

DEC 17 2009

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
EASTERN GRAND DIVISION

Tennessee Claims Commission
CLERK'S OFFICE

DEXTER McMILLAN,

 Claimant,
v.
STATE OF TENNESSEE,

 Defendant.

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Claims Commission No. 20091307
Regular Docket

COMPUTER _____
DOCKETED _____
C/D-COUNSEL _____
DCA _____
AG _____
ALJ _____
FEE PAID _____
NOTICE SENT _____
FILED _____

ORDER GRANTING STATE'S MOTION

THIS MATTER IS BEFORE the undersigned on the Defendant State's Motion to Dismiss, the Claimant's Response to Defendant's Motion to Dismiss, and the record as a whole.

Motions pending before the Tennessee Claims Commission ("the Commission") are to be decided without oral argument pursuant to Tennessee Claims Commission Rule 0310-1-1-.01(5)(a) unless otherwise ordered. There has been no order for oral argument in this matter. Further, there has been no motion by either party for oral argument. Therefore, the State's Motion is properly before the Commission and will be heard on the record.

Claimant McMillan demands One Million Dollars (\$1,000,000.00) from the State of Tennessee and alleges that Circuit Judges Richard Baumgartner and Mary Beth Leibowitz, along with General Sessions Court Judge Bob McGee¹ and "incompetent counsel"

¹ Judge McGee after the events alleged in Mr. McMillan's claim was elected to a circuit judgeship.

conspired not only to force him to enter a guilty plea but also to deny him the right to proper post conviction relief.²

Mr. McMillan identifies February 13, 2009, at 12:29 p.m. as the time of the conspiracy against him which took place in Division III of the Knox County Circuit Court.

This claim was filed on May 26, 2009, and transferred to the Commission on August 24, 2009.

In response to this claim, the State has filed a motion to dismiss under Tenn. R. Civ. P. 12.02(1) [lack of subject matter jurisdiction] and 12.02(6) [failure to state a claim upon which relief may be granted]. Those provisions read as follows:

Tennessee Rules of Civil Procedure, Rule 12.02(1) and (6):

12.02. How Presented. – Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing: (1) lack of jurisdiction over the subject matter, ... (6) failure to state a claim upon which relief can be granted,....

In support of its motion, the State has also filed a Memorandum of Law arguing first that the legislature has not waived the State's sovereign immunity against suit in cases involving alleged civil rights or constitutional violations.

Secondly, the State argues that the State has absolute immunity for suits brought against it alleging improper actions of the judiciary.

Following the filing of the State's motion, Mr. McMillan filed a document captioned Motion in Respond (sic) To Defendant's Motion to Dismiss. In that document, Mr. McMillan asserts that this Commission is the proper jurisdiction to hear his claim since it was the "the

² Judge Leibowitz, in a February 13, 2009, Order held that claimant's request for post conviction relief was barred by the statute of limitations for post conviction relief actions.

State” which caused him to end up in front of judges McGee, Baumgartner, and Leibowitz. In that document he goes on to state again his contention that he was not allowed his right to a proper post conviction proceeding by Judge Leibowitz and that he was not afforded counsel to properly handle such a proceeding. Additionally, he states in this filing that he was placed in jail on a Seventy-five Thousand 00/100 Dollars (\$75,000.00) bond for a first DUI charge and told that if he wanted to be released, he would have to “cop out charges”.

Normally, the State of Tennessee by the terms of its Constitution is immunized against suit, except as the General Assembly decides to waive that immunity. This is known as the concept of sovereign immunity.

It is well established that the jurisdiction of this Commission represents a closely and narrowly tailored waiver of sovereign immunity granted by the electorate’s representatives, the General Assembly of the State. This waiver of sovereign immunity, in its current form, dates back to 1984 with the passage of the Tennessee Claims Commission Act which became effective in 1985.

Sovereign immunity is a principle of law immunizing a governmental body against suit. It has long been a part of the jurisprudence of every state in the Union. The thought behind the concept is the protection of the government against a wide variety of legal claims which could, without sovereign immunity, cause a state severe financial problems to the detriment of the population as a whole.

The doctrine of sovereign immunity against suit in Tennessee derives from the common-law as it developed in North Carolina and subsequently in this state. *Lucas v. State*, 141 SW3d 121, 125 (Tenn. Ct. App. 2004).

With that principle in mind, the drafters of the Constitution of Tennessee embedded as a paramount principle of governance the concept that only the legislature of the State

could determine those circumstances in which the shield of sovereign immunity would be lowered and suit against the State permitted. Article I, Section 17 of our Constitution provides as follows:

“Section 17. That all courts shall be open; every man, for an injury done him and his lands, goods, person or reputation, shall have remedy by due course of law and right and justice administered, without sale, denial or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct. (Emphasis supplied.)

The General Assembly itself later enacted statutory law which reiterates the concept of the sovereign immunity of this State. **Tenn. Code Ann.** § 20-13-102(a) reads as follows:

“20-13-102. Actions Against State Prohibited. – (a) No court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, property, and all such suits shall be dismissed as to the state or such officers, on motion, plea or demurrer of the law officer of the state, or counsel employed for the state.” See also *Brewington v. Brewington*, 387 SW2d 777, 778-779 (1965).

However, as stated above, in 1984 the General Assembly made a significant change to the law of sovereign immunity with the enactment of The Tennessee Claims Commission Act, Tennessee Code Annotated, Section 9-8-301, *et seq.* In Tennessee Code Annotated, Section 9-8-307(a)(1), the legislature has set out very clearly those areas in which the State has relinquished its immunity to the financial extent permitted by other provisions of that Act.

An adjunct principle to the State's decision, through the legislature, to partially waive its sovereign immunity is the rule that statutes waiving immunity, because they are in derogation of the common-law, must be strictly construed. *State ex Rel Allen v. Cook*, 106 SW2d 858, 860 (1937); *Stokes v. University of Tennessee*, 737 SW2d 545, 547, (Tenn. Ct.

App., 1987).

The Supreme Court has made it abundantly clear that if a particular cause of action is not enumerated or listed in Tennessee Code Annotated, Section 9-8-307, this Commission does not have jurisdiction since sovereign immunity has been waived only in the areas set out therein. *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000).

Here, Mr. McMillan has alleged that three judges not only conspired to force him to enter a guilty plea but also took that conspiracy so far as to deny him the right to a post conviction relief proceeding represented by competent counsel.

Of course, these allegations would constitute claims that Mr. McMillan's constitutional and civil rights have been violated since his freedom and liberty was affected when he was incarcerated.

Consequently, one must then analyze Tennessee Code Annotated, Section 9-8-307(a)(1) to determine whether the State has waived its sovereign immunity against suits alleging violations of constitutional or civil rights by State employees.

A close review of that Code section reveals very clearly that the Tennessee Claims Commission does not have the jurisdiction or power to consider Mr. McMillan's constitutional or civil rights allegations.

Briefly, the Commission did have jurisdiction of cases involving alleged negligent deprivation of constitutional rights. However, in 1989, the words "or constitutional" were deleted from Tennessee Code Annotated, Section 9-8-307(a)(1)(N), thus negating this Commission's power to entertain such claims. See *Shell v. State*, 893 S.W.2d 416, 418-420 (Tenn. 1995).

Additionally, Mr. McMillan has alleged a conspiracy directed against him. This conspiracy involved not only a forced guilty plea, a "cop-out", but also a denial to him of a

post-conviction proceeding represented by competent counsel. Tennessee Code Annotated, Section 9-8-307(d) provides that the State is not liable for, among other things, “willful, malicious or criminal acts by state employees”. A conspiracy is a willful act committed by the joint action of more than one individual or entity. This being the case, Mr. McMillan’s claims of conspiracy must be dismissed.

Rule 12.02(1) of the Tennessee Rules of Civil Procedure permit dismissal of a claim in those cases where an individual, such as Mr. McMillan here, has filed claims in areas over which this Commission does not have subject matter jurisdiction. As discussed above, we simply do not have the jurisdiction and therefore the power to consider Mr. McMillan’s allegation involving violation of constitutional rights or conspiratorial acts committed against him.

There is a second reason why claims against the State involving the three named judges must be dismissed.

Tennessee Code Annotated, Section 9-8-307(d) provides in pertinent part that the State may on its own behalf assert as defenses any absolute common law immunities available to one of its officers or employees. State court judges are state employees. Common law judicial immunity against suits for acts by judges has long been recognized by the United States Supreme Court. *Wilkes v. Dinsman*, 48 U.S. 89, 12 L.Ed. 618 (1849); *Randall v. Brigham*, 74 U.S. 523, 19 L.Ed.2d 285 (1968). The State of Tennessee has also followed the doctrine of judicial immunity since 1902. *Heath v. Cornelius*, 511 S.W.2d 683 (Tenn. 1974). Judicial immunity is inapplicable only in those instances where a judge has acted in complete absence of all jurisdiction or where the judge’s actions were not taken in the judge’s judicial capacity. *Mireles v. Waco*, 502 U.S. 9, 11-12, 112 S. Ct. 286, 288, 116 L.Ed.2d 9, (1991).

Here Mr. McMillan has alleged that one General Sessions and two Circuit Court judges have unconstitutionally conspired against him. However, these judicial officers are protected from suit based on such allegations since at the time they took the actions Mr. McMillan complains of they were acting in a judicial capacity. That same immunity, under the terms of the Tennessee Claims Commission Act, Tennessee Code Annotated, Section 9-8-307(a)(1)(d) may be asserted by the State as a defense in connection with the allegations made against it based on the actions of the two Circuit judges.³

It is therefore clear, as discussed above that the State's Motion to Dismiss this claim pursuant to Tenn. R. Civ. Pr., Rule 12.02(1) must be granted since we simply do not have the jurisdictional power to address claimant's alleged constitutional and civil rights violations under Tennessee Code Annotated, Section 9-8-307(a)(1)(N).

Additionally, as just discussed, this claim must be dismissed under Tenn. R. Civ. Pr., Rule 12.02(6), for failure to state a claim upon which relief can be granted, since even if we do admit the truth of all of the allegations set out in Mr. McMillan's claim and construe them liberally in his favor, the allegations regarding the actions of Judges Baumgartner and Leibowitz are insufficient since they have immunity against such charges under Tennessee law and that immunity may also be asserted by the State against Mr. McMillan's claims here. That being the case, Mr. McMillan "... can prove no set of facts in support of [his] claim that would entitle [him] to relief..." See *White v Revco Discount Drug Centers, Inc.* 33 S.W.3d 713, 718 (2000). Further, Mr. McMillan's claim based on alleged conspiracies against him also cannot withstand the State's Motion to Dismiss for failure to state a claim under Tenn. R. Civ. Pr., Rule 12.02(6) since he has failed to provide any factual details

³ Judge McGee was not an employee of the State of Tennessee at the time of the actions complained of and therefore suit against the State may not be instituted on the basis of those actions before the Commission.

whatsoever supporting such allegations. This is not a measurement of the "strength of [his] proof". Rather, Mr. McMillan has presented no evidence whatsoever of a conspiracy and for that reason the conspiracy component of the claim must be dismissed.

Because Mr. McMillan's allegation cannot withstand the State's assertions of lack of jurisdiction and failure to state a claim upon which relief can be granted, this claim must be and is respectfully **DISMISSED**.

ENTERED this the 10th day of December, 2009.



William O. Shults, Commissioner
P.O. Box 960
Newport, TN 37822-0960

CERTIFICATE

I certify that a true and exact copy of the foregoing Order has been transmitted to:

Dexter L. McMillan
5724 Matlock Drive
Knoxville, TN 37921

P. Robin Dixon, Jr., Esq.
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202

This the 17 day of December, 2009.



Marsha Richeson, Clerk