RENDERED: SEPTEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-000904-MR

KEVIN R. BLACK — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 10-CI-01801

ROBERT C. WHITE, GARY HUFFMAN, LADONNA THOMPSON, AND JEFF HULKER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: The Appellant, Kevin R. Black, appeals the April 12, 2012, order of the Franklin Circuit Court dismissing the action which Black filed

against Appellees Robert C. White,[1] Gary Huffman,[2] LaDonna Thompson,[3] and Jeff Hulker,[4] wherein Black asserted that the Louisville Metro Police Department (hereinafter "LMPD") illegally obtained Department of Corrections (hereinafter "DOC") recordings of telephone calls between Black and his attorney and between Black and his wife in violation of the Kentucky Eavesdropping Statute, Kentucky Revised Statutes (KRS) 526.020. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

At the time that this claim was filed, Black was an inmate at Green River Correctional Complex ("GRCC") and he had been a Kentucky inmate for about 32 years. Black was serving a 75-year sentence for two counts of first-degree rape, one count of burglary in the first degree, one count of sexual abuse in the first degree, one count of sodomy in the first degree, criminal facilitation of robbery in the first degree, criminal facilitation of burglary in the first degree, burglary in the third degree, and receiving stolen property.

Important to the allegations he now makes on appeal, we note that when Black arrived at GRCC in June of 2009, he was given an inmate orientation packet, including an Inmate Handbook, which he acknowledged receiving. He further acknowledged that he had "completed the orientation session at the Green

[1] Officer Robert White was the Chief of the Louisville Metro Police Department (hereinafter "LMPD").

[2] Gary Huffman was a Detective for the LMPD.

[3] LaDonna Thompson was the Commissioner of the Department of Corrections (hereinafter "DOC").

[4] A DOC employee whom Black alleges illegally provided his telephone records to the LMPD.

River Correctional Complex" and "received a copy of the Inmate Handbook,[5]" which warned that "Inmate telephone calls may be monitored at any time.[6]" Moreover, in the Orientation Handbook, which was provided during the orientation session that Black attended, he was informed that "Telephones shall be subject to monitoring.[7]" Black was also informed that he would need to contact his unit administrator to arrange "special telephone calls, such as those to an attorney[.][8]" Beyond those warnings, a sign was posted above each telephone made available for inmate use at GRCC indicating that "Telephones may be monitored at any time."[9] Finally, we note that the record indicates that when a phone call is placed by an inmate at GRCC, both parties to the call are warned by a recorded message at the beginning of the call which states "Hello, this is a collect call from _____, an inmate at Green River Correctional Complex, a Kentucky correctional institute, this call is subject to recording and monitoring."[10]

Despite the aforementioned warnings, Black elected to call his wife and attorney on the recorded telephones and discuss his involvement in crimes for which he had not yet been convicted. The admissions which Black made during

[5] T.R. at 214.

[6] T.R. 217-18.

[7] T.R. at 215-16.

[8] T.R. at 134.

[9] T.R. at 219-20.

[10] T.R. at 201.

the course of those calls apparently caused LMPD officers to believe he had committed a 1995 murder in which he was a suspect.[11] LMPD requested that the DOC provide it with those telephone recordings, which the DOC did so provide. Approximately a year after the records were turned over to LMPD by DOC, Black filed this action in the Franklin Circuit Court.

Black initially filed this action on December 20, 2010, asserting that the Appellees had violated his civil rights under various legal theories by disclosing to officers of the LMPD several recordings of Black's telephone conversations which he knowingly made to his wife and to his attorney on recorded telephone lines from prison.[12] Black filed the claim against White and Huffman based upon his assertion that Huffman was improperly provided with a copy of "Plaintiff's telephone recordings originating at Green River Correctional

[11] Black was ultimately charged in that case, though the charge was later dismissed.

[12] We note that Black's initial complaint included 147 pages of facts, arguments, and exhibits. The arguments contained therein were quite convoluted, as are the arguments he now makes on appeal. We note that in his complaint, Black's substantive allegation seemed essentially to be that, "On or about November 20, 2009, Defendants Huffman and Hulker colluded to avoid the limitations of the Kentucky Eavesdropping Statute, KRS 526.020, by providing the police and prosecutor in said murder prosecution with Plaintiff's telephone recordings originating at Green River Correctional Complex (GRCC) between October 5, 2009, and November 20, 2009. Approximately thirty such recordings were involved, half of which included attorney/client privileged communications with DPA attorneys regarding trial strategy pertaining to said murder case, and the other half involved conversations between Plaintiff and his wife." Appellant's December 20, 2010 "Civil Rights Complaint," T.R. at 120.

Upon review, we note that the issue presented to the circuit court was the decision of the DOC to give the recordings to the LMPD, "in the absence of any subpoena or other judicial process." Black did not raise a claim as to the initial telephone recording of his conversation. Regardless, if Black had raised that issue, such a claim would have been time-barred by the statute of limitations contained in KRS 413.140. Moreover, the record is clear that Black was informed that his calls were monitored and recorded at least twice in writing, via a sign above the phones themselves, and through an audio recording at the beginning of each call. Thus, using the telephones under those circumstances appears to have been clear consent to the monitoring, and makes the legal "eavesdropping" arguments made herein by Black inapplicable. Accordingly, we decline to address those arguments in any greater detail herein.

Complex between October 5, 2009, and November 20, 2009," by Hulker, and against LaDonna Thompson as Commissioner of the DOC.

On January 13, 2011, LMPD defendants Chief Robert White and Detective Gary Huffman filed a motion to dismiss the action, asserting that the complaint failed to state a claim upon which relief could be granted, arguing that there is no legal requirement that a warrant be obtained to allow one law enforcement agency to voluntarily provide evidence, already in its custody, to another law enforcement agency. White and Huffman further asserted that they were entitled to sovereign immunity for the state law claims filed against them in their official capacity, and that they were entitled to qualified immunity on the claims asserted against them in their individual capacities. Shortly thereafter, on January 20, 2011, Appellees Thompson and Hulker filed a response to Black's claim, along with a motion to dismiss.

On January 28, 2011, the circuit court entered an order dismissing the action on the basis that the petition failed to state a claim upon which relief could be granted and was "legally without merit and factually frivolous.[13,14]" Following the issuance of this order, this matter became procedurally convoluted with Black filing numerous motions.[15] On April 15, 2011, Thompson and Hulker filed a

[13] T.R. p. 227.

[14] We note that the order signed by the court was the order tendered along with the DOC defendants' response and motion to dismiss. The Appellees nevertheless assert that the court's order clearly intended that the complaint be dismissed in its entirety, and specifically indicated that it was a "final and appealable order."

[15] These included a January 31, 2011, motion requesting an extension of time to file a response to the motion to dismiss filed by White and Huffman, as well as a motion for extension of time to

response to all of Black's pending motions. On that same date White and Huffman filed a reply to Black's motion to dismiss and a response to Black's motion to amend the complaint. On April 25, 2011, Black filed a reply to Hulker and Thompson's response to various motions and on that same date Black filed a reply to White and Huffman's response to his motion to amend the complaint. Thereafter, on May 2, 2011, Hulker and Thompson filed a motion asking the court to deny Black's Kentucky Rules of Civil Procedure (CR) 59 motion as a sanction for failing to serve it upon the defendants, and on May 9, 2011, Black filed a response to that motion.

Ultimately, on August 25, 2011, the court entered an order finding that the case had been "dismissed by a final order entered on January 20, 2011.[16]" Two months later, on October 24, 2011, Black filed a petition for writs of prohibition and mandamus with this Court.[17] In light of the convoluted nature of the proceedings below, all of the Appellees filed renewed motions to dismiss this

file a response to the motion to dismiss filed by Hulker and Thompson. Thereafter, on February 7, 2011, Black filed a motion for findings of fact and conclusions of law, as well as a motion to alter, amend, or vacate. On February 8, 2011, the court granted Black's motion for extension of time and gave him until March 4, 2011, to file a response to White and Huffman's motion to dismiss. On February 16, 2011, Black filed a motion for clarification, and on March 2, 2011, he filed another motion for extension of time to respond to the motions to dismiss. On March 7, 2011, the court granted Black's motion and gave him until April 4, 2011, to file his response to the motions to dismiss. Thereafter, on March 10, 2011, Black filed a motion to hold in abeyance. On March 28, 2011, an order was entered transferring this matter to Division One. On April 1, 2011, Black filed a motion to amend the complaint, as well as a combined response to the motions to dismiss.

[16] We note that the order was actually entered on January 28, 2011.

[17] Case No. 2011-CA-001941-OA.

matter. On November 15, 2011, Black filed a combined response to the motions to dismiss.

On February 10, 2012, this Court entered an order denying Black's petition and made the following findings: (1) The lower Court dismissed this action on January 28, 2011; (2) Black's motion to alter, amend, or vacate was timely filed; (3) The order entered on January 28, 2011, and the order entered on August 25, 2011, by the lower court denying Black's following motions: "Motion for Rule 11 Sanctions,"; "Motion to Strike 'Response and Motion to Dismiss'"; and the "Motion for Leave to File Amended Complaint" were not final and appealable orders. Therein, this Court further found that the lower court had not yet ruled on Black's motion to alter, amend, or vacate, and advised it to do so.

On April 12, 2012, the Franklin Circuit Court entered an order reaffirming the order dismissing and denying the motion to alter, amend, or vacate. It is from that order that Black now appeals to this Court.

On appeal, Black makes a number of arguments. While these arguments are certainly somewhat convoluted, this Court believes they are best summarized as follows: (1) That the circuit court erred in dismissing Black's action without giving him an opportunity to respond to the motions to dismiss filed by Appellees; (2) That the circuit court erred in refusing to allow him to file an amended complaint which he asserts was tendered prior to the responsive pleadings filed by Appellees; and (3) That the circuit court erred in dismissing this

action for failure to state a claim upon which relief could be granted. The Appellees disagree, and urge this Court to affirm on all issues.

In addressing the issues before us, we note that pursuant to CR 12.02(f), a cause of action must be dismissed for failure to state a claim upon which relief can be granted if the pleading party appears not to be entitled to relief under any statement of facts which could be proved to support his claim. *See Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849, 851 (Ky. 2002). In making this decision, the circuit court is not required to make any factual determination. *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002). Instead, the question the court must ask is whether, if the facts alleged in the complaint can be proven, the Appellant would be entitled to relief. *Id.* We review the issues raised by Black with these standards in mind.

As his first basis for appeal, Black argues that the circuit court abused its discretion by denying his CR 59.05 motion to dismiss because "the DOC defendants' submission of extraneous material served to convert their motion to dismiss into a motion for summary judgment." It seems that Black contends that the motion to dismiss filed by the DOC Appellees should have been treated as a motion for summary judgment to which he was allowed to respond, but that, "no such opportunity for the Plaintiff to respond to Defendants' motions was allowed."

Upon review of the record, we simply cannot agree. Indeed, the record reveals that Black filed responses to the motions to dismiss filed by both

Appellees, and filed many pages of documentary evidence into the record.[18] This case was not finally dismissed until more than a year after the motion to dismiss was initially filed. Accordingly, we decline to reverse on this basis.

As his second basis for appeal, Black argues that the court below abused its discretion by denying Black leave to file an amended complaint. In making this argument, Black asserts that the circuit court should have permitted the filing of his amended complaint because the LMPD defendants had filed a motion to dismiss, which was not a responsive pleading. In reviewing this matter, we note that a motion to dismiss is not a "responsive pleading" within the rule permitting a party to amend her pleading once as a matter of right at any time before a responsive pleading is served and, consequently, an amended complaint which was offered before a court rules on a motion to dismiss should be accepted. *See Kentucky Lake Vacation Land, Inc. v. State Property and Buildings Commission,* 333 S.W.2d 779 (Ky. App. 1960).

However, we note that Black's motion for leave to file an amended complaint was not filed until April 1, 2011, and that the court had previously entered its first order dismissing this action on January 28, 2011. Moreover, we note that in his brief to this Court, Black describes his amended complaint as "scarcely more than an embroiderment of the original charges.[19]" Thus, we note that by Black's own admission the amended complaint was substantially similar to

[18] T.R. at 130-152, and 362-96, "Plaintiff's Combined Response to Various Defendants' Motions to Dismiss."

[19] Further, we note that Black did not raise any issues in the new complaint which were not previously raised in his initial complaint, or in his response to the motions to dismiss.

the original complaint. Accordingly, we find that error, even if it did occur, was not prejudicial and that Black has failed to meet his burden of proof in that regard. *See Connecticut Indemnity Co. v. Kelley*, 301 S.W.2d 584 (Ky. App. 1957). Accordingly, we affirm.

We now turn to Black's final basis for appeal, namely, that the lower court erred in concluding that no legally cognizable claim had been stated. Having reviewed the record, the arguments of the parties and the applicable law, this Court is of the opinion that the facts alleged in Black's complaint and the arguments he makes on appeal do not entitle him to relief under any legal theory of which this Court is aware. Indeed, Black cites to no authority, nor are we aware of any, which would support his assertion that a law enforcement agency must use a warrant or a judicial process to obtain evidence already seized by and in the custody of the DOC. The only issue with respect to which Black exhausted his administrative remedies below was his assertion that Appellee Hulker "relinquished to police" the standard prison recordings of his telephone calls made with his consent. We are unaware of any law that would have required the DOC to obtain a warrant or "judicial process" to do so. Accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the April 12, 2012, order of the Franklin Circuit Court reaffirming the dismissal of Black's claim and denying his motion to alter, amend, or vacate, the Honorable Phillip J. Shepherd, presiding.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kevin R. Black, *Pro Se*
Eddyville, Kentucky

BRIEFS FOR APPELLEES LADONNA THOMPSON AND JEFF HULKER:

Brenn O. Combs
Frankfort, Kentucky

BRIEFS FOR APPELLEES ROBERT C. WHITE AND GARY HUFFMAN:

Lisa Schweickart
Louisville, Kentucky