INDIANA JUDICIAL CENTER

# CASE CLIPS

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## CRIMINAL LAW ISSUE

**KINCAID v. STATE, No 06A01-0104-PC-138, ___ N.E.2d ___ (Ind. Ct. App. Nov. 6, 2001).**
VAIDIK, J.

Pursuant to the plea agreement that was accepted on September 22, 1997, the trial court sentenced Kincaid to the Indiana Department of Correction for a period of one year on each count, consecutive, which the trial court suspended except for the 22 days already served, and to supervised probation for a period of two years.

. . . .

On October 6, 1999, Kincaid sought post-conviction relief from the plea he entered into in September 1997. Kincaid alleged that he did not enter the plea knowingly and voluntarily. On February 3, 2000, the trial court granted Kincaid's petition and set aside his previously entered pleas . . . . [K]incaid again pled guilty . . . . The terms of the new plea agreement mirrored the terms of Kincaid's previous plea. The trial court did not credit Kincaid for the time he previously served on probation.

. . . .

Kincaid posits that the trial court's failure to credit him for probation served prior to granting his petition for post-conviction relief violates the Double Jeopardy Clauses of the United States and Indiana Constitutions. In particular, Kincaid maintains that re-sentencing him to the full two years of probation resulted in multiple punishments for the same offense in contravention of double jeopardy principles. [H]e asserts that had the trial court credited him for the time he served on probation, he would not have had any further probation to serve and would not have been on probation at the time of his July 28, 2000 probation violation.

. . . .

[W]e need only determine whether the trial court subjected Kincaid to "multiple punishments' for the same offense by re-sentencing him under the new plea agreement without giving him credit for time he served on probation under his original plea.

. . . [W]e have recognized probation as a form of punishment. [Citation omitted.] . . . Moreover, it is a well-established principle that for double jeopardy purposes a defendant must be credited for time served if re-sentenced following a successful petition for post-conviction relief. [Citations omitted.] Because probation is punishment, as is actual incarceration, we find that a probationer is similarly entitled to credit for time served on probation for double jeopardy purposes.

. . . .

Based on the foregoing, we conclude that Kincaid was subjected to multiple punishments for the same offense in contravention of double jeopardy principles. Additionally, we recognize that to hold otherwise could have a chilling effect upon a

defendant's decision to file a petition for post-conviction relief to set aside an illegal plea. [Footnote omitted.] While the trial court acted within its discretion in accepting the new plea, it should have given Kincaid credit for the 636 days of probation he previously served. . . . Further, because when properly credited his term of probation expired prior to his July 28, 2000 probation violation, we remand with instructions for the trial court to dismiss the State's Petition to Revoke. [Citation omitted.]

. . . .

DARDEN, J., concurred.

MATHIAS, J., filed a separate written opinion in which he concurred, in part as follows:

I concur that, under the unique and extraordinary facts presented to the court in this case, it was error not to credit Kincaid with his probation time previously served on the same offenses. [I] write separately to emphasize my belief that the result appropriately reached with regard to Kincaid is not a holding that should support broad application and extrapolations throughout Indiana's criminal justice system.

The critical feature in this case is that Kincaid was not credited with his probation time served on exactly the same offenses to which he pled guilty a second time after the original convictions were overturned on a post-conviction relief petition. . . .

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## CIVIL LAW ISSUE

**SIMS v. BEAMER, No. 50A03-0008-CV-295, ___ N.E.2d ___ (Ind. Ct. App. Oct. 31, 2001).**

SULLIVAN, J.

Appellant, Mario Sims, Sr., challenges the trial court's dismissal of his complaint against appellees George Beamer, James F. Groves, Michael P. Barnes, Richard A. Nussbaum, II, John Marnocha, and the County of St. Joseph.

We affirm.

The record reveals that on March 9, 2000, Sims filed a verified complaint against the defendants, which read in pertinent part:

"Plaintiff Mario L. Sims, Sr., **pro se**, for his cause of action against the defendants, states as follows:

1. Plaintiff is an African-American resident of St. Joseph County.
2. The defendants, lawyers, judges, and a County, acting under the color of state law, and pursuant to custom or policy, intended to discriminate on the basis of race, denied the plaintiff rights protected by 1st and 14th Amendments to the United States Constitution, and **42 U.S.C. §§ 1981, 1983, and 1985(3).**
3. On January 13, 2000, plaintiff filed his valid change of venue of County in the suit captioned, Mario L. Sims, Sr., v. Michael P. Barnes, John Marnocha, Richard A. Nussbaum, II., and the County of St. Joseph.
4. On February 3, 2000, Judge George Beamer, of the St. Joseph Superior Court, granted the change of venue of County motion of the plaintiff thereby divesting Beamer of any jurisdiction or authority in that case to do anything other than transfer venue.
5. The plaintiff filed his motion for default as to defendant St. Joseph County on February 16, 2000.
6. George Beamer, completely lacking in jurisdiction and authority because of the order granting the change of venue entered on February 3, 2000, and in conspiracy with Barnes, Marnocha, Nussbaum, St. Joseph County, and the attorney for Barnes, Nussbaum, and Marnocha, James F. Groves, denied the plaintiff's motion for default the same day it was filed on February 16, 2000.

. . . .

With regard to Sims' claim against Judge Beamer, particular considerations are germane. Specifically, we must determine whether Judge Beamer is entitled to judicial immunity. [Footnote omitted.] Generally, judges are entitled to absolute immunity from suits for money damages for all actions taken in the judge's judicial capacity; only where a judge's actions are taken in the complete absence of any jurisdiction will judicial immunity not apply. [Citation omitted.]

Sims argues that, because Judge Beamer had previously granted his motion to change venue, Judge Beamer acted in the complete absence of any jurisdiction when he denied Sims' motion for default judgment. Thus, according to Sims, Judge Beamer is not entitled to the protections afforded by the doctrine of judicial immunity. We disagree.

It is true that when a change of venue has been granted, a judge is generally divested of jurisdiction except to hear emergency matters. [Citations omitted.] Thus, Judge Beamer may have acted in excess of his authority. Nevertheless, a judge will not be deprived of immunity simply because the action he took was in error or in excess of his or her authority. [Citation omitted.] The United States Supreme Court has stated that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, *even when such acts are in excess of their jurisdiction,* and are alleged to have been done maliciously or corruptly." [Citation omitted.] The only situation in which a judge may be held liable for his or her actions is where the act is undertaken with clear and complete absence of jurisdiction over both the parties and the subject matter. [Citation omitted.] . . .

. . . [J]udge Beamer's act of denying Sims' motion for default judgment, although perhaps in excess of his jurisdiction over the case, was not taken in complete absence of *any* jurisdiction. . . .

Sims also claims that Judge Beamer should not be afforded the protections of judicial immunity because he is suing Judge Beamer for a non-judicial act. Sims cites Rankin v. Howard, 633 F.2d 844, 847-48 (9th Cir. 1980), for the proposition that a private, prior agreement by a judge to decide in favor of one party is not a judicial act entitled to judicial immunity. However, the Ninth Circuit's decision in Rankin was the subject of much criticism. See Ashelman, [v. Pope], 793 F.2d [1072 (9th Cir. 1986)] at 1077-78. In Ashelman, the Ninth Circuit Court of Appeals explicitly rejected and overruled Rankin, holding that a conspiracy between a judge and a prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, does not pierce the immunity extended to judges and prosecutors. 793 F.2d at 1078. Thus, we are not persuaded that, even had Judge Beamer conspired with the other defendants as alleged in Sims' complaint, we are enabled under existing precedent to pierce the cloak of judicial immunity. If the allegations in Sims' complaint are taken as true, Judge Beamer is still entitled to judicial immunity, and the trial court did not err in dismissing Sims' claim as to Judge Beamer. [Footnote omitted.]

Having determined that the trial court did not err in dismissing Sims' claim against Judge Beamer, we must determine whether the trial court properly dismissed Sims' claim as to the remaining defendants, Barnes, Groves, Marnocha, Nussbaum, and the County of St. Joseph. . . .

. . . In Indiana, there is no civil cause of action for conspiracy. [Citation omitted.] However, there is a civil cause of action for damages resulting from conspiracy. [Footnote omitted.] [Citation omitted.]

Here, the damage resulting from the alleged conspiracy was Judge Beamer's denial of Sims' motion for default judgment. Yet Sims' complaint contains no allegation, nor can any reasonable inference be drawn therefrom, suggesting that he was, in fact, entitled to a default judgment. [Footnote omitted.] If Sims was not entitled to a default judgment, he has suffered no harm from the denial. Thus, Sims has failed to allege any damage resulting from the alleged conspiracy, and even if the facts contained in the complaint are taken as true, the complaint does not state a set of facts upon which Sims could be granted relief. . . .

. . . .

MATTINGLY-MAY and NAJAM, JJ., concurred.

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