RENDERED: OCTOBER 14, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000202-MR

OSCAR UMAR GONZALEZ — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS WINGATE, JUDGE
ACTION NO. 14-CI-01093

GENERAL ASSEMBLY,
COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AND ORDER
AFFIRMING

** ** ** ** **

BEFORE: MAZE, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Oscar Umar Gonzalez (Gonzalez) alleges that the Department of Public Advocacy (DPA) is so inadequately funded that it infringes upon the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Gonzalez also alleges that the disparity in funding between the Attorney General's Office and the DPA violates the Equal Protection

Clause. He requests three different remedies as a result: 1) injunctive relief to prevent the Kentucky state legislature from passing additional budget cuts to the DPA; 2) a declaration that his trial counsel was ineffective; and 3) damages in breach of contract and tort. The trial court granted the General Assembly's motion to dismiss on the basis of immunity. We hold that Gonzalez does not have standing to bring this action, he has raised the issue of his counsel's alleged ineffectiveness previously, and he failed to state a claim for monetary relief. We affirm.

Relevant Facts

Gonzalez asserts that the DPA is underfunded. In support of this argument, he cites to several figures stating that the DPA receives less money annually than the Attorney General's office, as well as several DPA documents stating that the DPA is unable to adequately meet its extensive caseload due to its lack of funds. Gonzalez argues that this results in wrongful convictions, and that this violates the Fourteenth and Sixth Amendments to the United States Constitution.

Analysis

As a preliminary matter, we note that the counsel for the General Assembly has chosen not to file an appellee brief in this case. Kentucky Rule of Civil Procedure (CR) 76.12(8)(c) "provides the range of penalties that may be levied against an appellee for failing to file a timely brief." *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). At our discretion, we

may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR 76.12(8)(c). In this instance, we choose to accept Gonzalez's statements of facts and issues as correct.

I. Injunctive Relief

Gonzalez first asserts that he is entitled to an injunction to prevent budget cuts to the DPA, on the basis that additional budget cuts would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and result in the denial of his right to counsel under the Sixth Amendment to the United States Constitution.[1]

The General Assembly argued below that it had sovereign immunity from suit. In this instance, we must disagree. Our Supreme Court has previously held that

> On the question of the constitutional appropriateness of governmental actions, there can be no immunity. To hold that the state has immunity from judicial review of the constitutionality of its actions would be tantamount to a grant of arbitrary authority superseding the constitution, which no law or public official may have.

Commonwealth v. Ky. Ret. Sys., 396 S.W.3d 833, 840 (Ky. 2013). Here, Gonzalez has alleged that the amount of funding provided to the DPA by the legislature is

[1] We do not wish to minimize the role of the Department of Public Advocacy in our justice system or the costs associated with providing representation to indigent criminal defendants. Our Supreme Court has noted that "[t]he expense is by no means trivial." *Maynes v. Commonwealth*, 361 S.W.3d 922, 926 (Ky. 2012) (citation omitted).

unconstitutional. It is for this same reason that this case is not a "political question." In *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005), our Supreme Court discussed the Governor's control over the legislature's budgetary process. Our Supreme Court concluded that "[t]he issue presented by this case is a constitutional issue, not a political one; thus, it is justiciable." *Id.* at 860. Because Gonzalez has raised a constitutional issue it is not a "political question" and the legislature is not immune from potential injunctive relief.

To have standing to sue in Kentucky, a party must have a "judicially recognizable interest in the subject matter of the suit." *Commonwealth v. Yamaha Motor Mfg. Corp.,* 237 S.W.3d 203, 205 (Ky. 2007). The interest of a party must be a present or substantial interest as distinguished from a mere expectancy. *Acuff v. Wells Fargo Bank, N.A.*, 460 S.W.3d 335, 338 (Ky. App. 2014) (quoting *Ashland v. Ashland F.O.P. No. 3, Inc.,* 888 S.W.2d 667, 668 (Ky. 1994)). Additionally, "[t]he issue of standing must be decided on the facts of each case." *Id.* (quoting *Rose v. Council for Better Educ., Inc.,* 790 S.W.2d 186, 202 (Ky. 1989)).

Gonzalez seems to assert that he is entitled to sue on behalf of all the incarcerated people in Kentucky.[2] The mere fact that Gonzalez is currently incarcerated is insufficient to establish that he has standing to sue on behalf of all

[2] Our Supreme Court has previously held that an appellate court may not raise standing *sua sponte*. *Harrison v. Leach*, 323 S.W.3d 702, 709 (Ky. 2010) ("Since Christopher did not in any way raise the issue of standing before the trial court, the Court of Appeals erred by injecting standing into the case on its own motion."). Here, however, the General Assembly raised standing in its motion to dismiss below.

future criminal defendants who will be affected by future cuts to the DPA's budget. Even assuming the truth of his claim that the budget cuts would infringe upon his right to counsel, Gonzalez is not within the class of people who would be affected by such cuts as he has not alleged that he is currently facing additional criminal charges.

More importantly, Gonzalez is unable to demonstrate that his counsel was actually ineffective due to the DPA's underfunding in his underlying criminal case, and is therefore unable to show that he suffered an actual injury. Our Supreme Court has previously noted the importance of requiring an injury-in-fact:

> As this Court recently noted in *Tax Ease Lien Investments 1, LLC v. Commonwealth Bank & Trust,* 384 S.W.3d 141, 143 (Ky. 2012), for a party to have standing to bring an action it is imperative that the party have a "present or substantial" interest in the matter litigated and not simply a "mere expectancy." In the realm of constitutional challenges, the rule was most concisely stated in *Merrick v. Smith,* 347 S.W.2d 537, 538 (Ky. 1961): "It is an elementary principle that [the] constitutionality of a law or its application is not open to challenge by a person or persons whose rights are not injured or jeopardized thereby." Indeed, "in addressing various constitutional challenges ..., Kentucky courts have long adhered to a strict injury-in-fact requirement." *Commonwealth Nat. Res. and Environ. Protection Cabinet v. Kentec Coal Co., Inc.,* 177 S.W.3d 718, 732 (Ky. 2005) (J. Cooper, concurring in part and dissenting in part). *See also Steel v. Meek,* 312 Ky. 87, 226 S.W.2d 542, 543 (1950) (constitutional challenge to statute governing absentee voting procedures on grounds that it made no provisions for absentee voting by the blind, the illiterate, or the disabled, dismissed for lack of standing where appellant failed to show that he, himself, was prejudiced by the alleged discrimination).

Beshear v. Haydon Bridge Co., 416 S.W.3d 280, 298-99 (Ky. 2013). *See also Veltrop v. Commonwealth*, 269 S.W.3d 15, 18 (Ky. App. 2008) ("Because the test result was within [the two-hour statutory] time period [the appellant is challenging], KRS 189A.010(2) had no relevance or application to her case. She therefore could not have suffered any injury or harm.").[3]

This Court has previously declined to find that Gonzalez's counsel was ineffective because the DPA's workload in his appeal of the denial of his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion. This Court stated in that opinion that

> Gonzalez does not specify how, but for his counsel being "overworked" or the failure of his counsel to hire or dispatch an investigator, the outcome of his case would have been different. Gonzalez has not presented any evidence about what the investigator would have discovered, or how that would combat such ample evidence and testimony presented at trial confirming the sexual abuse of his daughters. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Gonzalez v. Commonwealth, No. 2014-CA-000845-MR, 2015 WL 8527998, at *2 (Ky. App. 2015) (citations and internal quotations omitted). Furthermore, in the appeal of the circuit court's denial of Gonzalez's RCr 11.42 motion, this Court ultimately concluded that Gonzalzes failed to prove his counsel's ineffectiveness at

[3] Gonzalez's claim under the Equal Protection Clause fails for the same reason. "To allege an injury-in-fact in the context of an equal protection challenge, the complaining party must set forth facts showing that it was *personally* denied equal treatment by the challenged conduct." *Commonwealth Nat. Res. & Envtl. Prot. Cabinet v. Kentec Coal Co.*, 177 S.W.3d 718, 732 (Ky. 2005) (emphasis in original).

all. *Id.* at *6. Here, Gonzalez again only states conclusory allegations concerning his counsel's ineffectiveness. Because Gonzalez has failed to demonstrate that he actually received ineffective assistance of counsel through the DPA's alleged underfunding, he has not received an injury-in-fact and does not have standing to request an injunction.

II. **Declaratory Judgment**

Gonzalez has asserted that the DPA's then-insufficient resources resulted in ineffective assistance of counsel on behalf of his DPA trial counsel, and so he requests a "declaration of rights" from this Court stating that the state's insufficient allocation of funds to the DPA caused his counsel's ineffectiveness. Again, the Court notes that Gonzalez has already filed his RCr 11.42 and that his appeal was denied. *Gonzalez*, *supra*. In *Sanders v. Commonwealth*, the Kentucky Supreme Court held that the appellant had filed an improper successive post-conviction motion, even though that motion was styled as a motion under CR 60.02:

> Appellant also alleges that the trial court erred by treating his CR 60.02 motion as an impermissible successive RCr 11.42 motion. An RCr 11.42 motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding. This provision has been held to bar successive RCr 11.42 motions. *An examination of the claims as listed above discloses that they are of the type ordinarily raised in an RCr 11.42 petition. Thus, in practical effect, Appellant's CR 60.02 motion was indeed, as found by the trial court, an impermissible successive RCr 11.42 motion.*

339 S.W.3d 427, 438 (Ky. 2011) (emphasis added) (citations and quotations omitted). To the extent that Gonzalez requests this Court to declare his counsel ineffective, this is a claim which could have been raised in his previous RCr 11.42 motion.[4] Moreover, our Supreme Court has also held that declaratory judgments are an inappropriate venue through which to seek postconviction relief:

> …[W]e have previously held that "[t]he structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete[,]" and "[t]hat structure is set out in the rules related to direct appeals, in RCr 11.42, and ... CR 60.02." *Gross v. Commonwealth,* 648 S.W.2d 853, 856 (Ky. 1983). This structure provides for wide-ranging opportunities for a defendant to challenge in all respects the legality and fairness of his conviction and sentence, and Foley has identified no deficiencies in this structure which would have prevented him from raising and litigating a challenge to the constitutionality of his self-defense jury instructions within its framework. Foley, in effect, seeks to incorporate the declaratory judgment action into the post-conviction remedy procedures, at least as an initial step to further collateral attacks; however, we find no compelling reason to deviate from the well established structure as explained in *Gross*.
>
> In this vein, we note that the exclusion of the declaratory judgment procedure from post-conviction process is widely followed in the federal court system.
>
> …

[4] Indeed, as previously stated, Gonzalez's claim that his counsel was overworked actually was raised in Gonzalez's appeal of his RCr 11.42 motion. "The courts have much more to do than occupy themselves with successive 'reruns' of RCr 11.42 motions stating grounds that have or should have been presented earlier." *Cardwell v. Commonwealth*, 354 S.W.3d 582, 585 (Ky. App. 2011) (quoting *Hampton v. Commonwealth,* 454 S.W.2d 672, 673 (Ky. 1970)).

> Similarly, KRS 418.040 is not a substitute for direct appeal, RCr 11.42, and/or CR 60.02 proceedings, nor, as here, a device to set the stage for such proceedings.
>
> That is not to say, however, that the declaratory judgment procedure may not be used by prison inmates for limited purposes unrelated to a direct collateral attack on a criminal judgment…

Foley v. Commonwealth, 306 S.W.3d 28, 31-32 (Ky. 2010).[5] Because the postconviction process cannot be supplanted through KRS 418.040, Gonzalez is not entitled to declaratory relief that his counsel was ineffective.

III. Monetary Relief

Gonzalez also asserts that the General Assembly should be liable for "breach of contract" and "in tort." Though Gonzalez argues that the DPA's employees are not able to meet their governmental contracts through a lack of funding, Gonzalez has failed to identify the existence of any contract to which he was a party.[6] Similarly, although Gonzalez claims that the state is liable in tort, he fails to identify the tort for which he believes the Commonwealth is liable.[7] Although *pro se* litigants are "not subject to the same standards as litigants represented by counsel[,]" it is also true that "the judiciary's conciliatory attitude

[5] To be sure, *Foley* would not preclude the entirety of Gonzalez's claims, only the portion in which he alleges that he is entitled to a declaration of rights concerning his trial counsel's alleged ineffective assistance.

[6] At best, Gonzalez could only be an incidental beneficiary to any contact between the state and the DPA. *See generally Daniel Boone Clinic, P.S.C. v. Dahhan*, 734 S.W.2d 488, 491 (Ky. App. 1987) (citations omitted) ("The second contract is between DBC and Dr. Dahhan. This is an employment contract involving professional services. Although the patients are the ones served, they are only incidental beneficiaries of this contract. As such, they have no rights to interfere with the contract or its enforcement.).

[7] It is unclear whether Gonzalez asserts that "state interference" is a tort.

toward unrepresented parties is not boundless." *Cardwell v. Commonwealth*, 354 S.W.3d 582, 585 (Ky. App. 2011). Simply stated, "[i]t is not our function as an appellate court to research and construct a party's legal arguments[.]" *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005) (citations omitted). *See also Harris v. Commonwealth*, 384 S.W.3d 117, 131 (Ky. 2012). Because Gonzalez has failed to allege a sufficient basis for his entitlement to monetary damages, these claims must fail.

Conclusion

In sum, we hold that Gonzalez was not entitled to injunctive relief to prevent any additional budget cuts to the DPA because he lacks standing to raise the issue. We also hold that, by requesting this Court to declare his counsel ineffective due to the DPA's lack of funds, Gonzalez had filed an impermissible successive RCr 11.42 motion. Finally, we hold that Gonzalez has failed to state a claim that would entitled him to relief for monetary damages.

The Franklin Circuit Court's order dismissing this case is affirmed. Having considered Gonzalez's motion to enter a default judgment, the Court ORDERS that the motion be, and it is hereby, DENIED. We have addressed the General Assembly's failure to file a brief in this opinion.

ALL CONCUR.

Entered: October 14, 2016

/s/ Laurance B. VanMeter
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Oscar Umar Gonzalez
West Liberty, Kentucky

NO BRIEF FILED FOR APPELLEE