

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Scott Kerns, :  
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 Appellant :  
 :  
 :  
 v. : No. 874 C.D. 2010  
 : Submitted: August 27, 2010  
 Richard A. Joyce, Esq., :  
 Tonya Helaine Tharp, Esq., :  
 Muhlenburg Police Department, :  
 Gail M. Chiodo, Esq. and Jamie L. :  
 Reed :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FLAHERTY

FILED: December 10, 2010

Scott Newton Kerns (Kerns) appeals, *pro se*, from four orders of the Court of Common Pleas of Berks County (trial court), which dismissed with prejudice Kerns' complaint against: Richard A. Joyce, Esquire (Joyce) and Tonya Helaine Tharp, Esquire (Tharp) on June 23, 2008; the Muhlenberg Police Department (Police) on December 1, 2008; Jamie L. Reed (Reed) on September 21, 2009; and Gail M. Chiodo, Esquire (Chiodo) on December 3, 2009 (Collectively, Defendants). Further, on December 3, 2009, the trial court dismissed the action, with prejudice, as there were no remaining defendants. We affirm.

On November 7, 2000, Kerns was charged with involuntary deviate sexual intercourse with a person less than 13 years of age and related charges as a result of numerous instances of sexual abuse of his stepdaughter. On May 14, 2001, Kerns admitted to the abuses and pled guilty to involuntary deviate sexual intercourse with a person less than 13 years of age. On June 13, 2001, Kerns moved to withdraw his guilty plea. After a hearing, on January 18, 2002, Kerns was sentenced to 7 ½ to 20 years in prison. Our Superior Court sustained the conviction and Kerns did not seek further review. Commonwealth v. Kerns, 844 A.2d 1282 (Pa. Super. 2003). Kerns subsequently challenged his conviction through a petition for post conviction relief and a federal petition for habeas relief, both of which were denied.

On August 2, 2007, Kerns, a prisoner at the State Correctional Institution at Mahanoy in Frackville (SCI-Mahonoy), filed a *pro se* complaint with the trial court listing five defendants, Joyce, who was Kerns public defender in his criminal proceeding, Tharp, the district attorney from the same proceeding, the Police, Chiodo, and Reed. Kerns complaint was premised upon ineffectiveness of counsel and malicious prosecution in his attempt to overturn his criminal conviction.

The complaint filed by Kerns suggests that Joyce and Tharp were negligent in their representation of Kerns and that Kerns 6<sup>th</sup> and 8<sup>th</sup> Amendment rights were violated. Joyce and Tharp filed preliminary objections on May 19, 2008, stating that Kerns failed to serve the complaint, and failed to state a claim. The preliminary objections also claimed preclusion of the cause of action due to tolling of the statute of limitations

and the bar on a collateral attack on an underlying conviction, and prosecutorial immunity. On May 30, 2008, a judgment of non pros was entered in favor of Joyce. On June 23, 2008, the preliminary objections of Joyce and Tharp were granted and they were dismissed from the action with prejudice.

On October 24, 2008, Police filed preliminary objections to Kerns' complaint for failure to serve the complaint, failure to set forth a viable claim, and for the cause of action being barred as a collateral attack on Kerns' own criminal conviction. On December 1, 2008, the trial court granted Police's preliminary objections and Police were dismissed from the action with prejudice.

On July 1, 2009, Reed filed preliminary objections to Kerns' complaint for failure to serve the complaint, and for legal insufficiency of the complaint itself. On August 6, 2009, the trial court scheduled argument for September 21, 2009 regarding Reed's preliminary objections to Kerns' complaint. On August 17, 2009, Kerns filed a petition for writ of habeas corpus ad testificandum, which the trial court declined to grant.

On August 25, 2009, the trial court ordered Kerns' motion for judgment by default against Reed denied as moot, due to Kerns' failure to file a certification that a written notice of intention to file the praecipe was mailed or delivered to the parties against whom judgment was to be entered.

On September 21, 2009, the trial court held arguments regarding Reed's preliminary objections. The only parties present were Reed and Chiodo. After arguments, the trial court sustained Reed's

preliminary objections and dismissed with prejudice Kerns' complaint against Reed.

Further, at argument on September 21, 2009, Chiodo made an oral motion to the trial court that she be dismissed from the action based upon Kerns' failure to effectuate service.

On October 23, 2009, Chiodo filed a response to Kerns' request to enter judgment by default, wherein Chiodo asserted that she had never been served with the complaint. Chiodo further stated that she was prejudiced by the lack of service since nearly five (5) years had lapsed since the conclusion of Chiodo's representation of Kerns in the criminal matter, which representation forms the basis of the complaint at issue here.

On December 3, 2009, the trial court granted Chiodo's request made by oral application, and dismissed her from the case. The trial court further dismissed the action with prejudice, as there were no remaining defendants. On December 23, 2009, Kerns' appealed the dismissal of his action with prejudice to this court.<sup>1</sup>

Kerns contends that the trial court dismissed the Defendants in this case for no reason and that the Defendants admitted to the allegations by not answering them, thus waiving any right to ever answer them.

In the present controversy, the trial court dismissed the complaint against all the Defendants due to Kerns' failure to serve Defendants with the complaint. Pa. R.C.P. No. 400(a) provides in pertinent part that:

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<sup>1</sup> Our review is limited to determining whether constitutional rights have been violated, or whether the trial court abused its discretion or committed an error of law. Grosso v. Love, 667 A.2d 43 (Pa. Cmwlth. 1995).

(a) Except as provided in subdivisions (b) and (c) and in Rules 400.1 and 1930.4, original process shall be served within the Commonwealth only by the sheriff.

Pa. R.C.P. No. 400(a). Additionally, Pa. R.C.P. No. 401 provides in pertinent part that:

(a) Original process shall be served within the Commonwealth within thirty days after the issuance of the writ or the filing of the complaint.

(b)(1) If service within the Commonwealth is not made within the time prescribed by subdivision (a) of this rule..., the prothonotary upon praecipe and upon presentation of the original process, shall continue its validity by reissuing the writ or reinstating the complaint....

In the present controversy, it is not disputed that Kerns failed to properly serve all of the Defendants and has never reinstated the complaint. Proper service is not presumed; rather the return of service itself must demonstrate that the service was made in conformity with the Rules of Civil Procedure. Township of Lycoming v. Shannon, 780 A.2d 835 (Pa. Cmwlth. 2001).

In Fraisar v. Gillis, 892 A.2d 74, 76-77 (Pa. Cmwlth. 2006), this court stated in pertinent part as follows:

A court must remain neutral and cannot act as the attorney for *pro se* litigants or be responsible for bringing a litigant's suit into compliance with the rules of civil procedure. As the trial court in this matter aptly noted, the burden to comply with all procedural rules lies with the plaintiff who chose

to initiate the suit, *pro se*.<sup>2</sup> For these reasons, we conclude that the trial court had no duty to effect service for Fraisar or to otherwise notify Fraisar that it would not effect service on his behalf.

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Before a court may determine a legal action, it must possess both subject-matter jurisdiction and jurisdiction of the person. Slezynger v. Bischak, 224 Pa. Super. 552, 307 A.2d 405 (Pa. Super. 1973). Jurisdiction of subject matter relates to the competency of a court to hear and determine controversies of the general nature of the matter involved, while jurisdiction of the person is ordinarily acquired by service upon such person of the court's process within the territorial limits of its authority. McGinley v. Scott, 401 Pa. 310, 164 A.2d 424 (1960). Proper service is a prerequisite to a court acquiring personal jurisdiction over a defendant. Cintas Corporation v. Lee's Cleaning Services, Inc., 549 Pa. 84, 700 A.2d 915 (1997), see Sharp v. Valley Forge Medical Center & Heart Hospital, Inc., 422 Pa. 124, 221 A.2d 185 (1966) (Jurisdiction of the court over the person of the defendant is dependent upon proper service having been made.). (Footnote in original).

In the present controversy, the trial court did not acquire personal jurisdiction over the Defendants, as the Defendants were not properly served.

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<sup>2</sup> It is well established that any lay person who chooses to represent himself in a legal proceeding must assume the risk that his lack of expertise and legal training may prove to be his undoing. Griffith v. Workers' Compensation Appeal Board (New Holland North America, Inc.), 798 A.2d 324, 328 (Pa. Cmwlth. 2002); City of Erie v. Stelmack, 780 A.2d 824 (Pa. Cmwlth. 2001); Groch v. Unemployment Compensation Board of Review, 472 A.2d 286 (Pa. Cmwlth. 1984). Where life and liberty interests are not at stake, there is a heavy presumption against court-appointed counsel in civil matter, which is not easily overcome. Harris v. Pennsylvania Department of Corrections, 714 A.2d 492 (Pa. Cmwlth. 1998).

However, in McCreesh v. City of Philadelphia, 585 Pa. 211, 888 A.2d 664 (2005), our Supreme Court held that dismissal of an action is appropriate only if the plaintiff has demonstrated an intent to stall the judicial machinery *or where failure to comply with the Rules of Civil Procedure has prejudiced the defendant*. The Court reasoned that this approach sufficiently protects defendants from defending against stale claims without the draconian action of dismissing claims based on technical failings that do not prejudice the defendant. Id.

In the present controversy, the applicable statute of limitations in this action was two years. See 42 Pa. C.S. §5524 and 42 U.S.C. §1983. A statute of limitations begins to run when the plaintiff knows or should have known of the alleged violation. Boughner v. University of Pittsburgh, 882 F.2d 74 (3d cir. 1989). Kerns entered a guilty plea on May 14, 2001 and was sentenced on January 18, 2002. There is no averment in the complaint that Kerns only became aware of the alleged misconduct of defendants within the two years prior to the complaint being filed. Thus, all of the claims set forth in the complaint are barred by the statute of limitations.

Kerns never served the Defendants with the complaint and the statute of limitations expired over four years ago. Thus, the trial court was correct in dismissing Kerns complaint with prejudice.<sup>3</sup>

Accordingly, we must affirm the decision of the trial court.

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JIM FLAHERTY, Senior Judge

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<sup>3</sup> Kerns argument that the Defendants admitted all allegations of the complaint due to their failure to respond to Kerns' complaint is in error. As stated above, Kerns did not serve the complaint on the Defendants, therefore, no waiver or admissions occurred.

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**ORDER**

AND NOW, this 10<sup>th</sup> day of December, 2010 the order of the Court of Common Pleas of Berks County in the above-captioned matter, is affirmed.

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JIM FLAHERTY, Senior Judge