

RENDERED: MARCH 9, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001850-MR

YAQOB THOMAS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 15-CI-01039

JAMES SHACKLEFORD;
WILMA LYNCH; AND
DAN LAREN

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND JONES, JUDGES.

KRAMER, CHIEF JUDGE: Yaqob Thomas, proceeding *pro se*, appeals the Franklin Circuit Court's order denying his motion to amend the court's judgment denying Thomas's motion to constructively serve a party, motion for leave to amend the complaint, and motion for default judgment, and granting the appellees'

motion to dismiss. After a careful review of the record, we affirm because Thomas failed to file an affidavit that was necessary to constructively serve the complaint on Wilma Lynch, and James Shackelford and Dan Laren are entitled to absolute immunity.

I. FACTUAL AND PROCEDURAL BACKGROUND

Yaqob Thomas was convicted of murder and tampering with physical evidence. On direct appeal of his convictions, the Kentucky Supreme Court summarized the facts underlying his convictions as follows:

Appellant was convicted for the murder of Dionte Burdette. On December 29, 2002, Appellant met with Gregory Baltimore regarding a cocaine purchase. Baltimore arranged for Appellant to purchase seven ounces of cocaine from Burdette for \$7,000. Appellant was to pay Baltimore \$2,000 for this arrangement.

Appellant and Baltimore met Burdette at a Waffle House in Lexington. After they ate, the three men entered Burdette's SUV. According to Baltimore, Appellant was in the backseat. After circling the parking lot several times, Appellant grabbed Burdette from behind and held a handgun to Burdette's head, demanding the cocaine. With the handgun pointed in a downward direction, Appellant shot Burdette once in the leg. Appellant once again demanded the cocaine, and Burdette replied that it was located with his partner across the street. Appellant shot Burdette three more times, and Burdette rolled out of the driver's side door. Appellant and Baltimore then left the vehicle and ran. According to Baltimore, when they stopped running for a moment, Appellant threatened to kill him if he said anything. Baltimore noticed Appellant throw the gun into some bushes. . . .

Thomas v. Commonwealth, No. 2005-SC-0085-MR, 2006 WL 141607, *1 (Ky. Jan. 19, 2006). The Kentucky Supreme Court affirmed Thomas’s convictions. *Id.* at *3.

Thomas moved to vacate his sentence pursuant to RCr¹ 11.42. His motion was denied. He then appealed, and this Court affirmed the circuit court’s decision. *See Thomas v. Commonwealth*, No. 2007-CA-001197-MR, 2008 WL 682521, *2 (Ky. App. Mar. 14, 2008).

Thomas filed a second motion pursuant to RCr 11.42 and a motion pursuant to CR² 60.02. The circuit court denied both motions. Thomas appealed. This Court summarized the basis of Thomas’s motions and how the circuit court addressed them as follows:

Although confusing, the basis of these motions was that in 2008, Appellant discovered a funeral program for the victim which listed a Devin Neal as a pallbearer. Appellant alleged that because Mr. Neal may have given Baltimore a ride after the shooting, and was an acquaintance of the victim, the funeral program could have been used to impeach Donna Brooks’ credibility at trial. Thus, Appellant contends that his trial counsel was ineffective for failing to properly investigate Neal’s relationship to Baltimore and Brooks. Appellant further claimed that this “newly discovered evidence” entitled him to a new trial. However, in an Opinion and Order entered January 14, 2010, the trial court denied the motions, concluding:

It is obvious . . . that the entire basis of [Thomas’s motions] is that he was not aware of the information contained in the

¹ Kentucky Rule of Criminal Procedure.

² Kentucky Rule of Civil Procedure.

decedent's funeral program that Devin Neal was a pallbearer at the funeral. Devin Neal was not called as a witness at the trial of this case although subject to the subpoena power of the Court. He was not a participant in the circumstances that [led] to the shooting and death of Burdett[e]. His name surfaced as a person who may have given Greg Baltimore a ride to some undisclosed location after the shooting took place and Thomas and Baltimore ran from the scene. How on earth this information shows there is a reasonable probability that the result of the trial would have been different has not been articulated by Thomas in this proceeding.

Assuming for the sake of argument that Neal was a friend of Baltimore and the decedent, the Court absolutely makes a Finding of Fact and Conclusion of Law that this information, even if brought out at the trial of this case, would not establish, by any stretch of the imagination, a reasonable probability that the result of the trial would have been any different.

Thomas v. Commonwealth, No. 2010-CA-000227-MR, 2011 WL 2553519, *1-2 (Ky. App. June 10, 2011). On appeal, this Court noted that the funeral program was “attached to Brooks’ victim impact statement provided prior to sentencing.” *Id.* at *3. This Court held that the record established that Thomas “was certainly aware of the existence of the funeral program prior to his first RCr 11.42 motion if not prior to his trial.” *Id.* at *3. Therefore, the circuit court’s decision was affirmed. *Id.* at *4.

Thomas subsequently filed his complaint in the present case “pursuant to the provisions [of] KRS³ Chapter 413 of the Commonwealth of Kentucky to redress violations of [Thomas’s] substantial rights under the same.” He filed his complaint against James Shackelford,⁴ an employee of the Attorney General’s Office; Wilma Lynch, the Fayette County Clerk; and Dan Laren, an employee of the Commonwealth Attorney’s Office. In his complaint, Thomas alleged:

In the course of appellate proceedings held before the Kentucky Court of Appeals, the above-named defendants committed Fraud which affected the proceedings by forging a case-history document, and presented such document to the Kentucky Court of Appeals. The defendants were in violation of KRS Chapter 516 and acting outside of their roles or duties intimately associated with the judicial process by forging a case/docket history document by inserting a “March 20, 2004” date that a “Miscellaneous document” was entered into the official record. Prior case/docket history documents do not show such a notation or entry into the official record. Furthermore, during federal habeas proceedings, Respondent Shackelford represented the state, filed an affidavit during a “show cause” hearing [and] acquiesced that the record was fallible.

[] Due to the known, intentional, and malicious acts of the defendants, on June 10, 2011, the Kentucky Court of Appeals decided adversely in the underlying action against the Plaintiff based upon the forged citation entered into the official record. This forgery was used by the Court of Appeals to fortify a procedural bar against the Plaintiff’s *Brady*⁵ claim. Thus, the Plaintiff was

³ Kentucky Revised Statute.

⁴ In the appellees’ brief, Mr. Shackelford’s last name is spelled “Shackelford.” However, because it was spelled “Shackelford” in the notice of appeal, we will use that spelling in this opinion.

⁵ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady*, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

denied his right to access the courts for redress of any grievance under Sections 1, 2, 14, and 115 of the [Kentucky Constitution] and Art. I, §9, 1st and 14th Amendments of the [United States] Constitution. The procedural bar has been also raised as a defense precluding the plaintiff from federal habeas corpus relief.

(Citations omitted and emphasis removed). He sought damages of an unspecified amount, which he claimed were more than the circuit court's jurisdictional minimum.

Appellees Shackleford and Laren moved to dismiss Thomas's complaint for failure to state a claim upon which relief can be granted. In their memorandum in support of their motion to dismiss, they stated that Shackleford "is an Assistant Attorney General in the Criminal Appeals Division, Wilma Lynch is a Fayette County Clerk and Dan Laren is the Fayette County Assistant Commonwealth's Attorney who handled Thomas's criminal case." They noted that Thomas claimed

the Tort-Complaint is brought pursuant to KRS 413, but does not specify which section of the statute he relies upon. Thomas also alleges the Defendants violated KRS 516, however, the Defendants have not been charged or prosecuted under this penal statute. At times, the Complaint reads as if it were intended to be a Complaint for relief under 42 U.S.C.^[6] §1983, however, he does not plead this.

Shackleford and Laren alleged that they are immune from suit because they acted within their roles as prosecutors. Additionally, they asserted that the complaint

punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97.

⁶ United States Code.

was allegedly brought “pursuant to KRS 413 (‘Limitations of Actions’), without naming a particular section of that Chapter.” Therefore, they claimed that if Thomas intended to make a “tort claim of fraud,” the complaint did not meet the requirements set forth by the Kentucky Rules of Civil Procedure. Furthermore, Shackleford and Laren contended that Thomas failed to explain how their alleged actions caused a “procedural bar against [Thomas’s] Brady claim.” They alleged that his claim was barred by the fact that “the Court of Appeals found that Thomas was aware of the existence of this document prior to his first RCr 11.42 motion,” and he “was procedurally barred from bringing a successive [RCr] 11.42 motion when he was aware of this document at the time he filed his first [RCr] 11.42 Motion.”

In his response to the motion to dismiss, Thomas alleged that although he had not cited the specific statute under which his complaint was brought, he intended to bring it pursuant to KRS 413.120(11), because he contended that the defendants “committed Fraud by maliciously, intentionally, and willfully forging an official document and submitted said document in [its] Response Brief to the Kentucky Court of Appeals of which the court used in rendering [its] order affirming the trial court’s judgment.” Thomas also contended that Laren and Shackleford were not entitled to absolute prosecutorial immunity and that the alleged forgery did create a procedural bar to his *Brady* claim.

Thomas then moved to amend his complaint. His motion was an attempt to transform his allegations in order to meet the elements required to

establish his claims of fraud. Laren and Shackelford objected to his motion to amend and argued that even if his complaint were amended, Thomas still failed to state a claim upon which relief can be granted.

Thomas moved to constructively serve one of the parties, *i.e.*, Wilma Lynch. The basis for his motion was that Lynch no longer worked for the Commonwealth, and as a prison inmate, he is not permitted to use the prison's mail service "to mail any document to a non-governmental agency."

Thomas subsequently moved for default judgment against Wilma Lynch pursuant to CR 55.01 on the basis that he had constructively served her pursuant to CR 4.05, due to the uncertainty of her whereabouts, yet she had not filed a defense in the case on her behalf. Thomas asserted that because Lynch had "failed to plead or otherwise defend," he was entitled to a default judgment.

The circuit court entered an order denying Thomas's motion to constructively serve a party, denying Thomas's motion for leave to amend the complaint, and denying Thomas's motion for default judgment. In that same order, the court granted the appellees' motion to dismiss.

Thomas moved to amend the court's judgment. He claimed that the court had ignored evidence in the form of an affidavit filed by Shackelford in a separate case in federal court. He also alleged that the Shackelford affidavit could only serve as a defense for Shackelford, not for the other defendants in the case. He further contended that the court erred in denying his motion to constructively serve Lynch and in failing to grant default judgment. Finally, he requested that the

circuit court judge recuse from the case due to his prior ruling in a separate state habeas corpus action.

The circuit court entered an order stating that it reviewed Shackleford's affidavit. Still, the court denied Thomas's motion to amend the court's judgment and affirmed its prior order dismissing the case.

Thomas now appeals, contending that the circuit court erred when it: (a) refused to constructively serve a named party to the lawsuit; (b) misapplied clearly established state and federal law in granting absolute immunity to all respondents; and (c) refused to grant relief after making an unreasonable determination of facts and law regarding the complainant's grounds for declaratory relief.⁷

II. ANALYSIS

A. CONSTRUCTIVE SERVICE

Thomas first alleges that the circuit court erred when it refused to constructively serve a named party to the lawsuit, *i.e.*, Wilma Lynch. He claims that the circuit court erred "in intentionally refusing to constructively serve Wilma Lynch once he submitted the requisite Affidavit and Warning Order to the court for its dissemination."

CR 4.05 concerns parties who may be constructively served. Pursuant to CR 4.05,

⁷ We have re-ordered Thomas's claims from how he listed them in his opening appellate brief. We did so for ease of discussion and understanding.

[i]f a party sought to be summoned is: . . . (e) an individual whose name or place of residence is unknown to the plaintiff; the clerk shall forthwith, subject to the provisions of Rule 4.06, make an order upon the complaint warning the party to appear and defend the action within 50 days.

In turn, CR 4.06 provides:

(1) The warning order provided in Rule 4.05 shall be made by the clerk only upon an affidavit of the plaintiff . . . stating the ground of the application for such order. The affiant shall state the last known address of the defendant, . . . or shall state his ignorance of such of those facts as he does not know. . . .

(2) An affidavit made pursuant to the provisions of Rule 4.06(1), unless it is controverted by the defendant's affidavit, shall be sufficient evidence of the facts therein stated for the support of the action as well as of the warning order.

In the present case, we have searched the record and found no affidavit from Thomas. Thus, contrary to Thomas's assertion, he did not submit an affidavit upon which a warning order could be issued. Consequently, the circuit court properly denied his motion to constructively serve Lynch because no warning order was issued.

B. ABSOLUTE IMMUNITY

Thomas next alleges that the circuit court erred when it misapplied clearly established state and federal law in granting absolute immunity to all respondents. In his appellate brief, Thomas appears to argue that all three appellees were granted absolute immunity in this case based upon an affidavit that

Shackleford filed in a separate action in federal district court, and that Laren and Lynch should not have been granted immunity based upon Shackleford's affidavit. In this claim, Thomas does not appear to dispute the circuit court's holding that Shackleford was entitled to absolute immunity; rather, he only appears to dispute its holding that Laren and Lynch were also entitled to absolute immunity. Nevertheless, we will review the circuit court's decision regarding Shackleford's entitlement to absolute immunity, as well.

The circuit court dismissed Thomas's complaint.

We review a trial court's order dismissing a complaint *de novo*. It is well established that a court should not grant a motion to dismiss a complaint unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.

Wagoner v. Bradley, 294 S.W.3d 467, 468 (Ky. App. 2009) (internal quotation marks and citations omitted), *overruled on other grounds by Hammers v. Plunk*, 374 S.W.3d 324, 330 (Ky. App. 2011).

First, we note that because Thomas failed to ensure that Lynch was properly served the complaint, as discussed *supra*, she is not a party to this lawsuit. Consequently, any claims against her were properly dismissed by the circuit court.

Second, regarding the circuit court's determination that the claims against Laren and Shackleford should be dismissed because they are entitled to absolute immunity, the circuit court's decision was proper.

As the circuit court noted,

[p]rosecutors are given immunity, but the immunity is not absolute in all circumstances. *McCollum v. Garrett*, 880 S.W.2d 530, 534 (Ky. 1994). If a prosecutor is functioning as an administrator or investigator, then the prosecutor is afforded qualified immunity. *Id.* . . . However, when a prosecutor is acting as a prosecutor and in accordance with the duties of the office, he or she [has] absolute immunity. *Id.*

As previously discussed, this Court, in addressing the appeal of Thomas's second RCr 11.42 motion, noted that the funeral program was "attached to Brooks' victim impact statement provided prior to sentencing." *Thomas*, No. 2010-CA-000227-MR, 2011 WL 2553519, at *3 (Ky. App. June 10, 2011). This Court held that the record established that Thomas "was certainly aware of the existence of the funeral program prior to his first RCr 11.42 motion if not prior to his trial." *Id.* at *3. Moreover, because Laren and Shackelford were not functioning as administrators or investigators in Thomas's case, but were functioning as prosecutors in prosecuting the case at trial and on appeal against Thomas, they are entitled to absolute immunity. *See McCollum*, 880 S.W.2d at 534-35.

C. DECLARATORY RELIEF

Finally, Thomas contends that the circuit court erred when it refused to grant relief after making an unreasonable determination of facts and law regarding the complainant's grounds for declaratory relief. He further asserts that the circuit court should have granted discovery and held a trial in this matter.

However, because Laren and Shackelford were entitled to absolute immunity and Lynch was never served with the complaint, the circuit court properly granted the motion to dismiss Thomas's complaint before discovery and a trial were held.

Accordingly, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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