ORDERS OF THE COURT

Case:3:08-cr-00031-JMH-HAI Doc#1046 Filed 3/29/21
page 1 of 2- page ID#14138

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at FRANKFORT

US	)	
	)	
Plaintiff,	)	Criminal Case No.
	)	3:08-cr-31-JMH-1
v.	)	**ORDER**
	)	
MICHAEL SMITH,	)	
	)	
Defendant.	)	

*****

The court has received several motions for the release of a certified copy of the unredacted indictment used in this matter. In particular, Defendant Michael D. Smith, proceeding pro se, has requested an unreacted copy of his indictment, arguing in state court that his conviction is invalid because of a faulty indictment. [DEs 1036, 1037, 1038, 1040]. Attorney Patrick Nash on behalf of the law firm Nash Marshall, PLCC (collectively "Nash") has also filed a motion seeking a copy of the unredacted indictment for a in camera review in a state court matter. [DE 1043].

The Court, having reviewed the motions and all relevant documents decline to grant the request to release a copy of the unredacted indictment in this matter for review in state court. Smith brought multiple motions [DEs 895, 945, 951], challenging the indictment, all of which have been previously denied by his court. [See DEs 901, 902, 967].

Accordingly, **IT IS ORDERED** as follows:

1) Defendant Smith's motions [DEs 1036m 1037, 1038, 1039, 1040] are **DENIED;**

2) Movant Patrick Nash's motion [DE 1043] is **DENIED;**

3) The court has reviewed the document in question and **CERTIFIES** that the indictment was properly brought with the signature of the foreperson of the grand jury, resulting in the conviction of Smith on some, but not all, of the charges listed therein. Moreover, Smith's conviction was affirmed on appeal [DE 875]; and

4) A **CERTIFIED** copy of this Order **SHALL** be provided to Defendant Smith, movant Nash Marshall, PLLC. and Chief Circuit Judge Hunter Daugherty for Garrard Circuit Court. Chief Judge Daughterty's copy **SHALL** be by certified mail.

This the 29th day of March, 2021.

Signed By:
Joseph M. Hood //s
Senior U.S. District Judge

FBI LETTER RECEIVED MARCH 2020

U.S. Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20535
March 6, 2020

Mr. MICHAEL DALE SMITH
**12926-032
FEDERAL PRISON CAMP
POST OFFICE BOX 6000
SUMMIT ROAD
ASHLAND, KY 41105-6000

Requst No.: 1460220-000
Subject: SMITH, MICHAEL
(BILL OF INDICTMENT)

Dear Mr. Smith:

This is in response to your Freedom of Information/Privacy Acts (FOIPA) request. Based on the information you provided, we conducted a search of the places reasonably expected to have records. However, we were unable to identify records responsive to your request. ----------

Sincerely
//s
David Hardy
Section Chief,
Record/Information
Dissemination Section
Information Management Division

Supreme Court of Kentucky

2022-SC-0458-D
(2021-CA-0713)

MICHAEL D. SMITH MOVANT

V. GARRARD CIRCUIT COURT
21-CI-00034

DEREK GORDON, ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the desicion of the Court of

Appeals is denied.

ENTERED: June 7, 2023.

/s/
Chief Justice

RENDERED: SEPTEMBER 23, 2022; 10:00A.M.
NOT TO BE PUBLISHED

COMMONWEALTH of KENTUCKY

COURT of APPEALS

No. 2021-CA-0713-MR

MICHAEL D. SMITH APPELLANT

APPEAL FROM GARRARD CIRCUIT COURT
v. HONORABLE HUNTER DAUGHERTY, JUDGE
ACTION NO. 21-CI-00034

DEREK GORDON; RACHEL YAVELAK; THOMAS LYONS; JOE JARRELL; STEPHEN MILNER; WILLIAM HAYES; PATRICK HASH; GUTHRIE TRUE; WILLIS COFFEY; JULIE ROBERTS GILLUM; JEFF HOOVER; ANGGELIS & FORD; HAYES LAW GROUP; TRUE, GUARNIERI, AYER, LLP; THE COURIER JOURNAL; WKYT 27 NEWS; WDKY FOX NEWS; WLEX COMMUNICTIONS; WTVQ 36 NEWS; THE LEXINGTON HERALD LEADER; AND UNKNOWN OTHERS 1
APPELLEES

OPINION
AFFIRMING
****

1 Pursuant to the usual practice in our court, the names of these party-appellees are taken verbatim from the appellant's notice of appeal. Here, this means including names whichare misspelled, as well as the common names for media enterprises rather than the appropriate corporate owners. We need not consider the legal effect of this latter error in order to affirm the circuit court's dismissal of the appellant's suits.

BEFORE: GOODWINE, JONES, AND MAZE, JUDGES.

JONES, JUDGE: Michael D. Smith appeals from multiple orders dismissing his complaint with prejudice which were entered by the Garrard Circuit Court on April 1, 2021, April 15, 2021, and June 3, 2021. The Circuit court's orders dismissed Smith's complaint for failure to state a claim pursuant to CR 12.02(f), We affirm.

I. BACKGROUND

Over twelve years ago. Smith owned and operated oil and gas companies operating in multiple states, including Kentucky. His business dealings came to an ignominious end when he was accused of misrepresenting the viability and productivity of oil and gas wells to his investors. "In 2010, a federal jury convicted Smith of conspiracy to commmit mail fraud, in violation of 18 U.S.C. 1349, and multiple substantive counts of mail fraud, in violation of 18 U.S.C. 1341." *United States v. Smith*, No. 21-5371, 2021 WL 7210170, at (6th Cir. Nov. 15, 2021) (unreported). The federal trial court then sentenced Smith to one hundred twenty months of imprisonment and three years of supervised release. Id. The Sixth Circuit thereafter affirmed the conviction and sentence. *United States v. Smith,* 749

F.3d 465 (6th Cir. 2014).

Since being released from prison in February 2020, Smith has been uniquely focused on the idea that his indictment did not constitute a "true bill" because it did not contain signatures from the grand jury foreperson and the government's prosecuting attorney. *Smith,* 2021 WL 7210170, at *1. In actuality, however, the indictment was merely sealed, and a redacted version used, in order to ensure the confidentiality of the grand jury. *Id.* In late 2020 through early 2021, Smith filed multiple motions in federal district court requesting unredacted copies of his indictment, followed by multiple *coram nobis* petitions asserting his actual innocence. *Id.* The district court denied Smith's motions and, in a written order, stated, "[t]he Court has reviewed the document in question and CERTIFIES that the indictment was properly brought with the signature of the foreperson of the grand jury, resulting in the conviction of Smith on some, but not all, of the charges listed therein." *Id.* The sixth Circuit affirmed this order in its unreported opinion. *Id.* at *2.

After the federal courts denied his motions and petitions, Smith, currently residing in Lancaster, Kentucky, turned his efforts at vindication toward the Kentucky Courts. On February 19, 2021, Smith filed the pro se complaint relevant to the present appeal in Garrard Circuit Court. The defendant-appellees may be broadly categorized into three groups: (1) attorneys who previously represented Smith; (2) attorneys who represented Smith's codefendants; and (3) media organizations which covered Smith's federal criminal case. The complaint is unfocused, but it generally alleges that the attorneys and media all conspired with the government to imprison Smith despite his actual

innocence, which smith asserts is proven by the lack of an indictment for his criminal charges. Smith's complaint essentially claims the attorneys committed legal malpractice, the media organizations defamed him, and all of the parties engaged in a civil conspiracy against him.

The defendant-appellees filed separate motions to dismiss the complaint based on its failure to state a claim for which relief may be granted, and the circuit court granted these motions wih prejudice in a series of orders entered in April and June 2021. Smith moved the circuit court to alter, amend, or vacate the judgements, as well as to provide findings of fact and conclusions of law. The circuit court denied the motions, ruling that its dismissals pursuant to CR 12 did not consider matters outside the pleadings and that no findings or conclusions were required in such cases by our Rules of Civil Procedure. This appeal followed.

II. ANALYSIS

Smith appeals from the circuit court's dismissal for failure to state a claim pursuant to CR 12.02(f). We review such appeals *de novo. Hardin v. Jefferson County Board of Education*, 558 S.W.3d 1, 5 (Ky. App. 2018). "It is proper to grant a CR 12.02(f) dismissal motion if... "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his [or her] claim[.]"" *Id.* (quoting *James v. Wilson*, 95 S.W.3d 875, 883 (Ky. App. 2002)). For purposes of the dismissal motion, we must accept the complaint's factual allegations as true; however, we will strip the complaint of any statements which are merely conclusory. *Moss v. Robertson*, 712 S.W.2d 351, 352 (Ky. App. 1986). "Stated another way, the court

must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?" James, 95 S.W.3d at 884.

For his sole issue on appeal, Smith asserts the circuit court erroneously dismissed his complaint. His pro se brief covers similiar ground as his *pro se* complaint, asserting he is the victim of a conspiracy by the appellees which resulted in his conviction and sentence in federal prison. He asserts there was no indictment in his criminal case, presuming any redacted indictment without signatures must be fraudulent. Furthermore, Smith apparently asked for a copy of the unredacted indictment in a Freedom of Information / Privacy Acts (FOIPA) request he sent to the Federal Bureau of Investigation (FBI). He then points to the response letter from the FBI, which was "unable to identify records responsive to [his] request," as proof that he was convicted without a *bona fide* indictment.

The appellees assert the circuit court properly dismissed Smith's complaint for a number of different reasons, but all of them agree that Smith's complaint is untimely. Smith's conviction was over ten years ago. The attorney appellees poiint to KRS 413.245, which requires professional service malpractice suits to be brought within one year of being discovered by the injured party. They also cite KRS 413.140(1)(c), which contains a one-year statue of limitations for conspiracy actions. Similarly, the media appellees point out that defamation claims must be brought wihin one year pursuant to KRS 413.140(1)(d).

Smith contends his imprisonment constituted a disability tolling the limitation statutes. However, the General Assembly repealed the statutory basis for prison inmate disability, KRS 413.310, more than thirty

years ago. We are obliged to carry out the legislative intent of a constitutional enactment. See, e.g., *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 683-84 (Ky. 2010); *Hale . Combs*, 30 S.W.3d 146, 151 (Ky. 2000). The expired statutes of limitation on Smith's claims provide sufficient grounds to affirm the circuit court's order dismissing Smith's complaint.

Furthermore, the appellees cite numerous other grounds, many of which are well taken, supporting the circuit court's dismissal of the complaint. The attorney appellees cite the Exoneration Rule announced in *Lawrence v. Bingham. Greenebaum, Doll, L.L.P.,* 567 S.W.3d 133 (Ky. 2018). This Rule is summarized as follows:

> [T]o survive a motion to dismiss for failure to state a claim in a professional malpractice case against a criminal defense attorney, the convicted client must plead in his complaint that he has been exonerated of the underlying criminal conviction. He or she need not prove actual innocence, but they also may not rely solely upon a claim of actual innocence in the absence of an exonerating court decision through appeal or post conviction order.

Kentucky Revised Statutes.
1990 Ky. Acts ch. 176, 2 (eff. Jul. 13, 1990); see Hamilton v. Merdian Mut. Ins. Co., No. 2002-CA-001246-MR, 2003 WL 22064128, at *3 n. 1 (Ky. App. Sep 5, 2003); Duffy v. Kindred Healthcare, Inc., No. 2004-CA-001523-MR, 2005 WL 1057547, at *2 n.3 (Ky. App. May 6, 2005)

Id. at 141. No such exoneration has occurred in Smith's case. In addition, the attorney appellees who did not directly represent Smith cite *Shoney's, Inc. v. Lewis*, 875 S.W.2d 514 (Ky. 1994), which discusses how lawyers are bound by professional ethics and the Supreme Court Rules to refrain from communicating about the subject of representation with those represented by other lawyers. *Id.* at 515 (citing SCR 3.130 (4.2)). Pushing aside the matter of not owing Smith a duty which would give rise to a negligence claim, the attorney appellees who did not represent Smith ran the risk of violating professional ethics rules if they had attempted the sort of aid which Smith now claims they should have provided.

For their part, in addition to the statute-of-limitation defense, the media appellees also assert Smith's claims against them are inaequately pleaded. Smith fails to allege any of the essential elements of defamation: "1. defamatory language 2. about the plaintiff 3. which is published and 4. which causes injury to reputation." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781 (Ky. 2004) (citation omitted), overuled on other grounds by *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276 (Ky. 2014). Smith identifies no specific incidents of defamation by the media appellees. The media appellees further assert that Smith cannot show their reporting of Smith's trial contained fabrications, and the truth is a complete defense to defamation claims. *Estepp v. Johnson County Newpapers, Inc.*, 578 S.W.3d 740, 744 (Ky. App. 2019).

All of these defenses bear considerable merit, in addition to showing the simple untimeliness of Smith's

claims. However, we would be remiss if we did not mention that Smith's complaint is problematic because it rests upon a claim that there was no valid indictment in his federal criminal case- a claim which is completely refuted by the record. Smith repeatedly asserts he was convicted upon a fraudulent indictment because it lacked the signatures required. However, in doing so, he confuses a sealed and redacted indictment for either an invalid indictment or no indictment at all. We have reviewed the record, and a copy of Smith' redacted indictment is contained within. Additionally, the federal district judge went so far as to send an order to Smith and the circuit court which denied requests for the unredacted indictment, but the district judge personally certified that the sealed indictment was properly brought with the appropriate signatures. Put bluntly, a null premise lies at the core of Smith's complaint, an the circuit court did not err in dismissing it.

III. CONCLUSION

For the foregoing reasons, we affirm the Garrard Circuit Court's orders of dismissal.

ALL CONCUR.

GARRARD CIRCUIT COURT DISMISSING COMPLAINT

NO. 21-CI-00034 GARRARD CIRCUIT COURT
CIVIL DIVISION
JUDGE HUNTER DAUGHERTY

MICHAEL D. SMITH PLAINTIFF

v.

DERECK GORDON, et al. DEFENDANT

[PROPOSED] ORDER

The Lexington Herald Leader, The Courier Journal, WLEX Communications LLC, WKYT 27 News, WTVQ 36 News, and WDKY Fox News (collectively the "Media Defendants") have filed a motion pursuant to Ky. R. Civ. P. 12.02(f) to dismiss Plaintiff's Complaint for failure to state a claim for which relief may be granted. The Court having reviewed the motion, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the motion is SUSTAINED, and the Plaintiff's claims against the Media Defendants are hereby DISMISSED WITH PREJUDICE.

/s/_____
HON. HUNTER DAUGHERTY
JUDGE, GARRARD CIRCUIT COURT

4-1-21
DATED

Tendered by:

/s/ Michael A. Abate
Jon L. Fleischaker
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COMMONWEALTH OF KENTUCKY
GARRARD CIRCUIT COURT
CASE NO. 21-CI-00034

MICHAEL D. SMITH PLAINTIFF

v.

ORDER

DERRICK GORDON, et al, DEFENDANTS

Comes now the Court, after hearing on the Motions filed by the Defendants, Hon. William Hayes and the law firm of Hayes Law Group, Hon. Guthrie True and the law firm of True Guarnieri, Ayer, LLP, Hon. Willis Cofey and the law firm of Coffey & Ford, PSC, Hon. Julie Roberts Gillum, and Hon. Jeff Hoover, all of whom are represented Hon. J. Hadden Dean and the law firm of Sheehan, Barnett, Dean, Pennington, Dexter & Tucker, PSC; and the Plaintiff being present in person on the 1st day of April, 2021; and the Court after otherwise being sufficiently advised;

DOES HEREBY ORDER AS FOLLOWS:

1. That all claims as filed b this Plainiff as against the above-referenced Defendants are hereby dismissed, with prejudice.
2. The Court stated on the record and does hereby find that the Plaintiff herein has failed to meet the statute of limitations for the presentation of any and all claims as against the above-referenced Defendants. Further, The Court also finds as valid, the defenses as raised in the pleadings, including but not limited to the

Exoneration Rule under the Kentucky Supreme Court authority of *Lawrence v. Bingham, Greenbaum, Doll, LLP.*, 567 S.W.3d 133, 134 (KY. 2018).

3. This Order is final and appealable and there is no just cause for delay in the entry o the same.

This 14 day of April, 2021.

/s/_____
HON. JUDGE HUNTER DAUGHERTY
GARRARD CIRCUIT COURT