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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-223

Filed: 1 October 2019

Onslow County, No. 17 CVS 3270

GEORGE REYNOLD EVANS, Plaintiff,

v.

SAMUEL STUART POPKIN, Defendant.

Appeal by plaintiff from order entered 26 March 2018 by Judge William W. Bland in Onslow County Superior Court. Heard in the Court of Appeals 7 August 2019.

*George Reynold Evans, pro se, for plaintiff-appellant.*

*No appellee brief filed.*

DIETZ, Judge.

After being convicted of a violent assault and related drug charges, George Reynold Evans sued his court-appointed criminal lawyer for malpractice. We affirm the dismissal of that malpractice action. Evans’s complaint fails to allege sufficient facts to show that defense counsel’s alleged malpractice—as opposed to the State’s evidence—was the proximate cause of Evans’s criminal conviction. Accordingly, the

trial court properly dismissed the complaint for failure to state a claim on which relief could be granted.

### **Facts and Procedural History**

On 11 April 2014, Plaintiff George Reynold Evans “was arrested and charged with attempted murder, possession of a firearm by a felon, domestic violence protective order violations on 28 and 29 March 2014, assault by pointing a gun, and assault with a deadly weapon with intent to kill inflicting serious injury.” *See State v. Evans*, \_\_ N.C. App. \_\_, 810 S.E.2d 417 (2018) (unpublished). The State also charged Evans with drug offenses in a separate but related case.

Defendant Samuel Stuart Popkin served as court-appointed counsel for Evans in these criminal proceedings. The charges went to trial and the jury found Evans guilty of assault with a deadly weapon with intent to kill inflicting serious injury and guilty of various misdemeanor drug charges.

In 2017, while incarcerated and serving his sentence for the assault conviction, Evans sued Popkin for legal malpractice in a *pro se*, handwritten complaint. Popkin moved to dismiss for failure to state a claim on which relief could be granted. The trial court held a hearing on Popkin’s motion to dismiss and later entered an order granting the motion and dismissing the complaint. Evans appealed.

### **Analysis**

“This Court reviews the grant of a Rule 12(b)(6) motion to dismiss *de novo*.”

*Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, \_\_ N.C. App. \_\_, \_\_, 796 S.E.2d 120, 123 (2017). “We examine whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.” *Id.* “Dismissal is only appropriate if it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim.” *Id.*

Evans asserts a legal malpractice claim against Popkin based on Popkin’s handling of criminal charges brought against Evans. Ordinarily, a claim for legal malpractice must allege that the attorney breached the duties owed to the client and that this breach of duty proximately caused damage to the plaintiff. *Hampton v. Scales*, \_\_ N.C. App. \_\_, \_\_, 789 S.E.2d 478, 484 (2016). But the standard in malpractice cases arising from a criminal proceeding is different.

Most jurisdictions bar convicted criminal defendants from suing their former criminal defense attorneys for malpractice unless they first establish their actual innocence. *Belk v. Cheshire*, 159 N.C. App. 325, 331–32, 583 S.E.2d 700, 705–06 (2003). This Court, after collecting and analyzing cases from those states, declined to adopt that majority rule. *Id.* Instead, the Court held that “[a]lthough we decline to adopt a ‘bright-line’ rule in this matter, we conclude that the burden of proof required to show proximate cause in an action for legal malpractice arising in the context of a criminal proceeding is, for public policy reasons, necessarily a high one.” *Id.* at 332, 583 S.E.2d at 706.

Those “public policy reasons,” the Court explained, included “three basic public policy principles: (1) the criminal justice system affords individuals charged with crimes a panoply of protections against abuses of the system and wrongful conviction, including safeguards against incompetent and ineffective counsel; (2) a guilty defendant should not be allowed to profit from criminal behavior; and (3) the pool of legal representation available to criminal defendants, especially indigents, needs to be preserved.” *Id.*

Applying the high burden set forth in *Belk* to this case, we affirm the trial court’s dismissal of Evans’s complaint for failure to state a claim on which relief could be granted. Evans asserts that Popkin mishandled his criminal case in various ways, such as refusing to subpoena witnesses and file motions as Evans requested, breaching client confidentiality, and submitting false cost reports to North Carolina Indigent Defense Services.

Even accepting the allegations in the complaint as true, as we must in reviewing a ruling under Rule 12(b)(6), Evans has not adequately stated a claim. *Jackson/Hill Aviation*, \_\_ N.C. App. at \_\_, 796 S.E.2d at 123. Although the complaint alleges various unprofessional acts by Popkin, it does not allege facts demonstrating that those unprofessional acts—as opposed to the State’s evidence—were the proximate cause of his criminal conviction. Accordingly, Evans’s complaint does not meet the necessarily high bar for stating a claim of legal malpractice based on court-

appointed representation in a criminal proceeding. *Belk*, 159 N.C. App. at 332, 583 S.E.2d at 706.

Evans's appellate brief also contains other legal arguments that appear to be collateral attacks on his criminal conviction. These arguments are not properly before this Court, as they are unrelated to Evans's civil complaint and concern issues not addressed in the challenged trial court order. *See* N.C. R. App. P. 10. We therefore decline to address those arguments.

### **Conclusion**

We affirm the trial court's dismissal of the complaint for failure to state a claim on which relief can be granted.

**AFFIRMED.**

Judges BRYANT and STROUD concur.

Report per Rule 30(e).