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IN THE
COURT OF APPEALS OF INDIANA

DAVID BURKS-BEY)
)
Appellant-Plaintiff,)
)
vs.) No. 79A02-1101-MI-149
)
TIPPECANOE COUNTY JAIL, ET AL.,)
)
Appellees-Defendants.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0706-MI-1

November 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

David Burks-Bey, pro se and incarcerated in the Indiana Department of Correction, appeals the trial court's Indiana Trial Rule 41(E) dismissal of his complaint against numerous defendants for failure to prosecute. Given the two-plus years of inactivity in this case and the fact that Burks-Bey has put forth no reason for failing to pursue his case during this period of time, we conclude that the trial court did not abuse its discretion in dismissing his complaint for failure to prosecute. We therefore affirm the trial court.

Facts and Procedural History

In June 2007, Burks-Bey was an inmate in the Tippecanoe County Jail facing felony drug charges in Cause No. 79D02-0608-FA-13. Burks-Bey was representing himself in the criminal matter, though the trial court appointed him stand-by counsel, John Sorensen.[1]

On June 14, 2007, Burks-Bey filed a complaint and summons against the Tippecanoe County Jail and correctional officers Denise Saxton, Robert Brewer, and Carol Wilson.[2] The filing of the "complaint and summons" is reflected in the CCS. *See* Appellant's App. p. 3, 154. Nevertheless, a May 26, 2010, "correcting entry to [the]

[1] In February 2007, Burks-Bey pled guilty in his criminal case to Class B felony possession of cocaine. He was sentenced on June 18, 2007 (which was four days before he filed the complaint in this case). *See Burks-Bey v. State*, Cause No. 79A02-0708-CR-741 (Ind. Ct. App. May 15, 2008), *trans. denied*. Burks-Bey appealed, arguing, among other things, that he was denied his right to a speedy trial. *Id.* We affirmed. *Id.*

[2] As noted later in the trial court's order, the Tippecanoe County Jail has since been dismissed because it is not a legal entity. On June 18, 2007, Burks-Bey filed a motion to amend the caption to add the Tippecanoe County Board of Commissioners and the Sheriff of Tippecanoe County, Tracy Brown, as necessary parties. Appellant's App. p. 102. For unknown reasons, this motion was not reflected in the CCS until January 26, 2010.

docket" provides, "In review of the file it does not show Summons being sent by petitioner with the complaint when case orginially [sic] filed. Therefore there is no manner of service shown on the docket." *Id.* at 2, 155.

In Burks-Bey's June 2007 complaint, he alleged that in September and October 2006, jail employees did not provide him with various legal materials under Indiana Code chapter 11-11-7, deprived him of his constitutional right to a speedy trial, and denied him his constitutional right to access the courts in his criminal case. *Id.* at 93-100.

Between June 2007 and November 2009, no activity took place in this case. *See id.* at 3, 154 (CCS). Accordingly, on November 4, 2009, the trial court issued the following order: "because [n]o action having been taken in this case for a continuous period of more than six (6) months,[3] pursuant to Trial Rule 41(E) [Burks-Bey is] ordered to show cause on or before December 21, 2009 . . . why this case should not be dismissed for want of prosecution." *Id.* at 3, 154. This order finally stirred Burks-Bey into action, and he filed a variety of documents on December 1, including a motion showing cause, a motion for default judgment, and a "notice of special appearance of intervenor." *Id.* Without first holding a hearing, the trial court dismissed Burks-Bey's complaint for failure to prosecute on February 3, 2010. Burks-Bey filed a motion to correct error, which the trial court denied.

Burks-Bey appealed to this Court. On appeal, we held that the trial court's failure to hold a hearing before dismissing Burks-Bey's complaint for failure to prosecute was erroneous. *Burks-Bey v. Tippecanoe Cnty. Jail*, Cause No. 79A05-1004-MI-225 (Ind. Ct.

[3] The trial court's order does not explain the significance of six months, because Trial Rule 41(E) requires only sixty days of no action.

App. Dec. 9, 2010). Accordingly, we reversed the dismissal and remanded with instructions for the trial court to conduct a hearing to determine whether Burks-Bey's complaint should be dismissed. *Id.*

In accordance with our instructions, the trial court held a hearing on January 24, 2011. At the hearing, Burks-Bey was in the custody of the Tippecanoe County Sheriff. The parties first discussed whether Burks-Bey had correctly filed the summonses along with his complaint on June 14, 2007. Burks-Bey explained that he had enlisted Sorensen, who was his stand-by counsel in his criminal case, to help him file the complaint and summonses in this case. The attorney for the defendants stipulated that Sorensen, in fact, filed the complaint and summonses in June 2007 even though it was undisputed that none of the defendants had received a complaint or summons at that time. Tr. p. 3-4. It was observed that service on the Tippecanoe County Board of Commissioners, the Tippecanoe County Sheriff, and the individually-named defendants was finally made in January 2011.[4] *See* Appellant's App. p. 157-59.

Burks-Bey then argued that the trial court was at fault for the two-year period of inaction in this case because the court failed to screen his complaint according to the Frivolous Claim Law. *See* Ind. Code § 34-58-1-2 ("A court shall review a complaint or petition filed by an offender and shall determine if the claim may proceed. A claim may not proceed if the court determines that the claim . . . ."). Burks-Bey also argued that because the parties agreed that Sorensen, in fact, filed the complaint and summons in June 2007, the clerk was negligent for failing to ensure that the summonses were properly

[4] Apparently, service was never made on Wilson because Wilson was no longer employed at the jail in January 2011. The attorney for the defendants, Douglas Masson, entered his appearance on behalf of the Tippecanoe County Commissioners, Sheriff Brown, Saxton, and Brewer. Appellant's App. p. 159.

served. *See* Ind. Trial Rule 4(B) ("Contemporaneously with the filing of the complaint or equivalent pleading, the person seeking service or his attorney shall furnish to the clerk as many copies of the complaint and summons as are necessary. The clerk shall examine, date, sign, and affix his seal to the summons and thereupon issue and deliver the papers to the appropriate person for service."); *see also* T.R. 4(D). Burks-Bey asserted that he could not "do anything as a plaintiff until the court[] [screened] the complaint. There's no rule that says I have to compel the court to rule on the complaint." Tr. p. 28.

The trial court dismissed Burks-Bey's complaint on January 27, 2011,[5] in the following well-reasoned order:

> 1. By agreement, the case as to defendant Tippecanoe County Jail is dismissed for the reason that the Tippecanoe County Jail is not a legal entity.
>
> 2. The Plaintiff, David Burks-Bey, was the defendant in 79D02-0608-FA-13, the cause which underlies this complaint and pursuant to which the defendant was in the custody of the authorities in Tippecanoe County and held in the Tippecanoe County Jail at all relevant times.
>
> 3. Mr. Burks-Bey exercised his right to represent himself in the criminal action and the Court appointed John Sorensen as his stand-by counsel in the criminal action.
>
> 4. Mr. Burks-Bey had the option to ask stand-by counsel to assist him in that matter or to decide that he would accept the representation of Mr. Sorensen. Mr. Sorensen was an employee of the Tippecanoe County Public Defender's Office and his services were made available to Mr. Burks-Bey without charge.
>
> 5. Mr. Burks-Bey's complaint related to problems he allegedly encountered in his attempt to represent himself in the Tippecanoe County Jail and difficulties he had in obtaining information or materials that he believed necessary to represent himself.
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> 6. The Court received a document filed by Mr. Burks-Bey, pro se, informed Mr. Burks-Bey that the document hadn't been properly filed and appointed his criminal stand-by counsel for the limited purpose of seeing that the document was filed correctly in the proper place and in the proper manner. *There is some confusion in the record as to whether the document*

[5] There is a discrepancy as to the date of this order. The order itself says January 27. Appellant's App. p. 164. The CCS entry is made on January 26 but says the order is "for" January 24. *Id.* at 159.

was filed correctly or not and Mr. Sorenson did not appear this date in response to a subpoena, but the Court finds that that is not a material issue. Either the complaint was filed without summonses or the complaint was filed with summonses, but in either event nothing else happened. After a period of more than two (2) years in which nothing happened, the Court, on its own motion, ordered to the defendant to show cause why the case should not be dismissed for want of prosecution. That awakened in Mr. Burks-Bey some activity but this particular case had been dormant for more than two years while Mr. Burk[s]-Bey pursued numerous other cases related to various matters, including his appeal of the criminal case.

7. The Court finds that Mr. Burks-Bey has not shown cause why the case should not be dismissed and the Court finds that all the criteria called to the Court's attention argue in favor of dismissal.

8. Mr. Burks-Bey is responsible for the delay himself. The complaint was not served on the defendants. Whether that was because of the absence of summons or any other reason, Mr. Burks-Bey took no action to seek to have the Clerk proceed with service of process.

9. The Court finds that Mr. Burks-Bey has a high degree of personal responsibility for the delay. Among other reasons, Mr. Burks-Bey took upon himself the burden of representing himself both in the criminal case and in this particular action and should be held to the standards of a lawyer proceeding in that action. Mr. Sorensen had a very limited role and his role was concluded when he saw that the papers were filed. Whether he did that diligently or not diligently, thereafter it was entirely up to Mr. Burks-Bey to prosecute the case and he did not.

10. The Court finds the defendants in this cause have been prejudiced by the delay by the passage of time.

11. Mr. Burks-Bey has a lengthy history of pro se litigation and as his presentation today indicates he has the ability to present a coherent argument. However, the Court also notes that a number of Mr. Burks-Bey's filings have no apparent legal significance. The Court also notes that other courts have found that the defendant's filings in those courts are without legal significance.

12. There is no indication that Mr. Burks-Bey is likely to succeed on the merits.

13. There is no indication that less drastic measures will be effective in the matter.

14. The Court does find it was the threat of dismissal which promoted the defendant's tardy diligence.

15. The Court finds that Mr. Burks-Bey has shown no reason why the case should not be dismissed.

Appellant's App. p. 161-64 (emphasis added). Although the trial court's written order does not specifically address Burks-Bey's argument that the trial court was responsible for the delay, the court orally addressed this at the hearing:

> Well, the trial court did not cause the delay. . . . [T]hose are matters which if you believed—if the plaintiff believed the court had been not diligent in its own right, the plaintiff could have proceeded in a diligent manner to ask the court to make a ruling. And, again, for two years the plaintiff was silent and the conclusion that was—that one could legitimately draw from that is that the plaintiff was not pursuing whatever rights the plaintiff had including rights in that regard.

Tr. p. 33.

Burks-Bey now appeals.

Discussion and Decision

Burks-Bey contends that the trial court erred in dismissing his complaint for failure to prosecute according to Trial Rule 41(E).[6]

We will reverse a Trial Rule 41(E) dismissal for failure to prosecute only in the event of a clear abuse of discretion, which occurs if the trial court's decision is against the logic and effect of the facts and circumstances before it. *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003), *trans. denied*. We will affirm if there is any evidence that supports the decision of the trial court. *Id.*

Trial Rule 41(E) provides:

> [W]hen no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or

[6] The bulk of Burks-Bey's appellate brief is devoted to issues beyond the scope of the trial court's order dismissing his complaint for failure to prosecute according to Trial Rule 41(E). Because we are affirming the trial court, we do not need to address Burks-Bey's other arguments.

> reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution.

The purpose of this rule is "'to ensure that plaintiffs will diligently pursue their claims. The rule provides an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution.'" *Belcaster*, 785 N.E.2d at 1167 (quoting *Benton v. Moore*, 622 N.E.2d 1002, 1006 (Ind. Ct. App. 1993), *reh'g denied*). "The burden of moving the litigation is upon the plaintiff, not the court. It is not the duty of the trial court to contact counsel and urge or require him to go to trial, even though it would be within the court's power to do so." *Id.* (quotation omitted). "Courts cannot be asked to carry cases on their dockets indefinitely and the rights of the adverse party should also be considered. [The defendant] should not be left with a lawsuit hanging over his head indefinitely." *Id.* (quotation omitted).

Courts of review generally balance several factors when determining whether a trial court abused its discretion in dismissing a case for failure to prosecute. These factors include: (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as

opposed to diligence on the plaintiff's part. *Id.* The weight any particular factor has in a particular case appears to depend upon the facts of that case. *Id.* However, a lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay. *Id.*

Several of these factors favor the trial court's dismissal of Burks-Bey's complaint for failure to prosecute, most importantly, the length of the delay, the extent to which Burks-Bey has been stirred into action by a threat of dismissal as opposed to diligence on his part, and the desirability of deciding the case on its merits. The record shows that Burks-Bey took no action in this case for approximately twenty-eight months, that is, from June 2007 to November 2009. The length of this delay is considerable. Although some of the delay can be attributed to the fact that none of the defendants received a complaint and summons back in 2007 even though – according to the stipulation – the complaint and summonses were actually filed, the fact remains that Burks-Bey never pursued his case in any way. He did not check on its status, request a default judgment, initiate a discovery nor did he take any action whatsoever for twenty-eight months. *Cf. Am. Family Ins. Co. v. Beazer Homes Ind., LLP*, 929 N.E.2d 853, 857 (Ind. Ct. App. 2010) (acknowledging that other activity was taking place with respect to the other defendants at the time of Trial Rule 41(E) hearing, we noted that "at least part of the reason for any delay in the case was caused by the fact that the summons for [one defendant] Maddox . . . was not served in a timely manner . . . . We decline to attribute to American Family responsibility for any delays which may have occurred in issuing a summons upon Maddox in this case."). The burden of moving the litigation is upon the

plaintiff, not the court. In addition, the extent to which Burks-Bey has been stirred into action by a threat of dismissal as opposed to diligence on his part is clear. After approximately twenty-eight months of no action, Burks-Bey finally took action in this case by filing three motions less than a month after the trial court sent out notice of the Trial Rule 41(E) hearing. Finally, there is nothing about Burks-Bey's complaint that suggests the desirability of deciding his claims on the merits. Burks-Bey alleges that jail employees violated Indiana Code chapter 11-11-7, but this chapter applies only to the Department of Correction. *See* Ind. Code § 11-8-1-7 (defining "Department"). Burks-Bey also alleges a violation of his speedy trial rights, but we rejected this argument in his underlying criminal case. *See Burks-Bey v. State*, Cause No. 79A02-0708-CR-741 (Ind. Ct. App. May 15, 2008), *trans. denied*. And as for Burks-Bey's access to courts claim, Burks-Bey was appointed stand-by counsel in his criminal case even though he chose to represent himself.

Although we recognize there is a preference for deciding cases on the merits, given the lengthy period of inactivity in this case and the fact that Burks-Bey has put forth no reason for failing to do anything in his case for a period of twenty-eight months, we conclude that the trial court did not abuse its discretion in dismissing his complaint for failure to prosecute.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.