

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 20, 2021

Christopher M. Wolpert
Clerk of Court

STEVEN W. DELIA,

Plaintiff - Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL JUDGE PAYNE, THOMAS
KOWALSKI, MELODY NELSON,
LINDA A. EPPERLEY, J. LANCE
HOPKINS, TENTH CIRCUIT COURT OF
APPEALS,

Defendants - Appellees.

No. 21-5047
(D.C. No. 4:20-CV-00611-GKF-CDL)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **MORITZ, BALDOCK, and EID**, Circuit Judges.**

Steven W. DeLia, a pro se litigant, filed this action in the federal district court in the Northern District of Oklahoma after this court vacated on appeal DeLia’s conviction of health care fraud because the statute of limitations had run. In his complaint, DeLia

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

alleged claims against a number of individuals and institutions involved in his earlier prosecution and appeal. After defendants moved to dismiss DeLia's complaint, the district court granted the motion, dismissing the complaint with prejudice. DeLia now appeals the district court's order dismissing his claims. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

On September 29, 2016, in the Eastern District of Oklahoma, a jury found Steven DeLia guilty of health care fraud in violation of 18 U.S.C. § 1347. DeLia appealed his conviction and, on October 29, 2018, this court vacated DeLia's conviction, finding that the prosecution was barred by the statute of limitations.¹

Over two years later, on November 25, 2020, proceeding pro se, DeLia filed a complaint in the Northern District of Oklahoma against the officials and institutions involved in his earlier prosecution and subsequent appeal. DeLia named as defendants: Judge Payne, the presiding federal district court judge; Melody Nelson, the prosecuting attorney; J. Lance Hopkins, DeLia's court-appointed attorney; and Thomas Kowalski, the federal investigator. He also named Linda Epperley, who represented the government on appeal; the Tenth Circuit; and the Department of Justice.

In his complaint, DeLia alleged various constitutional violations and wrongdoings. DeLia claimed that "[t]he Federal Judge, Federal Investigator, Federal ADA Prosecutor,

¹ Details of the factual background of DeLia's criminal prosecution are set forth in *United States v. DeLia*, 906 F.3d 1212, 1214–16 (10th Cir. 2018).

and even my own Court appointed Attorney conspired to illegally convict me!” ROA Vol. I at 13. According to DeLia, “[t]hese illegal Federal employees exhibited misconduct, negligence, malpractice, and outright illegalities in conspiring against [DeLia] to a ridiculous illegal extent, not understanding Statute of Limitations, not understanding health care law, violating [his] Constitutional rights, doing an illegal case that never should have been done (Selective Prosecution), putting slanderous lies on the internet that damage [him] continuously and is on-going, and illegal incarceration[.]” *Id.* Referring to his initial appeal of the criminal conviction, DeLia alleged: “Epperley telling slanderous lies in front of Appeals Court Judges cannot be disputed!” *Id.* at 12. DeLia also claimed that the Tenth Circuit “refuses to hold Judge Payne in Misconduct, and refuses to give the plaintiff a written copy of the Oral Argument where the ADA committed Perjury.”² DeLia sought \$5,060,000 in damages.

The defendants moved to dismiss all claims asserted against them pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Lance Hopkins later joined the motion to dismiss. On April 30, 2021, the district court granted the motion to dismiss. The district court found that DeLia’s claims against the Department of Justice and this court were barred by sovereign immunity. The court held that the claims against Judge Payne were barred by absolute judicial immunity. It also held that the claims against Nelson and Epperly were barred by prosecutorial immunity, and that the claims against

² DeLia also “filed Complaint of Misconduct Forms against Judge Payne with the [Tenth] Circuit Court on 8/5/19[.]” which was dismissed on November 22, 2019. *Id.* at 14.

Agent Kowalski were time-barred. The remaining claims against Hopkins were dismissed for failure to state a claim.

DeLia filed a motion to reopen and to recuse, which was denied. DeLia now appeals.

II.

DeLia's claims were dismissed for lack of subject-matter jurisdiction (Rule 12(b)(6)) and failure to state a claim (Rule 12(b)(1)). The standard of review under both of these rules is de novo. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009), *cert. denied*, 558 U.S. 1148 (2010). Under this standard, the court must "accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Id.*

DeLia appears pro se. "[A] pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation marks omitted). However, this court is not "bound by conclusory allegations, unwarranted inferences, or legal conclusions" contained in pro se pleadings. *Hackford v. Babbitt*, 14 F.3d 1457, 1454 (10th Cir. 1994). Additionally, this court does not take on the role of advocate, nor does it supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997).

A. Department of Justice and the Tenth Circuit

DeLia's claims against the DOJ and this court are barred by sovereign immunity because DeLia has failed to identify any waiver of immunity. Sovereign immunity protects the federal government from suit except where Congress has "unequivocally expressed" a waiver of immunity. *See Lane v. Pena*, 518 U.S. 187, 192 (1996); *see also High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006) ("Waiver of sovereign immunity must be explicit and cannot be implied."). The plaintiff bears the burden of establishing that the government "has waived its sovereign immunity with respect to [his] claim[s]." *Iowa Tribe of Kan. & Neb. v. Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010) (citations omitted).

Here, DeLia does not dispute that his claims against the DOJ and the Tenth Circuit are actually claims against the United States. DeLia also fails to identify any waiver of sovereign immunity for these claims in his complaint, his response to the motion to dismiss, and his brief on appeal to this court.³ Without a waiver, these claims are barred by sovereign immunity. Accordingly, because "[t]he defense of sovereign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable," the district court correctly held that it lacked subject-matter jurisdiction over DeLia's

³ Even if we construe these claims under the Federal Tort Claims Act, the DOJ and the Tenth Circuit would still be dismissed because DeLia's intentional tort claims are barred by the intentional tort exception under 28 U.S.C. § 2680(h), and DeLia did not file this lawsuit within six months of the Tenth Circuit's denial of his complaint of misconduct regarding Judge Payne. *See Barnes v. United States*, 776 F.3d 1134, 1142–43 (10th Cir. 2015) (finding that a suit filed over six months after an agency's formal denial of a claim was time-barred).

claims against the DOJ and the Tenth Circuit. *Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urb. Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009) (citing *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1080 (10th Cir. 2006)); *see also Lonsdale v. United States*, 919 F.2d 1440, 1443–44 (10th Cir. 1990) (finding that, without a specific waiver of immunity, a party seeking to assert a claim against the government fails to establish subject-matter jurisdiction).

B. Judge Payne

DeLia's claims against Judge Payne are barred by judicial immunity because they all arise from the fact that Judge Payne presided over DeLia's criminal proceedings at the district court. The doctrine of absolute judicial immunity shields judges from liability for their "official adjudicative acts." *Lundahl v. Zimmer*, 296 F.3d 936, 939 (10th Cir. 2002) (citing *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978)). However, judicial immunity does not shield judges from "actions taken outside the judicial capacity; and actions taken in the 'complete absence of all jurisdiction.'" *Edge v. Payne*, 342 Fed. App'x 395, 399 (10th Cir. 2009) (unpublished) (quoting *Stein v. Disciplinary Bd. of Supreme Court of N.M.*, 520 F.3d 1183, 1195 (10th Cir. 2008)). In "determining whether an act by a judge is a 'judicial' one," the Supreme Court has explained that courts look to whether the act "is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump*, 435 U.S. at 362.

DeLia's allegations against Judge Payne arise from actions that he took while presiding over DeLia's criminal proceedings. DeLia alleges that Judge Payne would not allow DeLia to represent himself during the third day of trial, and "[i]f Judge Payne had

not knowingly violated the Constitution (wanting me convicted at all costs), I may have been able to off-set the P[r]osecutor [sic] slanderous lies and win the case! If that had happened, my damages would have been tremendously reduced!” ROA Vol. I at 8. DeLia further claims that, “Judge Payne did rulings that were obviously biased against me!” *Id.* Determining whether to allow a defendant to represent himself, making rulings and overseeing a criminal case are all “official adjudicative acts” and “function[s] normally performed by a judge.” *Stump*, 435 U.S. at 356–57; *Edge*, 342 Fed. App’x at 399. DeLia does not include any allegation against Judge Payne that falls outside the scope of his official capacity overseeing DeLia’s criminal proceedings. Thus, Judge Payne is entitled to absolute judicial immunity, and the district court correctly dismissed DeLia’s claims against Judge Payne.

C. Nelson, Epperley, and Kowalski

First, DeLia’s claims against AUSAs Nelson and Epperley are barred by prosecutorial immunity because they exclusively involve the actions of initiating and presenting the government’s case, as well as arguing the case on appeal. Prosecutorial immunity provides absolute immunity from suit for activities that are “intimately associated with the judicial phase of the criminal process.” *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). These activities generally involve “actions that cast [her] in the role of an advocate initiating and presenting the government’s case.” *Mink v. Suthers*, 482 F.3d 1244, 1261 (10th Cir. 2007); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (“[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are

entitled to the protections of absolute immunity.”). However, prosecutorial immunity “does not extend to those actions that are investigative or administrative in nature, including the provision of legal advice outside the setting of a prosecution.” *Mink*, 482 F.3d at 1261–62; *Burns v. Reed*, 500 U.S. 478, 486, 493–94 (1991)).

DeLia alleges that Nelson violated Plaintiff’s constitutional rights during the criminal proceeding brought against him in the Eastern District of Oklahoma and told slanderous lies about Plaintiff.⁴ DeLia alleges that Epperley committed perjury by “telling slanderous lies” to the Tenth Circuit during the oral argument in DeLia’s appeal. These allegations arise from the AUSAs’ preparation of, and performance during, DeLia’s trial and appeal. Regardless of DeLia’s characterization, DeLia’s claims against Nelson and Epperley are barred by prosecutorial immunity. *Summers v. Sjogren*, 667 F. Supp. 1432, 1434 (D. Utah 1987) (“[M]alice can be alleged and the prosecutor is still immune if acting within his or her prosecutorial function.”) (citing *Grow v. Fisher*, 523

⁴ DeLia also makes claims referencing, “Selective Prosecution.” But a selective prosecution claim must be raised prior to the criminal trial, and requires showing “that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.” *United States v. Bryant*, 5 F.3d 474, 476 (10th Cir. 1993) (“Fed. R. Crim. P. 12(b)(1) requires a defendant to raise ‘objections based on defects in the institution of the prosecution’ prior to trial. A selective prosecution claim clearly qualifies as such an objection.”) (citation omitted). DeLia argues, “before the criminal trial . . . I immediately did a Motion To Dismiss based on Selective Prosecution.” Reply Br. at 3. But, outside of this statement, there is little evidence in the record before this court of this actually happening. And, in his initial appeal, DeLia failed to raise this claim in his motion to dismiss based on the statute of limitations. In addition, even if we assume that DeLia raised this issue before trial, his complaint fails to allege any discriminatory purpose or effect, and entirely fails to state a plausible claim for selective prosecution.

F.2d 875, 877 (7th Cir. 1975)). Additionally, prosecutorial immunity still applies when a prosecutor, such as Epperley, is handling an appeal. *See Ellibee v. Fox*, 244 Fed. App'x 839, 844–45 (10th Cir. 2007) (unpublished) (“Absolute immunity applies to the adversarial acts of prosecutors during post-conviction proceedings, including direct appeals, habeas corpus proceedings, and parole proceeding[.]” (quoting *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003))). Therefore, DeLia’s claims against Nelson and Epperley are barred by prosecutorial immunity.

Second, DeLia’s claims against Agent Kowalski, as well as Nelson and Epperley, are barred by the statute of limitations. DeLia alleges various violations of the right to a fair trial and due process, which are construed to be brought under *Bivens*. *See Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002) (“Bivens claims allow plaintiffs to recover from individual federal agents for constitutional violations[.]”). “A Bivens action is subject to the limitation period for an action under 42 U.S.C. § 1983, and that limitation period is set by the personal injury statute in the state where the cause of action accrues.” *Roberts v. Barreras*, 484 F.3d 1236, 1238 (10th Cir. 2007). Oklahoma law provides that the limitations period for a personal injury action is two years. *See OKLA. STAT. tit. 12, § 95(A)(3)*. However, “[f]ederal law, not state law, controls the issue of when a federal cause of action accrues.” *Industrial Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 968 (10th Cir. 1994). Under federal law, “[t]he statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action.” *Id.* at 969.

Here, the alleged constitutional violations occurred during DeLia’s criminal trial and appeal. DeLia had reason to know of the existence and cause of his alleged injury by the time the Tenth Circuit issued its decision on October 29, 2018. Thus, even assuming the clock started upon the latest possible date relating to the basis of his action, DeLia filed his complaint on November 25, 2020 — almost a month beyond the two-year statute of limitations.

DeLia has also failed to provide any circumstances that justify an equitable tolling of the statute of limitations. “[S]tate law governs the application of tolling in a [federal] civil rights action.” *Young v. Davis*, 554 F.3d 1254, 1258 (10th Cir. 2009) (quoting *Alexander v. Oklahoma*, 382 F.3d 1206, 1217 (10th Cir. 2004)). Oklahoma law allows for tolling the statute of limitations when (1) there is a legal disability; (2) “defendants engage in false, fraudulent or misleading conduct calculated to lull plaintiffs into sitting on their rights[;]” and (3) “[i]n the appropriate case, exceptional circumstances may justify tolling a statute of limitations.” *Id.* (quoting *Alexander*, 382 F.3d at 1217).

DeLia’s allegations do not apply to any of these scenarios. DeLia claims that COVID-19 caused difficult circumstances and the closing of several government offices and courts. But DeLia fails to show how these circumstances prevented him from contacting the courts considering that the federal courthouse in the Northern District of Oklahoma “has remained open throughout the pandemic, the staff in the Clerk’s Office has been available by telephone, mail has been received, and intake desks have remained

open for filings.” ROA Vol. III at 108.⁵ These circumstances do not warrant tolling the statute of limitations. Therefore, DeLia’s claims against Kowalski, as well as Nelson and Epperley, are barred by the two-year statute of limitations.⁶

D. Hopkins

DeLia’s claims against Hopkins, his court-appointed attorney, fail to state a claim upon which relief may be granted. DeLia alleges that “even [his] own Court appointed Attorney conspired to illegally convict [him],” and that his attorney “is included in this lawsuit because at the time of his crimes, he was a Federal employee! He was being paid by the Feds to represent [DeLia].” *Id.* Under 42 U.S.C. § 1983, “[t]he Constitution does not ordinarily provide a private right of action for federal officials,” however, under *Bivens*, individuals may “seek damages for unconstitutional conduct by federal officials.” *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 859 (10th Cir. 2016) (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91

⁵ DeLia argues, “I waited at least 2 months for court documents to be typed! I wanted at [sic] all court documents typed before seeing lawyers (and a lot of lawyers were hiding from COVID at home).” Reply Br. at 4. However, DeLia’s desire to have “all court documents typed before seeing lawyers” is not the type of exceptional circumstance that is contemplated by Oklahoma law for tolling the statute of limitations. *See Young*, 554 F.3d at 1258 (quoting *Alexander*, 382 F.3d at 1217).

⁶ If these claims were to be construed under the Federal Tort Claims Act (“FTCA”), they would still be barred by the statute of limitations because DeLia does not allege exhaustion of any FTCA claim, and DeLia is past the two-year time period for presentment of any claim. *See* 28 U.S.C. § 2401(b) (noting that an FTCA claim “shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing . . . of notice of final denial of the claim”).

(1971). A Bivens action must be brought against a “federal agent [] acting under color of federal law.” *See Bivens*, 403 U.S. at 389. But a court-appointed defense attorney “does not act under color of federal law in performing . . . as a lawyer to an indigent defendant in a federal proceeding.” *Lay v. Otto*, 530 F. App’x 800, 802 n.1 (10th Cir. 2013) (unpublished) (quoting *Cox v. Hellerstein*, 685 F.2d 1098, 1099 (9th Cir. 1982)).

Here, Hopkins was a court-appointed CJA Attorney⁷ who represented DeLia, an indigent defendant, in a federal proceeding. *See Lay*, 530 F. App’x at 802 (finding that, in addition to two public defenders, a private attorney appointed by the court to represent an indigent defendant was not acting under color of federal law when representing that defendant). Thus, even if these claims were liberally construed to be brought under *Bivens*, Hopkins is not a federal actor. Accordingly, DeLia’s claims against Hopkins are dismissed for failure to state a claim.⁸

⁷ Where a defendant is financially unable to obtain adequate representation, district courts provide for representation under the Criminal Justice Act. *See* 18 U.S.C. § 3006A. This representation involves hiring private attorneys, such as J. Lance Hopkins, “in a substantial proportion of the cases.” *Id.* § 3006A(a)(3).

⁸ DeLia has also filed a motion that we construe as a motion for leave to file a supplement brief, along with the brief itself. Here, in our discretion, we grant this motion. DeLia’s supplement disagrees with various statements and characterizations made in Hopkins’s response brief, including the conclusion that the district court’s dismissal for failure to state a proper claim was correct. *See* Suppl. at 8. However, DeLia largely restates the same arguments made in his original briefing, simply restating unsupported conclusory allegations that are without merit.

IV.

For the foregoing reasons, we affirm the district court's dismissal of DeLia's claims.

Entered for the Court

Allison H. Eid
Circuit Judge