

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-08-00452-CV

**IN RE COMMITMENT OF ALBERT NICHOLAS, A/K/A ALBERT NICOLAS,
JR. A/K/A ALLEN NICOLAS**

**On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 08-06-06017 CV**

MEMORANDUM OPINION

This appeal by Albert Nicolas follows a non-suit of the State’s petition to have Nicolas committed as a sexually violent predator.¹ In two issues, Nicolas contends that the trial court abused its discretion. Essentially, he contends the proceeding should have been dismissed with prejudice.

The original petition for commitment alleged that a psychologist “examined” Nicolas on April 3, 2008, to determine whether Nicolas suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. The

¹In their appeal briefs, both parties spell the appellant’s name as “Albert Nicolas,” and so we use that spelling in the opinion. In the style, we have followed the style of the case as it appears in the clerk’s record.

petition further alleged that, “[b]ased on the review of [Nicolas’s] records and the evaluation of [Nicolas],” the psychologist determined that Nicolas met the criteria for civil commitment.

Nicolas appeared in court on June 24, 2008. Nicolas had been served with the petition earlier that day. Nicolas announced that he desired to exercise his right to represent himself and to “reject counsel.” The trial court questioned Nicolas at length, determined that Nicolas is indigent, and eventually informed Nicolas that counsel from State Counsel for Offenders would be appointed to represent Nicolas but that the court would consider a request for self-representation at a later date. Nicolas stated, “I am objecting to any kind of counsel at this point.” The record reflects that Nicolas refused to sign a request for appointment of counsel. The trial court granted the State’s motion to have Nicolas examined by the State’s expert.

The State filed an amended petition on July 7, 2008, and presented the petition to Nicolas at the conclusion of a hearing held that day. Nicolas represented himself at the hearing, with stand-by counsel from State Counsel for Offenders present. The trial court ordered Nicolas to appear for a deposition on August 14, 2008.

On July 17, 2008, Nicolas filed his original answer. In addition to a general denial, Nicolas’s answer stated counsel for the State had falsely alleged that Nicolas had been examined by the psychologist, asserted that the case should be dismissed for lack of jurisdiction, and prayed that the suit be dismissed with prejudice.

The State filed a second amended petition on July 30, 2008. The second amended petition alleged that the psychologist met with Nicolas, that Nicolas refused to be evaluated by the psychologist, and that the psychologist based his opinion on a review of Nicolas's records.

Nicolas did not appear for deposition on August 14, 2008. That same day, counsel filed a motion to withdraw on the grounds that counsel could not communicate with Nicolas because Nicolas had escaped from the facility to which he had been paroled.

On August 18, 2008, Nicolas filed a motion to withdraw his request to represent himself and requested appointment of counsel other than State Counsel for Offenders. Nicolas argued that the psychologist's report had stated that Nicolas "was a low risk to reoffend." The motion contended that "the Trial Court, should in all fairness dismiss the State's Petition, that in the future if the State wishes to file another [suit], to listen to the Respondent when he claims surprise and make [an] inquiry as to proof to support such a suit." Nicolas also urged that any information from the examination conducted June 25, 2008, should be quashed on grounds it had been obtained "based on the falsified petitions" or based upon bias by the trial court.

The motion included a section in which Nicolas alleged that he "has absented himself from the proceeding as set out in his manifesto included herein to the Court for their consideration." Nicolas alleged "his absence could not be avoided in light of the State's attorney's misrepresentation to the Court" in the superseded original and first

amended petitions. He argued he should be entitled to counsel other than State Counsel for Offenders because “he is no longer in prison or a prison setting and should be entitled to the same rights and privileges as would any other free individual.” The “manifesto” included contentions that Nicolas “did in fact refuse treatment” while incarcerated “because he is not guilty[]” of the sexual offenses for which he was imprisoned, and that he had the right to decline to contract with the State for sex offender treatment. According to Nicolas, counsel for the State “falsified a[n] official Court document when she caused it to be filed in this case and the misrepresentation was done to further the crime of fraud and harm the Respondent where he had no alternative but to flee in order to develop[] this Motion. . . .” Nicolas argued civil commitment would be a punitive restriction on the liberty he enjoys as a parolee. Nicolas prayed for dismissal of the suit, asked for a recommendation that the District Attorney initiate criminal proceedings against counsel for the State, and requested a hearing to determine whether counsel for the State deliberately misrepresented the facts of the case.

On September 5, 2008, the State filed a notice of non-suit without prejudice. On September 15, 2008, Nicolas filed a motion to dismiss the suit with prejudice as a sanction for filing a frivolous pleading. *See generally* TEX. R. CIV. P. 13. Nicolas requested a hearing on his Rule 13 motion. On September 25, 2008, the State amended its notice of non-suit to include recitations that Nicolas’s parole had been revoked on September 12, 2008, and that he was returned to prison with a projected release date in

2020. On September 25, 2008, the trial court signed an order “that this cause shall be non-suited without prejudice.”

In his first issue, Nicolas contends that his status as a parolee at the time the State filed its petition affects the civil commitment proceedings. In particular, Nicolas argues that the trial court abused its discretion in appointing counsel from State Counsel for Offenders. Generally, section 841.005(a) of the Health and Safety Code provides representation by State Counsel for Offenders of an indigent person subject to sexually violent predator civil commitment proceedings. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.005(a) (Vernon Supp. 2009).

At the first hearing on the case, the trial court appointed counsel from State Counsel for Offenders in accordance with section 841.005(a). Nicolas expressed his desire to represent himself and Nicolas insisted that he was objecting to “any kind of counsel” at that point in the proceedings. At Nicolas’s request, he was allowed to act as counsel on his own behalf in the subsequent hearing, with State Counsel for Offenders present to assist him.

Nicolas first requested counsel other than counsel from State Counsel for Offenders on August 18, 2008, after Nicolas had failed to appear for deposition and after State Counsel for Offenders had requested leave to withdraw because Nicolas’s fugitive status prevented counsel from communicating with him. After the State’s non-suit, Nicolas was no longer “subject to a civil commitment proceeding” for purposes of

appointment of counsel pursuant to section 841.005 of the Texas Health and Safety Code. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.005(a). The trial court's duty to appoint other counsel would not have been triggered after non-suit of the State's petition for commitment. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.005(b) (Vernon Supp. 2009).

Furthermore, Nicolas's status as a parolee would not affect the role of State Counsel for Offenders in his representation. Although State Counsel for Offenders represents indigent inmates accused of committing criminal offenses while in prison, the Counsel also represents persons subject to sexually violent predator civil commitment proceedings under a separate statute that makes no distinction between inmates and parolees. *See* TEX. CODE CRIM. PROC. ANN. art. 26.051(e) (Vernon 2009); TEX. HEALTH & SAFETY CODE ANN. § 841.005(a). Because he was indigent, Nicolas had a statutory right to counsel in the civil commitment proceeding. *Id.* That right was satisfied by appointment of counsel from State Counsel for Offenders. *Id.*

Nicolas also argues that the trial court abused its discretion by failing to rule on Nicolas's original answer and general denial. A general denial merely places at issue those allegations in the opposing party's petition that are not required to be denied under oath. *See generally* TEX. R. CIV. P. 92. The State's non-suit mooted any consideration by the trial court of Nicolas's solely defensive pleadings. *See* TEX. R. CIV. P. 162; *see also Villafani v. Trejo*, 251 S.W.3d 466, 469-70 (Tex. 2008).

Moreover, the defensive matters affirmatively alleged in Nicolas's answer do not, as he argues, impact the trial court's jurisdiction. Nicolas contends the trial court lacked jurisdiction over him because Nicolas's qualifying convictions were not sequential. To be subject to civil commitment as a sexually violent predator, a person must be a "repeat sexually violent offender." TEX. HEALTH & SAFETY CODE ANN. § 841.003(a) (Vernon 2003). "A person is a repeat sexually violent offender for the purposes of this chapter if the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses" TEX. HEALTH & SAFETY CODE ANN. § 841.003(b) (Vernon 2003). Section 841.003 does not require that the convictions be sequential. *Id.* The case cited by the appellant involved a different statute, the sex offender registration statute, before that statute was amended to clarify that a person receives multiple convictions regardless of whether the judgments are entered on different dates. *See generally Creekmore v. Attorney General of Tex.*, 138 F.Supp.2d 795, 807 (E.D. Tex. 2001); Act of May 8, 2001, 77th Leg., R.S., ch. 211, § 9, 2001 Tex. Gen. Laws 399, 401 (current version found at TEX. CODE CRIM. PROC. ANN. art. 62.058 (Vernon 2006)).

Nicolas also argues that his convictions are "constitutionally infirm" because the appellate court that reviewed the appeal of his criminal case held that counsel rendered ineffective assistance of counsel when counsel failed to object to misjoinder of separate offenses in a single indictment. *See Nicholas v. State*, Nos. 04-94-00849-CR - 04-94-

00854-CR, 1996 WL 93777, at **3-4 (Tex. App.--San Antonio Mar. 6, 1996, pet ref'd) (not designated for publication). Finding fundamental error, the appellate court reformed the judgments to delete the improperly joined counts. *Id.* at **3-4, 8. But counsel's ineffectiveness did not extend to his convictions on the remaining counts, which the court affirmed. *Id.* at **4, 8. Because his underlying premise is not supported by the record, Nicolas has not shown that the trial court abused its discretion by failing to consider Nicolas's assertion that his qualifying convictions were constitutionally infirm.

The arguments raised in Nicolas's first issue do not support his claim that the trial court abused its discretion. We overrule issue one.

In his second issue, Nicolas contends the trial court abused its discretion by failing to initiate criminal and professional disciplinary proceedings against the lawyer who signed the original and first amended petition on behalf of the State. Although it is conceivable a criminal proceeding may arise from an action that occurs in a civil case, generally the ensuing criminal proceeding, if any, would not occur in the original civil suit. *See generally* TEX. CODE. CRIM. PROC. ANN. art. 21.01 (Vernon 2009). Professional disciplinary actions, as a general matter, commence and proceed separately from any civil case in which the referable conduct occurs. *See generally* TEX. R. DISCIPLINARY P. 2.10, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 2005). The trial court's inaction regarding initiation of other proceedings is not error in this case.

This appeal concerns Nicolas's request for imposition of sanctions in the civil action. *See* TEX. R. CIV. P. 13. Rule 13 permits a trial court to impose sanctions for filing a pleading that is groundless and is brought in bad faith or for the purpose of harassment. *Id.* Courts presume that pleadings are filed in good faith. *Id.* In considering whether to impose Rule 13 sanctions, the trial court may consider the entire history of the case. *Great West. Drilling, Ltd. v. Alexander*, No. 11-08-00110-CV, 2009 WL 3212558, at *9 (Tex. App.--Eastland Oct. 8, 2009, no pet.) (not yet reported). A refusal to impose sanctions is reviewed for abuse of discretion. *Id.*; *Allstate Ins. Co. v. Garcia*, No. 13-02-092-CV, 2003 WL 21674766, at *2 (Tex. App.--Corpus Christi, July 18, 2003, no pet.). A sanction for filing a groundless pleading under Rule 13 must be "appropriate." Generally, case-determinative sanctions cannot be imposed "unless the violation warrants adjudication of the merits." *Id.*; *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 731 (Tex. 1993).

In this case, the State clarified its factual allegations in an amended pleading. *See* TEX. R. CIV. P. 63. The pleader did not persist in the face of a complaint regarding the accuracy of the pleading. *See generally Twist v. McAllen Nat'l Bank*, 248 S.W.3d 351, 366-67 (Tex. App.--Corpus Christi 2007, orig. proceeding [mand. denied])(assessing sanctions under Texas Rule of Appellate Procedure 52.11 for persisting in asserting grounds previously held to lack merit). Furthermore, Nicolas has not shown that the particular sanction he sought to have imposed by the trial court -- dismissal with

prejudice -- bears a direct relationship to the offensive conduct (inaccurately stating a fact in a superseded pleading). The State would also have been able to obtain an order for psychiatric examination under its amended pleadings. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.061(c),(f) (Vernon Supp. 2009). Nicolas argues the petition for commitment was groundless because the psychologist who evaluated his file found that Nicolas scored as a low risk on the actuarial measures for recidivism, but the psychologist's report also indicated that Nicolas's psychopathy score was sufficiently above the research cut-off for scores predicting child molestation recidivism. The trial court did not commit error in this case by failing to initiate other proceedings against counsel for the State.

The trial court did not abuse its discretion in declining to dismiss the case with prejudice. We overrule issue two and affirm the trial court's order granting a non-suit dismissal without prejudice.

AFFIRMED.

DAVID GAULTNEY
Justice

Submitted on April 6, 2010
Opinion Delivered May 6, 2010

Before McKeithen, C.J., Gaultney and Horton, JJ.