

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAYMOND GEAN PADILLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80099-COA

FILED

AUG 12 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Raymond Gean Padilla appeals from a district court order of dismissal in a civil rights action. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

In the proceedings below, as relevant here, Padilla filed an amended civil rights complaint pursuant to 42 U.S.C. § 1983 against respondent the State of Nevada, alleging a violation of his Fourth, Fifth, Sixth, and Seventh Amendment rights. In particular, Padilla alleged that his attorney in a criminal matter had a conflict of interest because she also represented one of the State's witnesses against Padilla in a second criminal matter he had pending. It is not clear when the conflict was discovered, but Padilla acknowledges that at the time of sentencing on his first case, his attorney made a record about the conflict and the district court appointed a new attorney to represent him. Based on these facts, Padilla's complaint alleged that both the district attorneys prosecuting him and the attorneys representing him in both cases violated his constitutional rights by failing to inform him of the conflict of interest before trial in his first case.

Respondent moved to dismiss the amended complaint with prejudice and the district court granted that motion, concluding that Padilla

failed to timely serve respondent with the complaint and, because his allegations sought to challenge the constitutionality of his conviction, Padilla's sole remedy was a petition for a writ of habeas corpus pursuant to NRS 34.724. Accordingly, the district court dismissed the case with prejudice, and this appeal followed.

This court reviews an order granting a motion to dismiss for failure to state a claim under NRCP 12(b)(5) de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); see also *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014). This court will affirm the decision to dismiss a complaint under NRCP 12(b)(5) when the complaint's factual allegations do not entitle a plaintiff to relief under the claims asserted. *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

Here, Padilla's complaint named the State of Nevada as defendant and seeks monetary damages based on his allegation that his attorneys, along with the district attorneys prosecuting him, violated his constitutional rights pursuant to 42 U.S.C. § 1983. But because 42 U.S.C. § 1983 allows claims against persons and states are not persons for purposes of 42 U.S.C. § 1983, "a plaintiff cannot bring a § 1983 action against a state." *Craig v. Donnelly*, 135 Nev. 37, 40, 439 P.3d 413, 416 (Ct. App. 2019). Thus, because Padilla's claims are not permissible against respondent, we discern no error in the district court's dismissal of his complaint.¹ See *id.* We likewise discern no error in the district court's

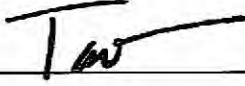
¹To the extent Padilla's complaint referenced NRS 41.0322, such that it could be construed as asserting a state tort claim, he has failed to present any argument as to that claim. Thus, any challenge to its dismissal is waived. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252

dismissal with prejudice. *See Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 169, 400 P.2d 621, 624 (1965) (noting that a dismissal with prejudice under Rule 12 can be a judgment on the merits and thus, a dismissal for failure to state a claim should only be granted if it appears certain a plaintiff cannot obtain any relief under any set of facts); *cf. Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 289, 357 P.3d 966, 973 (Ct. App. 2015) (“[L]eave to amend, even if timely sought, need not be granted if the proposed amendment would be ‘futile.’ A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim” (internal citations omitted)).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

P.3d 668, 672 n.3 (2011) (noting that if a matter is not raised on appeal, it is considered waived)

²Insofar as Padilla raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Kenneth C. Cory, District Judge
Raymond Gean Padilla
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk