

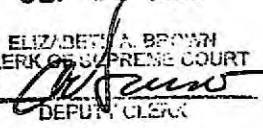
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,  
Appellant,  
vs.  
EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA; NEVADA  
DEPARTMENT OF PUBLIC SAFETY  
DIVISION OF PAROLE AND  
PROBATION; AND THE HONORABLE  
MICHAEL VILLANI, DISTRICT  
JUDGE,  
Respondents.

No. 79704-COA

FILED

SEP 28 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Brian Kerry O'Keefe appeals from a district court order dismissing a complaint in a tort and civil rights action. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

In his operative complaint, O'Keefe asserted various tort and civil rights claims against respondents the Eighth Judicial District Court of the State of Nevada, the Nevada Department of Public Safety Division of Parole and Probation (P&P), and the Honorable Michael Villani. For support, O'Keefe alleged that his presentence investigation report (PSI) incorrectly listed certain of his prior convictions as felony convictions, that he was denied parole as a result, and that respondents were responsible, either because they prepared the report or refused to correct it. Respondents moved to dismiss arguing, among other things, that O'Keefe was required to challenge any inaccuracies in the presentence investigation report prior to sentencing. O'Keefe responded by filing a document styled as an "omnibus motion to [oppose respondents' motion and seek other forms of relief]" that are not relevant here. Nevertheless, the district court

granted respondents' motion under EDCR 2.20(e), which gives the district court discretion to construe the nonmoving party's failure to oppose a motion as an admission that the motion is meritorious and a consent to granting the same. The district court also denied O'Keefe's omnibus motion as moot. This appeal followed.

On appeal, O'Keefe argues that, because he opposed respondents' motion to dismiss in his omnibus motion, the district court could not properly rely on EDCR 2.20(e) to grant respondents' motion. Initially, although O'Keefe did not file a separate opposition to respondents' motion, he filed the omnibus motion, which referenced his intent to oppose respondents' motion in its title and included substantive arguments addressing the grounds on which respondents sought to have his complaint dismissed. Thus, while its title is somewhat confusing, O'Keefe's omnibus motion effectively operated as an opposition to respondents' motion to dismiss, and the district court therefore abused its discretion by applying EDCR 2.20(e) based on the purported lack of an opposition.

Nevertheless, we recognize that O'Keefe's opposition was untimely, *see* EDCR 2.20(e) (requiring the nonmoving party to file and serve an opposition within 14 days after service of the underlying motion); NRCP 6 (explaining how to compute time for purposes of the EDCR), and that the district court had discretion to apply EDCR 2.20(e) on that basis. *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 277-78, 182 P.3d 764, 768 (2008) (stating that the district court did not abuse its discretion by applying EDCR 2.20(b), which is now EDCR 2.20(e), where an opposition was eventually filed, but untimely). But because the district court erroneously concluded that respondents' motion was unopposed, there is no indication that the court would have exercised its

discretion to apply EDCR 2.20(e) based on the untimeliness of O’Keefe’s opposition, and we therefore cannot affirm the court’s reliance on that rule to dismiss O’Keefe’s complaint or its concomitant conclusion that his omnibus motion was moot.

This does not end our analysis, however, as we must still determine whether dismissal was warranted under NRCP 12(b)(5), which is a question that we review de novo. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (explaining that a motion to dismiss under NRCP 12(b)(5) is subject to de novo review). And based on our de novo review, we conclude that the allegations in O’Keefe’s complaint do not support viable claims for relief.<sup>1</sup> *See id.* at 228, 181 P.3d at 672 (providing that dismissal under NRCP 12(b)(5) is appropriate “if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief”).

Indeed, O’Keefe’s claims were based on his allegation that, because his prior Ohio convictions for criminal non-support of a dependent only resulted in concurrent 9-month prison sentences, the convictions

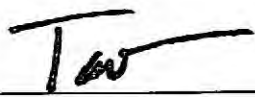
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<sup>1</sup>Moreover, the district court was required to dismiss O’Keefe’s state law claims against P&P, as he failed to satisfy the naming and service requirements set forth in NRS 41.031(2) for invoking Nevada’s waiver of sovereign immunity with respect to P&P. *See Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) (providing that subject matter jurisdiction is a question of law subject to de novo review). Additionally, because respondents are state agencies and a district court judge named in his official capacity, to the extent O’Keefe asserted civil rights claims against them under 42 U.S.C. § 1983, the district court was likewise required to dismiss the claims for lack of subject matter jurisdiction. *See id.*; *see also Craig v. Donnelly*, 135 Nev. 37, 40, 439 P.3d 413, 416 (2019) (explaining that § 1983 claims may not be maintained against stage agencies or state employees acting in their official capacities since neither are persons for purposes of that statute).

should have been classified as gross misdemeanors rather than felonies in his PSI. But our supreme court has specifically held that any objections to the content of a PSI “must be resolved prior to sentencing, and, if not resolved in the defendant’s favor, the objections must be raised on direct appeal.” *Stockmeier v. State, Bd. Of Parole Comm’rs*, 127 Nev. 243, 250-51, 255 P.3d 209, 214 (2011) (reasoning that, although any inaccuracies in a PSI can follow a defendant into the prison system, the period to challenge a PSI must be limited to prevent excessive litigation and to ensure that factual determinations are not tainted by stale evidence and unavailable witnesses). And the supreme court further concluded that, where an appellant failed to timely challenge his PSI and no entity therefore had authority to amend it post-sentencing, P&P and the Board of Parole Commissioners could not be held liable in tort for refusing to amend, or relying on, the purportedly inaccurate PSI. *Id.* at 249, 252, 255 P.3d at 213, 215. Because the supreme court’s reasoning applies equally to each of the respondents in the present case with respect to both O’Keefe’s tort claims and his civil rights claims, we conclude that his claims fail and that dismissal was therefore warranted under NRCP 12(b)(5). *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Jacqueline M. Bluth, District Judge  
Brian Kerry O'Keefe  
Attorney General/Carson City  
Attorney General/Las Vegas  
Eighth District Court Clerk