SC90988

IN THE SUPREME COURT OF MISSOURI

JOSEPH WILLIAMS,

Plaintiff - Appellant,

vs.

COLONEL JERRY LEE and COLONEL RON REPLOGLE,

Defendants - Respondents.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Dale W. Hood

SUBSTITUTE BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

Plaintiff-appellant's statement of facts is not accurate or complete. Mo. R. Civ. P. 84.04(f). Therefore, defendants-respondents provide the following corrections and additions:

Plaintiff filed his petition on January 2, 2009, seeking to have his name removed from the sex offender registry and his prior registration records expunged. (LF 5). He alleged in the petition that he "pleaded guilty and was convicted at a military tribunal located at Fort Campbell, Kentucky in 2000, to one specification of carnal knowledge . . . and one specification of sodomy with a child under the age of 16 years." (LF 6-7). He did not allege in the petition, however, his age at the time of these sex offenses, the victim's age at the time, or the factual circumstances leading to the sex offenses. He also did not allege that he met any exception to registration under the federal Sex Offender Registration and Notification Act ("SORNA").

Defendants then moved to dismiss the petition for failure to state a claim because plaintiff is required to register in Missouri under SORNA. (LF 31). In response to the defendants' motion to dismiss, plaintiff argued in his "brief" to the trial court – without a supporting pleading or evidence – that "the encounter between Mr. Williams (who was 19 years old at the time of the offense) and the prosecuting witness (who was 15 years old at the time of the offense) was a non-violent consensual sexual act." (LF 36).

If the supposed facts in plaintiff's argument were actually alleged and true, plaintiff could potentially meet an exception to SORNA registration for "[a]n offense involving consensual sexual conduct . . . if the victim was at least 13 years old and the offender was not more than 4 years older than the victim." 42 U.S.C. § 16911(5)(C). The trial court, however, had neither allegations nor evidence before it and therefore held that "Plaintiff is required under federal law to register in Missouri." (LF 66).

At no point did plaintiff ever seek to amend his petition or provide evidence to support his argument that he meets the SORNA exception. The Legal File, which was compiled by plaintiff for appeal, contains no copy of the police report, and in fact contains no evidence whatsoever. Nor were there any exhibits presented to the trial court establishing the age of the plaintiff, the victim's age, or the supposedly consensual nature of the sex offenses.

Attached to this Substitute Brief is a redacted copy of the relevant police report for plaintiff's sex offenses (which is not in the record).[1/] It provides the following narrative:

[1/] The police report is attached only for the purpose of showing that a court of appeals that reaches outside the record is likely to err – and did err in this case.

> [T]he victim who stated she was sexually assaulted. She stated she met the suspect through a friend of hers in July 1999 and that she was 14 at the time and the suspect was 22. She stated that the suspect knew she was 14 but continued to show an interest in her.

Appendix A10. Thus, we see that the victim was not 15 at the time of the sex offenses as argued by the plaintiff. Instead, she was 14, and according to the police report she became pregnant as a result of the sex offenses and the suspect never made contact with her again. Appendix A11.

The court of appeals, based on the unpled and unsupported (and apparently false) arguments of plaintiff, nevertheless held that "Williams alleged that he was 19 years old at the time of the offenses and that his girlfriend . . . was 15 years old at the time," and that "the trial court had before it the police report that gave the ages of the participants, and the consensual nature of the conduct." Slip op. at 5 (Appendix A6). As a result, the court of appeals reversed the trial court and held that plaintiff met the exception to registration under federal law.

ARGUMENT

Standard of Review

A motion to dismiss for failure to state a claim, as in this case, is "solely a test of the adequacy of the plaintiff's petition." *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 101 (Mo. banc 2010) (citing *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. banc 2009)). The petition is "reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). Thus, if the plaintiff fails to allege necessary facts in a petition, there is no means to determine if the elements of a claim are met on appeal.

Review on appeal is limited strictly to matters included in the record on appeal. *See State v. Tokar*, 918 S.W.2d 753, 762 (Mo. banc 1996); *State v. Burrington*, 371 S.W.2d 319, 320-21 (Mo. 1963) (matters not included in the transcript or record on appeal are improper for consideration on appeal), *cited in State v. Strong*, 142 S.W.3d 702, 729 (Mo. banc 2004). Thus, appellate review of a judgment granting a motion to dismiss is limited to the allegations in the petition. *Shapiro v. Columbia Union Nat. Bank and Trust Co.*, 576 S.W.2d 310, 315 n. 6 (Mo. banc 1978); *see also Lueckenotte v. Lueckenotte*, 34 S.W.3d 387, 391 (Mo. banc 2001) ("This Court does not review the case on the merits, but

rather determines whether [the plaintiff's] pleadings were sufficient to withstand a motion to dismiss.").

I. The Trial Court Correctly Granted Defendants' Motion to Dismiss Because Plaintiff Must Register Under SORNA – Responding to Appellant's Point I.

In this case, plaintiff argues that he is not required to register under the federal Sex Offenders Registration and Notification Act ("SORNA") because he supposedly meets an exception to registration in 42 U.S.C. § 16911(5)(C). *See* Appellant's Brief, pp. 12-15. This exception applies only to "[a]n offense involving consensual sexual conduct . . . if the victim was at least 13 years old and the offender was not more than 4 years older than the victim." 42 U.S.C. § 16911(5)(C). The plaintiff, however, made no allegations in the petition concerning his age or the age of his victim at the time of the sex offenses, nor did he allege any facts concerning the nature of the offenses to determine whether they were consensual or not.

Missouri is a fact pleading state. *See* Mo. R. Civ. P. 55.05; *Luethans, v. Wash. Univ.,* 894 S.W.2d 169, 171 (Mo. banc 1995). Compared to the federal analogue of notice pleading, fact pleading "demands a relatively rigorous level of factual detail." *Green v. Penn-America Ins. Co.*, 242 S.W.3d 374, 379-80 (Mo. App. W.D. 2007). "A petition must describe ultimate facts demonstrating entitlement to the relief sought." *Id.* Thus, the petition must allege facts to

support each essential element of the cause to be pleaded. Not only did plaintiff fail to plead any essential facts supporting an exception to registration under SORNA, but plaintiff did not even identify in the petition the exception to registration he now claims. This left the trial court with a pleading that included neither facts nor a reference to the law that plaintiff now seeks to apply. And plaintiff never amended his pleadings either, even after discovering this exception.

The court of appeals found its way around these fatal defects by asserting that the necessary facts were "alleged" in "a brief." Slip op. at 5 (Appendix A6). Creating allegations on appeal is not appropriate in reviewing a motion to dismiss. In fact, if information outside the pleadings is presented and not excluded by the trial court, the trial court is required to treat the motion to dismiss as one for summary judgment and must notify the parties. *Shapiro*, 576 S.W.2d at 315 n. 6 ("There is no indication, however, that [the trial court considered matters outside the pleadings], therefore we rule on whether the petition states a claim."). The trial court did not treat the motion to dismiss as a motion for summary judgment in this case, and the court of appeals could only review the allegations in the pleadings.

The Missouri Rules of Civil Procedure give emphasis to this orderly means of appellate review. Rule 81.12(b) specifically identifies matters that are omitted from the record on appeal. Matters to be omitted include "briefs and

memoranda." Mo. R. Civ. P. 81.12(b). And why? Because these materials can provide no basis for appellate review, particularly appellate review of a motion to dismiss. Yet, the plaintiff's briefs and memoranda are the very material relied upon by the court of appeals in its Opinion.

The consequences of erroneously relying on unsupported "allegations" and evidence that was never pled or properly presented, is that it often turns out to be false – as in this case. Had the police report actually been submitted to the trial court, the plaintiff could not have met the federal exception under SORNA. The police report demonstrates that plaintiff was 19 or older and the victim was 14 at the time of the sex offenses. *See* Appendix A10. If the ages were in fact 14 and 19 at the time of the sex offenses, as they appear to be, then plaintiff is in no way entitled to the federal exemption from registration.

Because plaintiff failed to allege any facts supporting an exception from registration under SORNA, the trial court's dismissal should be affirmed. If not simply affirmed, then at a minimum the case should be remanded to the trial court for a determination as to whether the plaintiff can satisfy the federal exception.

II. Destruction of Records is Contingent on the Requirement to Register Under SORNA – Responding to Appellant's Point II.

In his second point on appeal, plaintiff argues that his records should be expunged. In his petition, plaintiff misused the term "expungement" which has

a very specific meaning with regard to arrest records. § 610.122, RSMo (2009 Cum. Supp.). Plaintiff, however, subsequently explained that he was only referring to the destruction of any records relating to his registration as a sex offender. Defendants do not contest that if plaintiff was never required to register then his registration records should be removed and destroyed.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court, or alternatively, remand to the trial court for a determination of whether the plaintiff satisfies the requirements for an exception to registration under 42 U.S.C. § 16911(5)(C).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing brief, and an electronic disk with the brief were mailed, postage prepaid, via United States mail, on October 6, 2010, to:

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 1,970 words.

The undersigned further certifies that the labeled disk simultaneously filed and served with the hard copies of the brief has been scanned for viruses and is virus-free.

_____
Jeremiah J. Morgan
Deputy Solicitor General

RESPONDENTS' APPENDIX

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