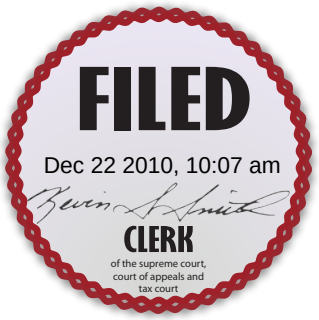

APPELLANT PRO SE:

JAMES A. NELSON
Greencastle, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JAMES A. NELSON,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 26A01-1007-PL-329
	)	
MICHAEL COLLINS,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE GIBSON SUPERIOR COURT
The Honorable Earl G. Penrod, Judge
Cause No. 26D01-1001-PL-2

December 22, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

James A. Nelson, pro se, appeals the trial court's order that granted the State's motion to dismiss Nelson's complaint alleging a violation of his rights under 42 U.S.C. § 1983. We consider a single dispositive issue on appeal, namely, whether the trial court abused its discretion when it dismissed Nelson's complaint with prejudice.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On August 30, 2007, the State charged Nelson with dealing in methamphetamine, as a Class A felony; possession of methamphetamine, as a Class C felony; possession of chemical reagents or precursors, as a Class D felony; possession of anhydrous ammonia with intent to manufacture, as Class D felony; illegal storage or transport of anhydrous ammonia, as Class A misdemeanor; manufacturing methamphetamine, Class B felony; and possession of a controlled substance, as a Class D felony. The facts underlying these charges were set out in our unpublished memorandum decision in Nelson v. State, 2009 Ind. App. Unpub. LEXIS 865 (May 15, 2009), trans. denied, as follows:

> In August 2007, the Oakland City Police Department was conducting an investigation of Nelson for possible illegal drug activity. On August 29, 2007, Officer Michael Collins conducted a routine traffic stop of Mike Marvel, who was driving a semi-truck with a nonfunctioning taillight and had a suspended license. Officer Collins recognized Marvel as an associate of Nelson. Officer Collins asked to search the vehicle, and Marvel consented. During the search, Officer Collins found pseudoephedrine pills, glass pipes, and lithium batteries. Marvel informed Officer Collins that he was taking the pseudoephedrine to Nelson in exchange for methamphetamine. Marvel agreed to assist the police by wearing a recording device, making the delivery, and attempting to pinpoint the time Nelson would be manufacturing the methamphetamine. Officer Collins observed Marvel enter and exit Nelson's home. During the visit,

> Marvel delivered the pills and learned that Nelson planned to "cook" the methamphetamine the next day.
>
> At 8:30 a.m. on August 30, 2007, Officer Collins and Conservation Officer Duane Englert began surveilling Nelson's house. During this time, Nelson exited his home and walked the perimeter of the property. He then went inside and came back out with a gas can and tool box. He went inside and emerged again with a laundry basket, which he carried into the barn. He then emerged from the barn with the laundry basket, which now contained a tank and a hose covered by a blanket. He took the basket inside the house and came out with a cup with "frosting" on it.[1]
>
> FN 1: Frosting indicates the presence of anhydrous ammonia.
>
> Officer Englert continued to surveil the property while Officer Collins obtained a search warrant. During this time, Officer Englert observed a man and woman enter Nelson's home. Officer Collins returned, and he, Officer Englert, and other officers executed the search warrant. During the search, Officer Collins observed a piece of burnt aluminum on the coffee table[2] and smelled camp fuel and anhydrous ammonia. He found methamphetamine under the couch where Nelson had been sitting and various jars of flammable solvents around the house. After the officers placed Nelson and his two guests in custody, Nelson showed them hydrochloric acid generators, "pill dough," and a tank containing anhydrous ammonia. Police also found acetone and two bags containing a total of 8.26 grams of methamphetamine.
>
> FN 2: Burnt aluminum indicates that methamphetamine has been smoked.

Id. at *2-*3 (internal citations omitted). The State dismissed the Class A felony dealing in methamphetamine count and the Class C felony possession of methamphetamine count, and a jury found Marvel guilty on all remaining counts. On direct appeal, we affirmed Nelson's convictions. Id. at *11. Nelson is currently litigating a pro se petition for post-conviction relief in the Gibson Superior Court under Cause No. 26D01-1004-PC-1.

On September 1, 2009, Nelson filed in the Gibson Superior Court a pleading entitled "Plaintiff's Motion for Preliminary Injunction[.]" Appellant's App. at 10. In that pleading, Nelson alleged that Officer Michael Collins' actions and "deliberate indifference" on August 29, 2007, violated Nelson's Fourteenth Amendment right to equal protection of laws and Eighth Amendment right against "undue force." Id. at 11. Nelson concluded by asking the court to "grant this Motion for Preliminary Injunction and note the Plaintiff is seeking compensatory, nominal, and punitive damages." Id. Nelson's Motion for Preliminary Injunction did not specify the conduct to be ordered or proscribed by the injunction. On September 3, the trial court entered an order, which denied Nelson's motion because "the documentation filed by [Nelson] does not set forth a claim for which relief can be granted[.]" Id. at 13. Nelson did not appeal that order.

On January 8, 2010, Nelson filed his "Civil Complaint" ("Complaint"). The Complaint contains the following allegations

> 1. On the 29th day of August 2007, Officer Michael Collins[] (Collins) conducted a routine traffic stop on Michael Marvel[] (Marvel), which led to the arrest of the Plaintiff on the 30th day of August 2008. This action by Collins[] caused Nelson intentional and undue harm by presenting false information to Marvel[] and failing to arrest Marvel and charging the Plaintiff in lieu of Marvel. (See Collins' deposition pages 7 and 13; Marvel deposition pages 8, 9 and 13; Transcript of Oral Probable cause Hearing pages 3, 4, and 5). The actions of Collins resulted in a direct violation of the Plaintiff's Fourteenth Amendment rights to the United States Constitution[]and his rights to the Eighth Amendment to the United States Constitution to endure [sic] undue force.
>
> 2. Upon information, belief and in compliance with [F]ederal Rules of [C]ivil Procedure, Plaintiff contends Collins' inadequate behavior, actions, operating outside legal jurisdiction and his employer[']s] knowledge proves they were aware of the substantial risk of serious harm to others and did nothing to prevent such harm. Therefore, their failure to respond reasonably caused deliberate indifference on their part. (See Marvel

> deposition pages 9 and 12). This is a direct violation of the Plaintiff[']s Fourteenth Amendment right [sic] to the United States Constitution to equal protection[] and[] Plaintiff[']s right to the Eighth Amendment right [sic] to the United States Constitution to [sic] excessive force.
>
> 3. The Plaintiff is seeking compensatory and nominal damages in the amount of five hundred thousand dollars ($500,000.00), and punitive damages in an amount to be determined by the Court.

Appellant's App. at 3-4. The allegations in the Complaint are nearly identical to those in the Motion for Preliminary Injunction.

Collins filed an answer to the complaint and a motion to dismiss, alleging that the initiation of the lawsuit "failed to comply with the procedures mandated by the Indiana Tort Claims statutes[,]" that the claims had been asserted "prematurely[,]" and, by subsequent amendment, that the statute of limitations had run. Appellant's App. at 8-9. And Collins later filed a motion for judgment on the pleadings under Indiana Trial Rule 12(C), alleging that Nelson's claims were barred because the limitations period had run and because he had not complied with the Indiana Tort Claims Act. On June 4, the trial court entered an order granting Collins' motion for judgment on the pleadings on the ground that the claim "is barred by the statute of limitations." Appellant's App. at 24.

On July 2, 2010, Nelson filed his notice of appeal. His brief was filed September 3. Collins did not file an appellee's brief, but on November 8 he filed a motion to dismiss the appeal.

DISCUSSION AND DECISION

Initially, we note that Officer Collins has not filed an appellee's brief. In such a case, we need not undertake the burden of developing arguments for him. See Splittorff v. Aigner, 908 N.E.2d 669, 671 n.2 (Ind. Ct. App. 2009). Applying a less stringent

standard of review, we may reverse the trial court if the appellant establishes prima facie error. Id. We also observe that the trial court denied Nelson's motion for a preliminary injunction, which asserted allegations identical to those in the civil complaint underlying this appeal. If the denial of the motion for a preliminary injunction were a final judgment, as assumed by the dissent, then the current appeal would be barred by res judicata.

But the record on appeal on this issue includes only a copy of the CCS in that case, which states that the motion was denied for failure to state a claim upon which relief can be granted and that the court returned to Nelson the documents "submitted in this cause." Appellant's App. at 25. The CCS further states that the case was "closed" and that Nelson "must file a new complaint, submit the proper Summons and Court costs or submit a waiver of Court costs." Id. Thus, the record indicates that the trial court's ruling on the motion for a preliminary injunction was not a final judgment. Indeed, Nelson's motion did not state a cause of action because a civil action is commenced by filing a complaint, not by filing a motion. As such, we do not apply res judicata and consider the appeal on the merits.

Here, Nelson appeals the trial court's order granting Collins' motion for judgment on the pleadings. Although his argument is not cogent, Nelson appears to contend that the trial court's dismissal with prejudice is erroneous because: (1) the limitation period has not yet begun to run on his claim; and, alternatively, (2) he timely filed his complaint under the limitation period applicable to the Indiana Tort Claims Act. The first issue is dispositive of Nelson's appeal.

Nelson contends that the limitation period has not yet begun to run on his claim against Officer Collins. In support, Nelson cites Heck v. Humphrey, 512 U.S. 477 (1994), in which the Supreme Court held that "a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." Id. at 489. Here, this court affirmed Nelson's conviction on direct appeal, and Nelson did not file a petition for transfer. Thus, Nelson's conviction has not been reversed, expunged, invalidated, or impugned in any way. And Nelson's petition on PCR is currently pending.[1] As such, a cause of action under 42 U.S.C. § 1983 has not yet accrued. See id. Because the § 1983 cause of action has not accrued, the trial court erred to the extent it dismissed Nelson's complaint with prejudice.

Because our conclusion regarding the accrual of the action is dispositive, we do not consider Nelson's argument that his complaint was timely filed. For the same reason, by separate order we deny Collins' motion to dismiss the appeal. We remand with instructions for the trial court to dismiss the complaint without prejudice.

Affirmed in part, reversed in part, and remanded with instructions.

MATHIAS, J., concurs.

BAKER, C.J., dissents with separate opinion.

[1] Because Nelson has not included a copy of his petition for post-conviction relief in the record on appeal, we cannot determine the nature of his claim in that petition or whether, if successful, the relief afforded might include a reversal, expungement, invalidation, or other impugnment of his convictions.

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	)	
Appellee-Defendant.	)	
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BAKER, Chief Judge, dissenting.

I respectfully dissent. On September 1, 2009, Nelson filed a motion for a preliminary injunction, which the trial court denied because his pleading set forth no claims for which relief could be granted. Nelson did not appeal that determination. As the majority notes, Nelson's complaint, filed in January 2010, contains allegations that are "nearly identical" to those in the motion for preliminary injunction. Slip op. p. 5. I believe that by virtue of the trial court's dismissal of Nelson's first, nearly identical, pleading filed against Officer Collins, and Nelson's failure to appeal that ruling, the issues Nelson attempts to raise in this new complaint are res judicata. See Kalwitz v. Kalwitz, 934 N.E.2d 741, 750 (Ind. Ct. App. 2010) (explaining that the doctrine of res

judicata "serves to prevent repetitious litigation of disputes which are essentially the same").

Here, (1) the first judgment was rendered by a court of competent jurisdiction, (2) the former judgment was rendered on the merits, (3) the matter now at issue was, or could have been, determined in that action, and (4) the controversy adjudicated in the preliminary injunction action was between the same parties. Id. Therefore, I believe all matters raised in this complaint are deemed conclusively denied and would affirm the trial court in all respects.