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NO. COA08-403

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2009

LARRY EUGENE SMITH,  
Petitioner,

v.

Scotland County  
No. 05 CVS 509

THEODIS BECK, in his  
official capacity as Secretary  
of the North Carolina Department  
of Correction,  
Respondent.

# Court of Appeals

Appeal by petitioner from order entered 2 January 2008 by  
Judge Richard T. Brown in Scotland County Superior Court. Heard in  
the Court of Appeals 25 September 2008.

## Slip Opinion

*Larry Eugene Smith, Jr. pro se.*

*Attorney General Roy Cooper, by Assistant Attorney General J.  
Philip Allen, for the State.*

GEER, Judge.

Petitioner Larry Eugene Smith, Jr. appeals from the trial court's order dismissing his claims pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. Smith contended in his complaint that the State had failed to provide him with meaningful access to the courts as required by Article I, Sections 18, 19, and 23 of the North Carolina Constitution. Because, however, Smith did not allege in his complaint that any inadequacies in the State's system

for providing access caused him actual injury, we affirm the trial court's dismissal of his claims.

### Facts

Prior to 1989, the State, through the Department of Correction ("DOC"), provided its prison inmates with access to the courts through the use of law libraries. In 1989, the State created North Carolina Prisoner Legal Services ("NCPLS"), an entity that now provides the sole source of legal services to North Carolina prisoners, and stopped providing law libraries. On 29 June 2005, Smith, a state inmate serving a 39-year sentence, brought this action in Scotland County Superior Court, challenging the sufficiency of NCPLS as a means of providing meaningful access and seeking declaratory and injunctive relief under the state and federal constitutions.

In his complaint, Smith alleged that NCPLS was "an inadequate substitute for law library, typewriter and photocopier access as NCPLS *does not* provide necessary support services such as legal research, typing, photocopying, or advice to inmates who are forced to represent themselves because NCPLS has refused to represent them in various non-frivolous legal matters." He further alleged that his "requests for legal assistance from NCPLS [were] routinely denied as NCPLS generally only accepts for representation lawsuits that have class action impact or where a large damage award is likely or when ordered to by a judge."

Smith alleged that he had been forced "to proceed *pro se* without access to the necessary legal research, typing and photocopying services [he] needed to adequately prosecute [his legal claims] within the courts . . . ." He claimed, therefore, that the State had violated "his right to be afforded adequate, effective and meaningful court access" under the United States Constitution as guaranteed in *Bounds v. Smith*, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977), and by Article I, Sections 18, 19, and 23 of the North Carolina Constitution. Smith requested that the trial court issue an injunction ordering the State to adequately fund NCPLS so that NCPLS could begin to meet the legal needs of Smith and the tens of thousands of other inmates; provide Smith with legal research access when proceeding *pro se* either through law library access, on-line legal research access such as Westlaw or LexisNexis, or through NCPLS; provide Smith with access to a photocopier; and provide Smith with access to a typewriter either at DOC or his own expense.

On 18 July 2005, Smith filed a motion for a preliminary injunction. On 8 August 2005, the State filed a notice of removal to the United States District Court for the Middle District of North Carolina. In an order dated 25 September 2007, United States District Judge N. Carlton Tilley, Jr. noted that Smith had made a motion for voluntary dismissal of his federal claims; he treated that motion as a motion to amend the complaint by dismissing the federal claims; and he allowed that motion, dismissing the federal claims with prejudice. Judge Tilley then declined to exercise

pendant jurisdiction over Smith's remaining state law claims and remanded the case to Scotland County Superior Court.

On 5 October 2007, the State filed a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. Smith filed a notice of hearing dated 8 October 2007, requesting that his motion for preliminary injunction be heard on 26 November 2007. Smith also filed a written response to the State's motion to dismiss on 31 October 2007. In a letter filed 8 November 2007, the State requested that the trial court decide the motion to dismiss "without an in-person hearing" since the motion raised only a question of law and "[a]n in-person hearing would add absolutely nothing to the briefs and would waste a considerable amount of court time, state employee work time, travel time, and gasoline."

Judge Richard T. Brown sent a letter to the parties on 16 November 2007, advising them that he would consider the State's motion "based on written briefs or memorandums." Judge Brown stated further that the parties could have additional time "to prepare and submit the proper paperwork for consideration" if the request was made prior to 26 November 2007.

On 2 January 2008, after considering the file and the written arguments of the parties, the trial court granted the motion to dismiss. The court concluded:

(1) that the North Carolina Constitution does not provide a right of access to the courts greater than that provided by the United States Constitution; (2) that meaningful access to the courts is provided under the current arrangement where, in lieu of law libraries, DOC contracts with North Carolina Prisoner Legal Services to provide legal

assistance to inmates (see *Wrenn v. Freeman*, 894 F. Supp. 244 (E.D.N.C. 1995)); (3) that meaningful access to the courts does not necessarily include a right to photocopies of legal documents (see *Wanniger v. Davenport*, 697 F.2d 992 (11th Cir. 1983)); and (4) that meaningful access to the courts does not include the right to use a typewriter (see *Stubblefield v. Henderson*, 475 F.2d 26 (5th Cir. 1973)).

The trial court, therefore, dismissed Smith's claims with prejudice. Smith timely appealed to this Court.

#### Discussion

As an initial matter, we must address two procedural arguments made by Smith. First, Smith contends that due process required the trial court to hear oral argument before ruling on the State's motion to dismiss. "Due process, of course, requires adequate notice and opportunity to be heard." *Forman & Zuckerman, P.A. v. Schupak*, 38 N.C. App. 17, 19, 247 S.E.2d 266, 268 (1978). We believe Smith was given both notice and an opportunity to be heard on the State's motion. He submitted written arguments to the trial court and was also given the chance to submit any additional materials that he wished the trial court to consider. Smith does not persuasively explain in what way the trial court's ruling would have been different if he had been permitted to present his legal arguments regarding the sufficiency of his complaint orally rather than in writing.

In *In re Estate of Pope*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 666 S.E.2d 140, 149 (2008), *disc. review denied*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2009 N.C. LEXIS 69, 2009 WL 422194 (Feb. 5, 2009), this Court recently rejected a plaintiff's claim that she was deprived of her

right to due process because the trial court did not hear oral argument before issuing its ruling. In *Pope*, we stressed that the plaintiff was given "ample opportunity to be heard" through the trial court's acceptance of written materials. *Id.* We think the same is true here. Because Smith had an opportunity to be heard through his eight-page response to the motion to dismiss and any additional materials he wished to submit, the trial court did not err in failing to hold oral argument before ruling on the State's motion. See also *Pueschel v. United States*, 369 F.3d 345, 354 (4th Cir. 2004) (explaining that there is no federal requirement "that a district judge hold a hearing prior to ruling on a motion to dismiss"); *Dayco Co. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 392 (5th Cir. 1975) (holding that denial of oral hearing before granting a motion to dismiss does not violate due process); *Spark v. Catholic Univ.*, 510 F.2d 1277, 1280 (D.C. Cir. 1975) (holding that "due process does not include the right to oral argument on a motion").

Smith next contends that the trial court was required to rule on his pending motion for a preliminary injunction prior to ruling on the State's motion to dismiss. We believe, however, that the trial court could have reasonably determined that deciding the motion to dismiss first would be a more efficient manner of proceeding. If the trial court determined that the motion to dismiss should be allowed, then the action would be dismissed, and the motion for a preliminary injunction would be moot. See *State v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357-58, 261

S.E.2d 908, 913 (holding that a preliminary injunction "lasts no longer than the pendency of the action"), *aff'd per curiam on reh'g*, 299 N.C. 731, 265 S.E.2d 387, *appeal dismissed*, 449 U.S. 807, 66 L. Ed. 2d 11, 101 S. Ct. 55 (1980); *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 408, 263 S.E.2d 313, 318 ("When a court decides to dismiss an action pursuant to G.S. 1A-1, Rule 12(b)(6), of the Rules of Civil Procedure, any pending motion for summary judgment against the claimant may be treated as moot, and therefore, need not be decided."), *disc. review denied*, 300 N.C. 374, 267 S.E.2d 685 (1980). On the other hand, if the trial court denied the motion to dismiss, it could still address the motion for a preliminary injunction.

We now turn to the merits of Smith's appeal. This Court reviews a trial court's grant of a Rule 12(b)(6) motion to dismiss *de novo*. *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 459, 646 S.E.2d 418, 422 (2007). The Court must determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. N.C. Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

On appeal, Smith contends that the State's failure to provide him with access to a law library, photocopier, and typewriter violates his state constitutional right of access to the courts.<sup>1</sup>

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<sup>1</sup>Smith also contends that reliance on NCPLS violates N.C. Const. art. I, § 23 (setting out the rights of the accused in all criminal prosecutions). We find this provision inapplicable.

Because this issue has been extensively discussed by the federal courts, we begin with a brief history of the federal constitutional right of access to the courts. In *Bounds*, 430 U.S. at 828, 52 L. Ed. 2d at 83, 97 S. Ct. at 1498, the United States Supreme Court, when reviewing a lawsuit challenging North Carolina's previous system of prison law libraries, held that the State was required by the United States Constitution "to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* The Court explained that although law libraries were one way to ensure that prisoners were afforded adequate access to the courts, other forms of legal assistance, such as a state-run program of attorneys dedicated to helping prisoners with their legal claims, would also accomplish this goal. *Id.* at 830-32, 52 L. Ed. 2d at 84-85, 97 S. Ct. at 1499-1500.

On remand, the United States District Court ordered the State to develop a plan for providing legal assistance to its prisoners. As a result, the State dispensed with its prison law libraries and created NCPLS to provide legal services to its inmates. This program was upheld as constitutional by the United States District Court for the Eastern District in 1995. See *Wrenn*, 894 F. Supp. at 249.

In *Lewis v. Casey*, 518 U.S. 343, 349, 135 L. Ed. 2d 606, 616, 116 S. Ct. 2174, 2179 (1996), the Supreme Court revisited its decision in *Bounds* and clarified "that an inmate alleging a



violation of *Bounds* must show actual injury . . . ." The Court explained that this "actual injury" requirement arises out of "the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Id.* The Court elaborated, with respect to *Bounds* claims, that "[i]t is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur." *Id.*, 135 L. Ed. 2d at 617, 116 S. Ct. at 2179.

The Supreme Court observed that the courts may step in to "grant[] relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals," but a court may not intervene if there has been "no actual or imminent harm," but rather the plaintiff has merely argued that he was "subject to a governmental institution that was not organized or managed properly." *Id.* at 350, 135 L. Ed. 2d at 617, 116 S. Ct. at 2179. In other words, an inmate "cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." *Id.* at 351, 135 L. Ed. 2d at 618, 116 S. Ct. at 2180. Instead, the inmate must show that "the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." *Id.* See also *id.* at 353, 135 L. Ed. 2d at 619, 116 S. Ct. at 2181 (stating alternatively

that inmate must "demonstrate that a nonfrivolous legal claim had been frustrated or was being impeded").

The United States Supreme Court's interpretation of the federal constitution is, of course, not binding on North Carolina courts' construction of the North Carolina constitution. See *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988) ("[W]e have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision."). Nevertheless, although North Carolina courts are not constrained by the "case or controversy" requirement of the United States Constitution – upon which the reasoning of *Lewis* rests – North Carolina still requires standing as "a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). In deciding whether standing exists, we look at "whether the party has alleged 'injury in fact' in light of the applicable statutes or caselaw." *Id.* at 114, 574 S.E.2d at 52.

Our Supreme Court recently addressed the issue of standing in *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008). The Court noted that "[a]s a general matter, the North Carolina Constitution confers standing on those who suffer harm: 'All courts shall be open; [and] every person for an injury

done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . ." *Id.*, 669 S.E.2d at 281-82 (quoting N.C. Const. art. I, § 18). While it is "not necessary that a party demonstrate that injury has already occurred," a plaintiff must at least make "a showing of 'immediate or threatened injury'" in order to establish standing. *Id.* at 642-43, 669 S.E.2d at 282 (quoting *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990)). This standing requirement – of either an actual injury that has already occurred or an immediate or threatened injury – parallels the *Lewis* requirement of "actual or imminent harm." 518 U.S. at 350, 135 L. Ed. 2d at 617, 116 S. Ct. at 2179. See also *Greene v. Town of Valdese*, 306 N.C. 79, 88, 291 S.E.2d 630, 636 (1982) ("A party has the necessary standing to raise a constitutional question only if he alleges some direct injury in fact."); *Charles Stores Co. v. Tucker*, 263 N.C. 710, 717, 140 S.E.2d 370, 375 (1965) ("Only one who is in immediate danger of sustaining a direct injury from legislative action may assail the validity of such action. It is not sufficient that he has merely a general interest common to all members of the public.").

In short, Smith was required to allege in his complaint that any inadequacy in the legal assistance program had either (1) in the past hindered his efforts to pursue a nonfrivolous legal claim, or (2) was presently impeding the pursuit of such a claim. While we acknowledge that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may

suffice,'" *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 364, 112 S. Ct. 2130, 2137 (1992)), our review of Smith's complaint reveals that even such "general" allegations of injury are missing.

With respect to Smith's contention that NCPLS does not, as currently funded and without law libraries, sufficiently meet the requirements of *Bounds*, the complaint's allegations describe only generally the inadequacies of the system without identifying any harm suffered by Smith. The one allegation specifically addressing Smith himself states:

18. That Smith has sought NCPLS's assistance with various non-frivolous legal matters during his incarceration such as, excessive use of force by prison officials and inadequate medical care, that have been rejected for representation by NCPLS, thereby forcing petitioner to proceed *pro se* without access to the necessary legal research, typing and photocopying services Smith needed to adequately prosecute said matters within the courts, for an adequate presentation of the merits of each in order to prevail and to comply with court rules.

This allegation does not, however, assert that as a result of any of the claimed inadequacies of NCPLS, Smith was prevented from prosecuting a nonfrivolous claim or that he is currently unable to proceed with any such claim. Thus, the complaint's allegations amount to no more than a claim that the "legal assistance program is subpar in some theoretical sense" and are not sufficient to allege standing. *Lewis*, 518 U.S. at 351, 135 L. Ed. 2d at 618, 116 S. Ct. at 2180.

Apart from the inadequacy of NCPLS, Smith also challenges the State's failure to provide him with access to a typewriter or a photocopier. His complaint contains the following more specific allegations relating to these claims:

28. That because the respondent and his agents in the DOC have refused Smith access to a typewriter Smith has been forced to file in the N.C. Court of Appeals various non-frivolous *handwritten* legal documents such as a petition[] for *writ of mandamus* on 16 November 1999, a motion on 2 October 2002 and petition for *writ of certiorari* on 12 May 2003 and 26 February 2004, all of which were denied by the Court of Appeals.

29. That in denying Smith typewriter access and forcing Smith to file *handwritten* documents in the N.C. Court of Appeals in direct violation of the applicable rules of court mandating *typewritten* documents, the DOC has injured and/or prejudiced Smith in violation of his right to be afforded adequate, effective and meaningful court access.

30. That Smith has repeatedly requested access to a photocopier needed to duplicate legal documents from the DOC, to no avail.

. . . .

32. That the providing of only carbon paper by the DOC to Smith in which to duplicate legal documents is an inadequate substitute to photocopier access as carbon paper cannot duplicate *any* document that Smith doesn't draft himself such as court orders, opposing party motions, discovery documents and records on appeal; documents which may/will need duplicat[ing] during the prosecution and/or appeal of an action in the trial or appellate courts. (See *e.g.*, Rule 26(b), N.C.R. App. P., attached hereto as Exhibit 4).

33. That it is impossible for Smith to adequately prosecute any civil or criminal action in court *pro se* without access to a

typewriter and photocopier as said access is necessary in order for Smith to comply with the applicable rules of the courts concerning the drafting, filing and service of legal documents with the courts and opposing parties.

These allegations – like the ones relating to NCPLS – do not allege a direct injury to Smith. Although he alleges that he was forced to file handwritten documents in this Court, in violation of the appellate rules, and that this Court denied his requests for relief, he has not alleged that his motions and petitions were denied *because* his filings were handwritten. As for the photocopier, Smith has not identified any action that he was unable to file or any action in which he was prejudiced because of the lack of a photocopier. Smith has, therefore, failed to allege that he has been injured by the lack of a typewriter or photocopier.

We note that apart from injunctive relief, Smith has also sought declaratory relief, seeking a declaration that certain DOC regulations relating to access to the courts are unconstitutional, including 5 N.C. Admin. Code § 2G.0201, 2G.0203(h), and 2G.0203(i). Whether a plaintiff may pursue an action under the Uniform Declaratory Judgment Act requires a slightly different analysis. See *Neuse River Found.*, 155 N.C. App. at 114, 574 S.E.2d at 52 (stating that in determining a party's standing, "we must also examine the forms of relief sought").

Our Supreme Court has held that "while a determination of the constitutionality of a statute may be a proper subject for declaratory judgment, jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or

real existing controversy between parties having adverse interests in the matter in dispute." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984). An actual controversy "is a jurisdictional necessity." *Id.* Further, "[i]t is mandatory that a complaint brought pursuant to the Declaratory Judgment Act set forth all of the facts necessary to disclose the existence of an actual or real existing controversy between the parties to the action." *Id.* at 339, 323 S.E.2d at 303. If the complaint does not contain the necessary allegations, "the court is without jurisdiction, and the complaint must be dismissed." *Id.*

With respect to the DOC regulations, Smith has himself acknowledged in his complaint that the regulations were repealed. Thus, there is no existing controversy regarding the constitutionality of those regulations. The mere fact that DOC has not removed the repealed regulations from its policy and procedures manual, as Smith alleges, does not create a controversy.

To the extent that Smith's complaint can be read to seek a declaratory judgment on issues apart from the regulations, if we assume, without deciding, that declaratory relief could be available for such claims, the complaint still does not contain the necessary allegations of an existing actual controversy. While Smith has alleged that he did not have access to NCPLS, a law library, a typewriter, or a photocopier in the past, he does not address the present, but rather implicitly alleges that he may have need of NCPLS, a law library, a typewriter, or a photocopier in the future.

Smith, however, may or may not engage in litigation in the future that may or may not give rise to a need for the assistance of NCPLS, a law library, a typewriter, or a photocopier. The complaint contains no allegations that this need currently exists or that it necessarily will exist in the future. Such allegations are not sufficient to establish an existing actual controversy. See *Lea v. Grier*, 156 N.C. App. 503, 508, 577 S.E.2d 411, 415 (2003) (finding allegations insufficient to establish an actual existing controversy when complaint alleged that School Board had violated statutes in the past and that actions of School Board, if allowed to continue, would create legal controversy, but complaint failed to allege actions had continued or would continue); *Nichols v. Lake Toxaway Co.*, 98 N.C. App. 313, 316, 390 S.E.2d 770, 772 ("A mere fear or apprehension that a claim may be asserted in the future is not grounds for issuing a declaratory judgment."), *disc. review denied*, 327 N.C. 141, 394 S.E.2d 178 (1990).

Accordingly, we hold that Smith's complaint fails to allege actual or imminent harm or actual controversy sufficiently to establish standing. The trial court, therefore, properly granted the State's motion to dismiss.

As a final argument, Smith contends that the trial court's order should be reversed because the order incorrectly states that "DOC contracts with North Carolina Prisoner Legal Services to provide legal assistance to inmates . . . ." As Smith accurately points out, in 2005, the State passed legislation providing that the Office of Indigent Defense Services would be responsible for



administering NCPLS. 2005 N.C. Sess. Laws ch. 276 § 14.9. See also N.C. Gen. Stat. § 7A-498.3(a)(2a) (2007) (placing responsibility on Office of Indigent Defense Services for maintaining a system for providing legal representation and related services in "[c]ases in which the State is legally obligated to provide legal assistance and access to the courts to inmates in the custody of the Department of Correction").

In connection with its motion to dismiss, the State provided the trial court with a draft order that included the erroneous statement. Subsequently, the State brought this error to the attention of the court in a letter and submitted a new draft order deleting the line referencing a contract with DOC. The trial court, however, signed the earlier draft order with the uncorrected mistake.

Smith makes various substantive arguments regarding how this transfer of responsibility from DOC to the Office of Indigent Defense Services affects his constitutional right to access to the courts, including his access to a typewriter and a photocopier. These arguments are, however, immaterial to our conclusion that Smith's complaint was properly dismissed for failing to sufficiently allege actual or imminent harm or an actual controversy. Since the arguments cannot affect our disposition of this appeal, we do not address them. The trial court's order, consequently, is affirmed.

Affirmed.

Judges ROBERT C. HUNTER and ELMORE concur.

Report per Rule 30(e).