

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSEPH B. X. SAMPLE, <i>pro se</i> ,	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 00-2022
v.	:	
	:	
PATRICIA DUGAN, Esq.	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J.

July 19, 2000

Presently before this Court in this legal malpractice and/or civil rights action is Defendant Patricia Dugan, Esq.'s Motion to Dismiss Plaintiff Joseph B. X. Sample's Complaint. For the reasons stated below, Dugan's Motion will be granted and Sample's Complaint will be dismissed.

I. BACKGROUND

In 1975, Sample was found guilty of second-degree murder, robbery, possession of an instrument of crime, possession of an offensive weapon, and violation of the Uniform Firearms Act. Following the denial of post-trial motions, Sample was sentenced to a term of life imprisonment, with concurrent sentences for the other convictions.

Following his conviction, Sample filed a Notice of Appeal nunc pro tunc, and in September, 1979, the Pennsylvania Superior Court found that his original trial counsel was ineffective for not preserving an issue with regard to alleged prosecutorial misconduct. His convictions were reversed with the direction that he receive a new trial.

In April, 1980, Sample filed a motion to dismiss the charges on double-jeopardy grounds. The trial judge denied the Motion, and Sample took an interlocutory appeal of that Order to the Pennsylvania Supreme Court, which affirmed the trial court's decision to deny his Motion. In October, 1981, after his second jury trial, Sample was convicted of voluntary manslaughter, robbery and possession of an instrument of crime. Post-verdict motions were denied and Sample was sentenced to a term of imprisonment of 15-30 years.

Following this conviction, Sample took an appeal to the Pennsylvania Superior Court, which affirmed his conviction, and a Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied. At the same time he was pursuing his state appeals, Sample filed a federal habeas corpus petition, which was dismissed on the basis of his failure to exhaust his state remedies.

In 1985, Sample filed a second petition for post-conviction relief under the then Pennsylvania Post-Conviction Hearing Act. The Petition was filed pro se, and counsel was appointed. Subsequently, an amended petition for post-conviction relief was filed under the Pennsylvania Post-Conviction Relief Act, and the Court of Common Pleas of Philadelphia County subsequently entered an order dismissing his Petition. Sample was represented at this stage of the litigation by the defendant in this case, Ms. Patricia Dugan, Esq. ("Dugan").

Sample then filed an appeal of the order denying his Petition, and at the same time, Dugan filed a petition for leave to withdraw as court-appointed counsel on the grounds that Sample's Appeal was frivolous. Sample was provided with proper notice of Dugan's petition to withdraw, and the Superior Court subsequently affirmed the decision by the Court of Common Pleas of Philadelphia County to dismiss Sample's PCRA Petition.

On November 6, 1997, the Superior Court granted Dugan's motion for leave to withdraw as Sample's counsel.¹ An appeal was taken to the Superior Court, but this appeal failed and Dugan withdrew as counsel.

Sample remains incarcerated at the Pennsylvania State Correctional Institute at Frackville. To date, no court has overturned his current conviction, and Sample has not been granted any post-conviction relief. However, in his Complaint, Sample alleges that Dugan committed professional negligence and/or malpractice in the handling of his post-conviction relief efforts, and/or that she committed professional malpractice when she "abandoned" him on June 13, 1996. He further alleges that he is innocent of all of the charges alleged in this matter, and that he is serving an improper sentence as a result of the alleged negligence of Dugan, and has sustained other specified and unspecified injuries and damages. Finally, Sample contends that Dugan violated federally protected civil rights in the context of her representation of him.

II. STANDARD

When deciding to dismiss a claim pursuant to Rule 12(b)(6) a court must consider the legal sufficiency of the complaint and dismissal is appropriate only if it is clear that "beyond a doubt ... the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McCann v. Catholic Health Initiative, 1998 WL 575259 at *1 (E.D. Pa. Sep. 8, 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The court assumes the truth of plaintiff's allegations, and draws all favorable inferences therefrom. See, Rocks v. City of Philadelphia, 868 F.2d. 644, 645 (3d. Cir. 1989). However, conclusory allegations that fail to give a defendant

1. In his Complaint, Sample alleges that Dugan abandoned him because he failed to pursue any legal action on his own behalf after June, 1996.

notice of the material elements of a claim are insufficient. See Sterling v. SEPTA, 897 F.Supp. 893, 895 (E.D. Pa.1995). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d. Cir. 1993). The Court must determine whether, under any reasonable reading of the pleadings, the law allows the plaintiff a remedy. See, Nami v. Fauver, 82 F.3d 63, 65 (3d. Cir. 1996).

III. DISCUSSION

A. Attorney Malpractice

In Bailey v. Tucker, 621 A.2d 108 (Pa. 1993), the Pennsylvania Supreme Court outlined the standards which are to be utilized when evaluating a potential legal malpractice claim brought by a plaintiff in connection with an attorney's handling of a criminal matter. The Supreme Court held that a "plaintiff will not prevail in an action for malpractice in a criminal context unless or until he or she has pursued post-trial remedies, and obtained relief which was dependent upon attorney error." Id. at 115. As Sample has not obtained relief which was dependent upon attorney error, and in fact, remains incarcerated for the very conviction upon which Dugan's representation arises, any attorney malpractice claim must fail as a matter of law.

B. Federal Civil Rights

Sample also appears to be pursuing a claim under federal civil rights statutes, however, a court-appointed defense attorney is generally not acting under color of state law for the purposes of a 42 U.S.C. § 1983 claim. Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). While it is unclear which federal civil rights statute Sample seeks

redress under, I will assume that his cause of action is one under Section 1983. However, because Sample is litigating this cause of action pro se, I will merely dismiss his Complaint without prejudice.

IV. CONCLUSION

For the reasons stated above, Sample's Complaint is dismissed without prejudice, as he has not been afforded post-conviction relief and Dugan was not acting under color of state law when she represented him. An appropriate order follows.

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ORDER

AND NOW, this 19th day of July, 2000, upon consideration of Defendant Patricia Dugan, Esq.'s Motion to Dismiss and Plaintiff Joseph B. X. Sample's Response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED and Plaintiff's Complaint is DISMISSED, without prejudice.

This case shall be marked CLOSED, statistically.

BY THE COURT:

RONALD L. BUCKWALTER, J.