REVERSE and REMAND; Opinion Filed August 24, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00492-CV

IVERY T. WILLIAMS, Appellant
V.
DAVID GUTIERREZ, Appellee

On Appeal from the County Court at Law No. 1
Dallas County, Texas
Trial Court Cause No. CC-18-04233-A

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Nowell

Ivery T. Williams appeals the trial court's order granting David Gutierrez's plea to the jurisdiction. Williams sued Gutierrez alleging Gutierrez is the Presiding Chair of the Texas Board of Pardons and Paroles ("TBPP") and, in that role, Gutierrez violated Williams's statutory and constitutional rights. Williams raises nine issues on appeal, but we need address only his ninth issue in which he argues the trial court erred by concluding it lacked subject matter jurisdiction. Because we conclude the trial court erred by granting Gutierrez's plea to the jurisdiction, we reverse the trial court's order and remand the case for further proceedings.

FACTUAL BACKGROUND

Williams, a former inmate presently on parole, pleaded guilty to rape in 1965 and was sentenced to twenty years' confinement. He was paroled after serving twelve years. In 1979, Williams's parole was revoked after he was indicted for and convicted of aggravated robbery. On March 30, 2012, he was paroled after serving thirty-three years on his 99-year sentence for aggravated robbery. On July 23, 2014, Williams filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Texas and raised several constitutional claims related to his alleged "denial of parole eligibility" between 1979 and 1999, the same claims raised in the present suit. *See Williams v. Owens*, Cause No. 3:14-cv-02652-N-BN (N.D. Tex. Dec. 14, 2015). The court denied Williams's *habeas* petition on December 14, 2015. *Id.*

After his habeas petition was unsuccessful, Williams filed the instant suit claiming he was denied parole eligibility and a yearly review to determine his parole risk classification while he was incarcerated. Williams alleges Gutierrez's actions deprived him of his constitutional rights and violated 42 U.S.C. § 1983. He further alleges these denials amounted to false imprisonment, intentional infliction of emotional distress, negligence, and conspiracy. He seeks monetary damages.

On September 10, 2018, Gutierrez filed a plea to the jurisdiction arguing: (1) Williams's claims are barred by sovereign immunity, and (2) Williams's claims are barred by the doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994).

Although Williams initially sued Gutierrez in his individual and official capacities, on March 1, 2019, Williams filed an amended petition in which he sued Gutierrez only in his individual capacity. Gutierrez did not amend his plea to the jurisdiction after Williams amended his petition. On April 16, 2019, the trial court granted Gutierrez's plea to the jurisdiction and dismissed Williams's claims with prejudice. This appeal followed.

LAW & ANALYSIS

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). The purpose of a plea to the jurisdiction is to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Ssch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Subject matter jurisdiction is essential to the authority of the court to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 443 (Tex. 1993). Subject matter jurisdiction is never presumed and cannot be waived. *Id.* at 443–44. Whether a court has subject matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

Gutierrez argues the trial court properly granted his plea to the jurisdiction and dismissed the suit for lack of subject matter jurisdiction because Williams's claims are barred by sovereign immunity. We disagree. Generally, a suit against a

government employee in his official capacity is a suit against his government employer, and the employee sued in his official capacity has the same governmental immunity, derivatively, as his government employer. *Franka v. Velasquez*, 332 S.W.3d 367, 382–83 (Tex. 2011). "But public employees (like agents generally) have always been individually liable for their own torts, even when committed in the course of employment, and suit may be brought against a government employee in his individual capacity." *Id.* (footnotes omitted). Generally, public employees may assert official immunity from suit arising from the performance of their discretionary duties in good faith as long as they are acting within the scope of their authority. [1] *Id.* Like other affirmative defenses to liability, official immunity is a form of immunity from liability which must be pled and proven by the party asserting it. *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 128 (Tex. 2015). Because immunity from liability does not affect a trial court's jurisdiction, it must be asserted in a motion for summary judgment, not in a plea to the jurisdiction. *See Baylor Coll. of Med. v. Tate*, 77 S.W.3d 467, 472 (2002).

[1] "Official immunity," "qualified immunity," "quasi-judicial immunity," "discretionary immunity," and "good faith immunity" are "all terms used interchangeably to refer to the same affirmative defense available to governmental employees sued in their individual capacities." *Methodist Hosps. of Dallas v. Miller*, 405 S.W.3d 101, 104, n.5 (Tex. App.—Dallas 2012, no pet.). "Official immunity," "absolute immunity," "qualified immunity" and "quasi-judicial immunity" are interchangeable terms referring to the same affirmative defense available to governmental employees sued in their individual capacities. *City of Hous. v. Kilburn*, 849 S.W.2d 810, 812 n.1 (Tex. 1993) (per curiam).

After amending his petition, Williams sued Gutierrez solely in his individual (rather than official) capacity.[2] Gutierrez's plea to the jurisdiction only raised sovereign immunity as a defense. However, because he was not sued in his official capacity, Gutierrez was not entitled to the defense of sovereign immunity. To the extent the trial court's order is based on Gutierrez having sovereign immunity, we conclude that rationale is in error.

The dissent relies on section 101.106(f) of the civil practice and remedies code to conclude the trial court did not err by granting Gutierrez's plea to the jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE §101.106(f). However, Gutierrez did not raise section 101.106(f) in his plea to the jurisdiction. Rather, as applicable here, Gutierrez's plea to the jurisdiction argued only that Williams's claims are barred by sovereign immunity. We could speculate that Gutierrez raised only sovereign immunity in his plea to the jurisdiction because, at the time he filed his plea, Williams asserted claims against Gutierrez only in his official capacity; Gutierrez did not amend his plea to the jurisdiction to assert new arguments, such as any argument based on section 101.106(f), after Williams filed his amended petition in which he sued Gutierrez only in his individual capacity.

[2] The amended petition, which Williams filed before the hearing on the plea to the jurisdiction, was Williams's live pleading at the time the trial court entered its order. *See City of McKinney v. Hank's Rest. Grp.*, 412 S.W.3d 102, 110 (Tex. App.—Dallas 2013, no pet.); *see also Matzen v. McLane*, No. 03-18-00740-CV, 2020 WL 1073777, at *4 (Tex. App.—Austin Mar. 6, 2020, no pet.).

We agree with the dissent that Gutierrez potentially could have forced Williams to dismiss his claims if Gutierrez met section 101.106(f)'s requirements, but Gutierrez did not do so. *See Cathcart v. Jones*, No. 05-18-01175-CV, 2020 WL 2214105, at *7 (Tex. App.—Dallas May 7, 2020, no pet. h.) (mem. op.) ("If the plaintiff chooses to sue only the [government] employees, those employees—if they can meet section 101.106(f)'s requirements—can force the plaintiff to dismiss its suit against them and file an amended petition against the governmental unit."). "[W]e will not affirm an order based on a legal theory that was not presented to the trial court and to which the opposing party had no opportunity to respond." *Tatum v. Hersh*, 559 S.W.3d 581, 585 (Tex. App.—Dallas 2018, no pet.) (citing *Victoria Gardens of Frisco v. Walrath*, 257 S.W.3d 284, 290 (Tex. App.—Dallas 2008, pet. denied)). Because Gutierrez did not argue section 101.106(f) as a basis for his plea to the jurisdiction in the trial court (and therefore did not seek to meet section 101.106(f)'s requirements), we disagree with the dissent that argues section 101.106(f) is a ground supporting the trial court's order of dismissal.

Gutierrez also contends the trial court properly granted his plea because Williams brought claims pursuant to 42 U.S.C § 1983, and those claims are barred by the Supreme Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994). Section 1983 provides a cause of action against any person who deprives another of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. To make a sufficient claim, a plaintiff "must (i) allege a

violation of a right secured by the Constitution or laws of the United States and (ii) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Moore v. Willis Indep. Sch. Dist*., 233 F.3d 871, 874 (5th Cir. 2000); *see also Cathcart*, 2020 WL 2214105, at *7.

Gutierrez points to language in *Heck* indicating a prisoner's § 1983 damages action cannot lie where a favorable judgment would "necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487. Gutierrez then argues a monetary judgment would necessarily imply Williams's parole revocation was invalid. We do not find this argument persuasive.

In *Heck v. Humphry*, the Supreme Court considered whether a state prisoner may challenge the constitutionality of his conviction in a suit for monetary damages under 42 U.S.C. § 1983; the prisoner did not seek injunctive relief or release from custody. *Id.* at 478-79. The Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's

> action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 486–87 (footnotes omitted). The rationale in *Heck* extends to parole revocation proceedings. *Jackson v. Vannoy*, 49 F.3d 175, 177 (5th Cir. 1995); *Littles v. Bd. of Pardons & Paroles Div*., 68 F.3d 122 (5th Cir. 1995); *Cathcart*, 2020 WL 2214105, at *8.

In *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the Supreme Court clarified that "a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Id*. at 81–82. But §1983 relief "remains available for procedural challenges where success in the action *would not necessarily* spell immediate or speedier release for the prisoner." *Id*. at 81; *see also Kyles v. Garrett*, 353 Fed. Appx. 942, 946 (5th Cir. 2009) (*Heck* did not bar inmate suit seeking relief that would render certain state parole procedure invalid because success would result in a new parole hearing not a shorter prison term); *Florence v. Cox*, No. 07-17-00390-CV, 2018 WL 6072247, at *3 (Tex. App.—Amarillo Nov. 20, 2018, no pet.) (mem. op.) (*Heck* did not bar prisoner's claim concerning disciplinary violation that did not affect the validity of his sentence).

Applying these principles to the present case, we conclude *Heck*'s applicability depends upon whether Williams's claims implicate the validity or length of his confinement or merely present challenges to procedures. *See Heck*, 512 U.S. at 486–87; *Wilkinson*, 544 U.S. at 83. Construing the pleadings liberally in favor of Williams and looking to his intent, we conclude Williams seeks relief that will render invalid the state procedures used to deny parole eligibility and yearly reviews—he does not seek an injunction ordering his immediate or speedier release. A favorable judgment will not "necessarily demonstrate the invalidity of [Williams] conviction." *Heck*, 512 U.S. at 481–82. Success for Williams does not depend on the validity of his conviction or parole revocation and, to prevail, he would not have to demonstrate the invalidity of any outstanding criminal judgment against him. We conclude the *Heck* doctrine does not bar his § 1983 claims.

CONCLUSION

We sustain Williams's ninth issue. In light of our resolution of his ninth issue, we need not consider his other issues. *See* TEX. R. APP. P. 47.1. We reverse the trial court's order of dismissal granting the plea to the jurisdiction and remand the case to the trial court for further proceedings.

/Erin A. Nowell/
ERIN A. NOWELL
JUSTICE

Schenck, J., dissenting
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IVERY T. WILLIAMS, Appellant	On Appeal from the County Court at Law No. 1, Dallas County, Texas
No. 05-19-00492-CV V.	Trial Court Cause No. CC-18-04233-A.
DAVID GUTIERREZ, Appellee	Opinion delivered by Justice Nowell. Justices Schenck and Molberg participating.

In accordance with this Court's opinion of this date, the trial court's order of dismissal is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 21st day of August, 2020.