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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JUSTIN DWAYNE HILL, *Plaintiff/Appellant*,

v.

BURGES McCOWAN, *Defendant/Appellee*.

No. 1 CA-CV 19-0676
FILED 9-10-2020

Appeal from the Superior Court in Maricopa County
No. CV2019-000128
The Honorable Michael W. Kemp, Judge

AFFIRMED

COUNSEL

Justin Dwayne Hill, Florence
Plaintiff/Appellant

Broening Oberg Woods & Wilson PC, Phoenix
By Donald Wilson, Jr., Alicyn M. Freeman
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Cynthia J. Bailey joined.

C A T T A N I, Judge:

¶1 Justin Dwayne Hill appeals the superior court's judgment on the pleadings in favor of Burges McCowan, an attorney who represented Hill during a criminal proceeding. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Between January and September 2018, McCowan served as Hill's defense counsel in a criminal proceeding in which Hill was charged with five counts of third-degree burglary and one count of theft.

¶3 In January 2019, before the criminal matter proceeded to trial, Hill filed a civil complaint against McCowan alleging legal malpractice, breach of fiduciary duty, conspiracy to violate his constitutional rights under 42 U.S.C. § 1983, and violations of his due process rights under the state and federal constitutions. The complaint alleged that McCowan failed to file pretrial motions and petitions for special action as Hill requested. Hill also alleged that McCowan conspired with the superior court judge and the prosecutor. In March 2019, McCowan filed an answer denying the allegations. The next month, after an 11-day criminal trial, a jury found Hill guilty of two counts of burglary but failed to reach a verdict on the remaining four counts.

¶4 In May 2019, McCowan filed a motion for judgment on the pleadings in this civil case, which the superior court granted. The court ruled:

A claim of legal malpractice requires that the underlying criminal case be concluded including all appeals and post-conviction proceedings, and that the outcome was favorable to the Plaintiff. *Glaze v. Larsen*, 207 Ariz. 26, 83 P.3d 26 (2004). Plaintiff must also prove causation, that is but for the attorney's negligence, the result would have been different. *Glaze*, 207 Ariz. at 30-31. The conviction must have been set

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aside before a convicted defendant can obtain damages. *Id.* at 32.

Here, [Hill] has been sentenced on Counts 2 and 5 only with counts 1, 3, 4, and 6 still pending. He has filed an Appeal and a Notice of Post-Conviction Relief. Further, [Hill] is now in Rule 11 proceedings. These facts are a matter of public record and subject to Judicial Notice. This case is not close to being concluded.

¶5 Hill timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶6 A motion for judgment on the pleadings under Arizona Rule of Civil Procedure (“Rule”) 12(c) “tests the sufficiency of the complaint, and judgment should be entered for the defendant if the complaint fails to state a claim for relief.” *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, ¶ 2 (App. 1999). This court reviews de novo the superior court’s ruling granting a Rule 12(c) motion, accepting as true the facts alleged in the complaint. *Save Our Valley Ass’n v. Ariz. Corp. Comm’n*, 216 Ariz. 216, 218, ¶ 6 (App. 2007) (as amended).

I. Judicial Notice and Conversion.

¶7 Hill first argues that the superior court erred by considering information outside the pleadings and that the court should have converted McCowan’s Rule 12(c) motion to a motion for summary judgment under Rule 56.

¶8 Under Rule 12(d), if “matters outside the pleadings are presented to, and not excluded by, the court, [a Rule 12(c) motion] must be treated as one for summary judgment under Rule 56.” But “public records regarding matters referenced in a complaint[] are not considered matters outside the pleading.” *See Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 601, ¶ 10 (App. 2016) (citation omitted) (interpreting identical language governing treatment of Rule 12(b)(6) motions). Here, the exhibits to McCowan’s Rule 12(c) motion contained superior court records related to the criminal case that Hill’s complaint referenced, and those records are public records subject to judicial notice. *See Ariz. R. Evid. 201(b); State v. Rhome*, 235 Ariz. 459, 461, ¶ 8 (App. 2014) (“[A] court may properly take judicial notice of its own records.”). Accordingly, the court did not err by

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considering the records and was not required to convert the motion to a motion for summary judgment.

II. Legal Malpractice and Breach of Fiduciary Duty.

¶9 In *Glaze v. Larsen*, the Arizona Supreme Court set forth the rule that “a cause of action for legal malpractice that occurs during the course of criminal litigation does not accrue until proceedings in the criminal matter have been terminated favorably to the criminal defendant.” 207 Ariz. at 35, ¶ 35. Hill contends that “the issue in *Glaze* was focused on damages[,] and the only damages Glaze was alleging was the time spent in jail after his unlawful conviction.” Because the complaint here sought damages not attributable to his conviction, such as pretrial incarceration and pain and suffering, Hill argues that *Glaze* is inapplicable.

¶10 The holding in *Glaze*, however, did not rely solely on the issue of damages. It also addressed judicial economy and the importance of avoiding duplicative claims. *See id.* at 31, ¶ 21. The court noted that “a criminal defendant who believes that his conviction was the result of his attorney’s ineffective assistance may raise such claims through a petition under [Arizona] Rule [of Criminal Procedure] 32 for post-conviction relief.” *Id.* at ¶ 20. Because “post-conviction proceedings often will provide definitive guidance as to whether any alleged legal malpractice actually occurred[,] . . . the outcome of post-conviction proceedings will often demonstrate that no malpractice suit will lie.” *Id.* at ¶ 21.

¶11 This rationale applies to Hill’s case as well. Although four criminal charges against him (those on which the jury was unable to agree) were subsequently dismissed, Hill was convicted of two criminal offenses, and he has not received a favorable termination of the criminal matter, whether by means of a Rule 32 petition alleging ineffective assistance of counsel or otherwise. Having failed to do so, Hill’s malpractice claim is unavailing. His claims for breach of fiduciary duty and alleged violations of due process, which likewise rely on principles dependent on favorable termination of the underlying criminal proceedings, are similarly unavailing. *Cf.* Ariz. R. Crim. P. 32.1(a) (authorizing post-conviction relief if “the defendant’s conviction was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions”). Accordingly, the superior court correctly found that Hill’s malpractice and fiduciary duty claims fail under *Glaze*.

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III. Section 1983 Claim.

¶12 Hill also alleged that McCowan conspired to violate his right to due process in violation of 42 U.S.C. § 1983. A claim under § 1983 “requires the violation of a constitutional right and a showing that a defendant acting under color of state law committed the deprivation.” *Johnson v. McDonald*, 197 Ariz. 155, 161, ¶ 25 (App. 1999). “[A] public defender’s representation of an indigent defendant does not constitute action ‘under color of state law’ for purposes of a civil rights claim brought pursuant to 42 U.S.C. § 1983, in a lawsuit alleging inadequate representation.” *State v. Anaya*, 170 Ariz. 436, 439 (App. 1991) (citing *Polk County v. Dodson*, 454 U.S. 312 (1981)). However, “[a] private person acts ‘under color of’ state law when involved in a conspiracy with state officials to deprive someone of federal rights.” *Johnson*, 197 Ariz. at 161, ¶ 25.

¶13 Hill’s complaint did not raise a colorable § 1983 claim. Hill alleged that McCowan “conspire[d] with a judge and the state to violate [his] due process right to have a fair and impartial presentation before the grand jury.” But he offered no facts supporting such a claim, and “[m]ere conclusory statements . . . are insufficient to state a claim upon which relief can be granted.” *Cleckner v. Ariz. Dep’t of Health Servs.*, 246 Ariz. 40, 42, ¶ 6 (App. 2019) (citation omitted). Thus, the superior court properly granted judgment in favor of McCowan on this claim.

CONCLUSION

¶14 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA