STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Matthew Dulaney,
Plaintiff Below, Petitioner

FILED
December 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-1283 (Kanawha County 08-C-1410)

David O. Schles,
Defendant Below, Respondent

MEMORANDUM DECISION

Petitioner Matthew Dulaney, *pro se*, appeals the August 18, 2011 order of the Circuit Court of Kanawha County dismissing his action against his former appellate defense attorney pursuant to the absolute immunity afforded to attorneys appointed under the federal Criminal Justice Act under *Mooney v. Frazier*, 225 W.Va. 358, 693 S.E.2d 333 (2010). Respondent David O. Schles, *pro se*, filed a summary response to which petitioner filed a reply.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In its order dismissing petitioner's action, the circuit court made the following findings of fact based upon petitioner's complaint and respondent's answer:

- On or about August 23, 2001, respondent was appointed pursuant to the federal Criminal Justice Act to represent petitioner in the United States District Court for the Southern District of West Virginia.

- Prior to respondent's appointment, petitioner had been convicted following a jury trial, where he was represented by counsel other than respondent, of robbery of a federal credit union by force or violence in violation of 18 U.S.C. § 2113(a).

- Respondent was appointed to represent petitioner in the post-conviction and appellate phases of his federal criminal

> action. During respondent's appointment and representation of petitioner, he filed numerous post-trial motions, objections to the pre-sentence report prior to sentencing, a timely appeal to the United States Court of Appeals for the Fourth Circuit, and a petition for a writ of certiorari in the Supreme Court of the United States.
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> - On or about April 4, 2003, respondent advised petitioner by letter that the Supreme Court denied the petition for a writ of certiorari and that his representation of petitioner was concluded. In the same letter, respondent advised petitioner of his right to file a petition pursuant to 28 U.S.C. § 2255 but that he would need to do so with other counsel or pro se.[1]
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> - On July 21, 2008, petitioner filed his instant action against respondent alleging that respondent committed legal malpractice during his representation of petitioner in the post-conviction phases of his federal criminal action.[2]

On July 22, 2011, respondent filed a motion to dismiss petitioner's action asserting, inter alia, that he had absolute immunity from the action pursuant to *Mooney v. Frazier*, 225 W.Va. 358, 693 S.E.2d 333 (2010).[3]

In *Mooney*, this Court held, in syllabus point four, that "[a]n attorney appointed by a federal court to represent a criminal defendant, in a federal criminal prosecution in West Virginia, has absolute immunity from purely state law claims of legal malpractice that derive from the attorney's conduct in the underlying criminal proceedings." In ruling upon respondent's motion to dismiss, the circuit court held as follows:

> In the present action, [petitioner]'s sole allegation against [respondent] is a state law claim of legal malpractice relating to [respondent]'s representation of [petitioner] in the underlying federal criminal proceeding. Therefore, the Court concludes as a

[1] Petitioner alleges that respondent failed to inform him of the deadline for filing a petition pursuant to 28 U.S.C. § 2255. *See* § 2255(f).

[2] Petitioner is an inmate at Federal Correctional Institution—McDowell in Welch, West Virginia. According to petitioner, he was sentenced to 135 months in prison to be followed by three years of supervised release. He indicates that he was also ordered to pay $22,680 in restitution. In his answer, respondent states his belief that petitioner's federal prison term is consecutive to state sentences he is still serving.

[3] Petitioner asked for a written apology from respondent along with $11,000,000 in damages.

> matter of law that [respondent] has absolute immunity from such claims. Thus, [respondent]'s Motion to Dismiss should be granted.

Accordingly, the circuit court dismissed petitioner's action.[4]

On appeal, petitioner argues that the circuit court should have liberally construed his complaint and evaluated if the complaint stated a cause of action for fraud. Petitioner asserts that respondent defrauded the federal government by billing it for a petition for a writ of certiorari he was not authorized to file, citing Rule 46(d) of the Local Rules of Procedure of the United States Court of Appeals for the Fourth Circuit. Petitioner argues that because respondent violated Local Rule 46(d), respondent acted outside the scope of his lawful representation of petitioner pursuant to the Criminal Justice Act and, accordingly, was deprived of the immunity afforded to him under *Mooney*, supra. Petitioner further argues that *Mooney* should not be applied to bar his action for a variety of reasons including that *Mooney* should not be retroactively applied. Petitioner also argues that *Mooney* allows lawyers to be slack in their representation of defendants and even allows them to sabotage their own clients' cases.

Respondent argues that petitioner's complaint did not use the word "fraud" or allege any facts that would support a claim of common law fraud. Respondent notes that petitioner made a motion to amend the complaint with the allegation that "[respondent] obtained money through the representation of [plaintiff] from the Federal Government for filing the legal filings mentioned in the complaint." Respondent asserts that this allegation, even if true, would not suffice to establish that respondent made a false statement of material fact to anyone, let alone petitioner, or that petitioner, reasonably or otherwise, relied on any statement respondent made to the federal government to suffer damages as a result of that reliance.[5] Respondent asserts that at most, petitioner's complaint makes the allegations that petitioner was not kept reasonably informed about the status of his case and that petitioner was negligently provided with erroneous legal advice. Respondent argues that *Mooney* applies to bar petitioner's action. Replying to petitioner's argument regarding retroactivity, respondent notes that "[t]he Supreme Court of Appeals of West Virginia, like all courts in the country, adheres to the common law principle that, '[a]s a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases.'" *Mooney*, 225 W.Va. at 370 n. 13, 693 S.E.2d at 345 n. 13 (internal citations omitted).

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). "[C]laims of immunities, where ripe for disposition, should be summarily

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[4] The circuit court noted respondent moved to dismiss on various grounds, but finding the issue of absolute immunity to be dispositive, the court declined to address the other grounds for dismissal.

[5] Respondent accurately describes the elements needed to prove fraud: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it." Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981) (quoting *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737, 738 (1927)).

decided before trial." *Hutchison v. City of Huntington*, 198 W.Va. 139, 147, 479 S.E.2d 649, 657 (1996) (footnote omitted) (holding that the ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine). In judicially creating immunity for court appointed attorneys, this Court in *Mooney* noted that without such immunity, "the lawyers in this state who represent indigent defendants in federal courts would be inundated with baseless claims of legal malpractice." 225 W.Va. at 370, 693 S.E.2d at 345 (footnote omitted). After careful consideration of the parties' arguments, this Court concludes that the circuit court properly dismissed petitioner's action against respondent.[6]

For the foregoing reasons, we find no error in the circuit court's decision and affirm its August 18, 2011, order dismissing petitioner's action.

Affirmed.

ISSUED: December 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

[6] Even if respondent did not have immunity, petitioner's action could still be properly dismissed because, given that his conviction was affirmed and his petition for a writ of certiorari was denied, he is unable to prove his actual innocence. *See* Syl. Pt. 2, in part, *Humphries v. Detch*, 227 W.Va. 627, 712 S.E.2d 795 (2011) (". . . There is no cause of action [for legal malpractice] as long as the determination of the plaintiff's guilt of that offense remains undisturbed.").