to the trial court with instructions to conduct an evidentiary hearing on Jacobi's claim of counsel misadvice or nonadvice concerning parole eligibility; if the court so found, it was to determine whether Jacobi had been so prejudiced as to justify post-conviction relief.

² Kentucky Rules of Criminal Procedure.

³ Kentucky Revised Statutes.

Upon remand, an evidentiary hearing was scheduled in the trial court. However, an agreed order vacating the judgment of conviction was entered instead. The matter was scheduled to come on for further proceedings which consisted of Jacobi's motion to enter a new guilty plea in the two cases. The trial court accepted the guilty pleas, and in an order entered May 19, 2014, Jacobi was found guilty of the charge of manufacturing methamphetamine (first offense) with a sentence of twenty years. In the separate case, he was found guilty of the charges of manufacturing methamphetamine (also first offense) and possession of drug paraphernalia, second offense. He was sentenced to serve twenty years on the manufacturing methamphetamine charge and two years on the drug paraphernalia charge with those sentences to run concurrently. The sentences in each case were to run concurrently for a total sentence of twenty-years' imprisonment. Jacobi was discharged from the custody of the Department of Corrections shortly thereafter.

On January 12, 2015, Jacobi filed a professional negligence action against attorney Holbert, who had represented him throughout the proceedings conducted in 2003. Jacobi alleged that Holbert had failed to exercise the degree of care and skill expected of a reasonably competent attorney while representing him, contending that Holbert had failed to properly advise him with respect to probation and parole eligibility standards. Jacobi contended that as a result of the misadvice or nonadvice, he had been incarcerated for years longer than he had expected when he opted to plead guilty.

Holbert answered the complaint and denied the allegations. He also asserted immunity as a defense. On June 22, 2015, Holbert filed a motion to dismiss the action. In an order entered on November 30, 2015, the trial court granted the motion based upon its determination that Holbert was entitled to qualified official immunity from suit. This appeal followed.

Jacobi alleges that the trial court erred in dismissing his complaint because he contends that Holbert was not entitled to immunity. Because the trial court's dismissal of Jacobi's complaint addresses an issue of law, it is subject to *de novo* review. *Greene v. Commonwealth*, 349 S.W.3d 892 (Ky. 2011).

Holbert, as an employee of the DPA, is entitled to invoke immunity against Jacobi's claims. The DPA is an agency of state government, and its attorneys are employees of the Commonwealth.⁴ KRS 31.010. Public employees are entitled to qualified official immunity from tort liability. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). This immunity applies to the negligent performance of “(1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority.” *Id.* at 522 (internal citations omitted).

In his complaint, Jacobi alleged that Holbert negligently represented his interests during the course of the criminal proceedings. He did not claim that Holbert acted in bad faith or outside the scope of his employment -- but only that

⁴ The DPA is a department of the Justice and Public Safety Cabinet.

Holbert failed to represent him adequately. The primary issue entails an analysis of a public employee's performance of his discretionary functions.

Jacobi contends that any analysis that concludes that Holbert was acting as a public employee necessarily renders him an agent of the prosecution -- thus placing Holbert in a position of conflict with the interests of his client. This convoluted reasoning is creative but unconvincing.

The standards governing Holbert's professional responsibility to his client, Jacobi, required Holbert to exercise his professional judgment and to maintain a relationship with Jacobi without regard to his status as a public employee. SCR⁵ 3.130(5.4)(c). Attorneys are universally required to provide representation and counsel to their clients independent of the interests of the person or entity providing compensation for their services. The DPA exists as a public entity to guarantee professional representation to those otherwise unable to afford an attorney.

Throughout the course of his representation of Jacobi, Holbert was a public employee acting in his official capacity. The scope of his employment in no way impaired Holbert's ability to provide competent, independent professional advice. He was in no way hindered by the interest of the Commonwealth, whose function in prosecuting criminal conduct was the polar opposite of Holbert's role in defending the criminal conduct charge.

⁵ Supreme Court Rule.

The Commonwealth has a profound and overriding interest in promoting justice. This ideal can be accomplished only where an indigent accused of a crime is provided independent legal counsel. It is the duty of the Commonwealth to insure that the Sixth Amendment guarantee of access to adequate counsel be upheld -- just as surely as it is the duty of the Commonwealth to prosecute wrongdoing. The dual roles and duties create no conflict -- inherent, implied or actual. The trial court did not err by concluding that Holbert is entitled to qualified official immunity from suit.

The order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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