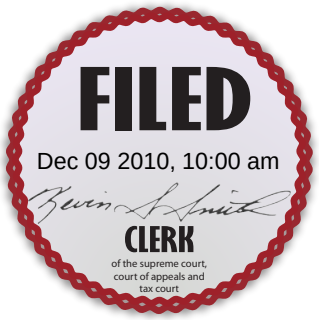


APPELLANT PRO SE:

**DAVID MICHAEL BURKS-BEY**
Westville, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| DAVID BURKS-BEY, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 79A05-1004-MI-225 |
| | ) | |
| TIPPECANOE COUNTY JAIL, et al. | ) | |
| | ) | |
| Appellees-Respondents. | ) | |

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

**December 9, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

David Burks-Bey appeals the dismissal for want of prosecution of an action he brought pursuant to 42 U.S.C. § 1983. Because the trial court did not conduct a hearing as required by our trial rules, we reverse and remand.[1]

## FACTS AND PROCEDURAL HISTORY

Burks-Bey brought an action in federal court against the Tippecanoe County Jail and three individuals,[2] claiming they denied him access to the courts to prepare his *pro se* criminal defense. The federal court dismissed his complaint and ordered that "[a]ny request for judicial intervention related to law library access needed for his *pro se* state criminal defense must be directed to the state criminal court." (App. at 91.) In June of 2007, he filed his complaint with the Tippecanoe Superior Court. In November 2009, the trial court, citing Ind. Trial Rule 41(E), ordered the parties to show cause by December 18, 2009, why the case should not be dismissed for want of prosecution. Burks-Bey responded December 1, 2009. In February 2010, the trial court dismissed the cause for want of prosecution. It did not conduct a hearing.[3] Burks-Bey filed a motion to correct error. It was denied and this appeal

[1] Because we remand on that ground, we need not address Burks-Bey's other allegations of error, as they will presumably be addressed at his hearing.

[2] Burks-Bey does not explicitly indicate in his complaint the status of the three named individuals, but it appears from the context of his allegations that they are Jail officials or police officers.

[3] Counsel for the Jail did not file a brief but did respond to a motion Burks-Bey brought with this appeal captioned "Appellants Showing of Prima Facie Error." In the response, the Jail's counsel asserted dismissal was appropriate because "as the trial court docket reflects . . . no further action was taken until the trial court, sua sponte, *set the matter for a Trial Rule 41(E) hearing* on November 4, 2009." (Response in Opposition to "Appellant's Showing of Prima Facie Error" at 2) (emphasis supplied). Counsel directs to nothing in the docket indicating a hearing was scheduled, and we find no such trial setting.

followed.

## DISCUSSION AND DECISION

Counsel for the Jail entered an appearance, but did not file an Appellee's Brief. Under that circumstance, we do not undertake to develop an argument on the appellee's behalf, but rather may reverse on an appellant's *prima facie* showing of reversible error. *Morton v. Ivacic*, 898 N.E.2d 1196, 1199 (Ind. 2008). *Prima facie* error in this context is defined as "at first sight, on first appearance, or on the face it." *Id*. The appellee's failure to submit a brief does not relieve us of our obligation to correctly apply the law to the facts in the record in order to determine whether reversal is required.[4] *Vandenburgh v. Vandenburgh*, 916 N.E.2d 723, 725 (Ind. Ct. App. 2009).

The trial rule controlling dismissal for failure to prosecute provides:

> **Failure to prosecute civil actions or comply with rules.** Whenever there has been a failure to comply with these rules or when 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 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.

T.R. 41(E) (italics added).

[4] In a motion captioned "Appellants Showing of Prima Facie Error," Burks-Bey notes the Jail filed no brief and asks us to reverse the trial court on that ground alone. As explained above, even when an appellee does not file a brief we are obliged to correctly apply the law to the facts in the record in order to determine whether reversal is required. *See Vandenburgh*, 916 N.E.2d at 725.

Our Indiana Supreme Court addressed the Rule 41(E) hearing requirement in *Rumfelt v. Himes*, 438 N.E.2d 980, 981 (Ind. 1982). Rumfelt sued Himes and others for nuisance, and Himes moved to dismiss because Rumfelt did not provide a court-ordered brief, did not itemize exhibits, and did not submit addresses of all witnesses, names of previously undisclosed witnesses, and names, addresses, and other information about expert witnesses. Himes also asserted Rumfelt's revised contentions were vague.

There, as here, the trial court ordered the parties to show cause why the case should not be dismissed. The order stated:

> Unless adequate cause is shown pursuant to the foregoing order, the Court will enter an order of dismissal of this action immediately after July 25. If, however, some cause is shown upon which the Court desires hearing whether argumentative or evidentiary, the Court will then set the matter for hearing.

*Id*. at 982.

Rumfelt timely filed responsive pleadings, alleging Himes's motions were vexatious and in bad faith, that Rumfelt had in fact complied with the court's orders with one exception approved by the court, and that Himes violated the court's order to provide Rumfelt with contention, witness, and exhibit lists. Himes's motion to dismiss was granted with prejudice pursuant to Rule 41(E) for Rumfelt's failure "to comply with the rules of civil procedure and the Court's orders thereunder," *id.*, without citation to the rules allegedly violated. We affirmed.

On transfer, Rumfelt claimed the trial court erred in ruling on the motion to dismiss without having ordered a hearing as required by T.R. 41(E), and our Supreme Court agreed.

It first addressed Himes's claim that Rumfelt was not prejudiced because he had responded in writing to the show cause order. It cited *Otte v. Tessman*, 426 N.E.2d 660 (Ind. 1981), which addressed the T.R. 56(C) notice and hearing requirements on motions for summary judgment. In *Otte*, the trial court granted summary judgment and dismissed Otte's action three years and three months after the suit had been initiated, and did not hold a hearing.

On appeal, Otte claimed she had not responded to Himes's motion to dismiss because she had the right to wait until the trial court set a hearing date. We held the trial court did not commit reversible error because the plaintiff did not demonstrate any resulting prejudice. *Otte v. Tessman*, 412 N.E.2d 1223 (Ind. Ct. App. 1980), *vacated* 426 N.E.2d 660 (Ind. 1981). Our Supreme Court reversed, noting:

> [P]rejudice is presumed on appeal where a trial court fails to follow the mandate of Trial Rule 56 which provides that the trial court fix a time for a hearing on the motion for summary judgment before ruling on the motion. The fixing of time for a hearing is the cornerstone which supports the equitable operation of Trial Rule 56. . . . If the failure to obey the clear explicit dictates of the Indiana Rules of Procedure can be simply dismissed as harmless error, then, the erosion of an orderly judicial system has begun. If the clear, explicit meaning of the Indiana Rules of Procedure can be re-written by judicial opinion to avoid the consequence of a violation, then, the shroud of confusion will prevent any meaningful, just and predictable solution to those disputes which must be resolved in our courts.

*Otte*, 426 N.E.2d at 661-62 (quoting *Otte*, 412 N.E.2d at 1231-32 (Staton, J., dissenting)).

Following the reasoning of *Otte*, the *Rumfelt* Court noted the "explicit" language of Trial Rule 41(E): "the court . . . shall order a hearing for the purpose of dismissing such case," and held the dismissal "wholly fails to comply with the clear dictates of the rule

requiring a hearing." 438 N.E.2d at 983. Therefore, it remanded the cause to the trial court "with instructions to order a hearing on appellees' motion to dismiss in accordance with Trial Rule 41(E)." *Id*. at 984.

As no hearing was set before the dismissal[5] of Burks-Bey's complaint, he has established *prima facie* error. *See id.* We accordingly reverse the dismissal and remand with instructions that the trial court conduct a hearing to determine whether Burks-Bey's complaint should be dismissed. *See id.*

Reversed and remanded.

ROBB, J., and VAIDIK, J., concur.

[5] It appears the court dismissed Burks-Bey's complaint *sua sponte* and not in response to a motion to dismiss as in *Rumfelt*. As T.R. 41(E) explicitly requires a hearing in either situation, ("the court, *on motion of a party or on its own motion* shall order a hearing for the purpose of dismissing such case") (emphasis supplied), this distinction does not change our result.