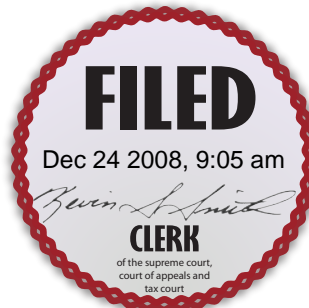


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ERIC D. SMITH
New Castle, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ERIC D. SMITH,)
)
Appellant-Defendant,)
)
vs.) No. 46A03-0808-CV-432
)
WILLIAM K. WILSON, et al.)
)
Appellees-Plaintiffs.)

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Paul J. Baldoni, Judge
Cause No. 46D03-0807-PL-364

December 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Eric Smith appeals the summary dismissal of his complaint against certain employees of the Department of Correction (“DOC employees”). We affirm.

Issue

The sole issue is whether the trial court properly concluded that Smith’s complaint was subject to summary dismissal under Indiana’s “Frivolous Claim Law” for pro se prisoner litigants.

Facts

Smith has filed multiple lawsuits while incarcerated by the DOC following his 2001 arson conviction. He filed thirteen lawsuits in 2005-06 alone. See Smith v. Ind. Dep’t of Corr., 883 N.E.2d 802, 811 (Ind. 2008) (Shepard, C.J., dissenting).

Smith filed the present lawsuit on July 2, 2008. In this complaint, which specifically relied upon 42 U.S.C. § 1983, Smith alleged that DOC employees had wrongfully confiscated various mail order items he had purchased from vendors. Smith claimed that prison officials were retaliating against him for frequently filing lawsuits, and specifically for successfully arguing before the Indiana Supreme Court that the “Three Strikes Law,” which severely curtailed pro se prisoner litigation after a third lawsuit deemed frivolous, violated the Indiana Constitution. See Smith, 883 N.E.2d at 810. Smith also claimed a violation of his freedom of religion under the First and Fourteenth Amendments because prison officials did not deliver to him a Wiccan pentagram necklace that he had ordered.

Because Smith is an incarcerated offender, the trial court preliminarily reviewed his complaint under Indiana Code Chapter 34-58-1 to determine whether it should proceed. On July 21, 2008, the trial court concluded that Smith's complaint did not assert a claim upon which relief could be granted; that the defendants were at least partially immune from liability; and that there was no arguable basis either in law or fact upon which the court could grant relief. It dismissed Smith's complaint, and he now appeals.

Analysis

Our supreme court has called Indiana Code Section 34-58-1-2 the "Frivolous Claim Law." Smith, 883 N.E.2d at 804. This statute provides in part:

- (a) A court shall review a complaint or petition filed by an offender and shall determine if the claim may proceed. A claim may not proceed if the court determines that the claim:
 - (1) is frivolous;
 - (2) is not a claim upon which relief may be granted; or
 - (3) seeks monetary relief from a defendant who is immune from liability for such relief.

- (b) A claim is frivolous under subsection (a)(1) if the claim:
 - (1) is made primarily to harass a person; or
 - (2) lacks an arguable basis either in:
 - (A) law; or
 - (B) fact.

We review de novo the dismissal of an offender's complaint pursuant to Indiana Code Section 34-58-1-2. Smith v. Carrasco, 850 N.E.2d 468, 470 (Ind. Ct. App. 2006).

We look only to the well-pleaded facts contained in the complaint or petition. Id. We must determine whether the complaint or petition contains allegations concerning all of the material elements necessary to sustain a recovery under some viable legal theory. Id.

Smith specifically filed his complaint under the auspices of 42 U.S.C. § 1983, alleging a violation of federal constitutional rights by officials acting under color of state law. Section 1983 permits recovery against individual officials, but not against the State itself. Cantrell v. Morris, 849 N.E.2d 488, 506 n.26 (Ind. 2006). The Indiana Tort Claims Act (“ITCA”) does not apply to claims based on 42 U.S.C. § 1983, even those filed in state court. Id. at 506.

However, the Seventh Circuit has held that where a person is stating Fourteenth Amendment claims for deprivation or destruction of personal property by government officials, whether negligent or intentional, ITCA provides the proper and adequate basis to pursue such claims. Wynn v. Southward, 251 F.3d 588, 592-93 (7th Cir. 2001); Shidler v. Moore, 409 F.Supp.2d 1060, 1069-70 (N.D. Ind. 2006). Accordingly, deprivation of personal property claims must be pursued through ITCA, and not a § 1983 action. See id. If Smith wishes to seek recovery for the confiscation of his personal property, he needs to file a suit under ITCA and comply with its procedural and substantive requirements. This alone was a sufficient basis to dismiss Smith’s claims with respect to most of his allegedly wrongly-confiscated property.

Smith has cited authority holding that where prison officials confiscate an inmate’s property in retaliation for the inmate’s litigation against the officials, the inmate

has sustained a constitutional injury affecting his or her right of access to the courts and the availability of state remedies does not bar adjudication under § 1983. See Hall v. Sutton, 755 F.2d 786, 787-88 (11th Cir. 1985). We note, however, that Smith's primary claim of retaliation relates to his successful invalidation of Indiana's "Three Strikes Law" by our supreme court in Smith. That case was decided on April 9, 2008. Three of the four deprivations of property alleged by Smith occurred before that date. As for the fourth, which allegedly occurred on April 29, 2008, prison officials did permit Smith to receive two electric fans from an outside vendor but confiscated the remainder of Smith's order. It is illogical to believe that the officials would have permitted Smith to receive part of his order if they intended to retaliate against him for his success in invalidating the "Three Strikes Law."

As for Smith's religious freedom claim, with respect to the withholding or confiscation of his pentagram, we conclude this also amounts to merely a property deprivation claim that should be pursued under ITCA. The available record reveals that Smith was not denied access to all materials related to Wicca. He was permitted to receive two books he had ordered on the subject. Thus, it does not appear to us, even assuming the facts Smith has alleged are true, that the failure to give him his pentagram was done with anti-religious intent. As such, Smith must pursue an ITCA loss of property claim for this item as well. See Shidler, 409 F.Supp.2d at 1069-70 (holding that where complaint failed to support an allegation that prison officials specifically intended

to deprive prisoner of access to religious property, it was a merely a property claim that had to be pursued under ITCA).

Conclusion

The trial court did not err in dismissing Smith's latest complaint under the "Frivolous Claim Law." We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.