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IN THE
COURT OF APPEALS OF INDIANA

CHARLIE HERBST,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 52A02-0701-CV-119
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MIAMI SUPERIOR COURT
The Honorable Daniel C. Banina, Judge
Cause No. 52D01-0504-SC-363

September 12, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Charlie Herbst ("Herbst") appeals from the Miami Circuit Court's grant of summary judgment in favor of the State of Indiana. Upon appeal, Herbst claims that the trial court erred in granting summary judgment because his notice of claim was not barred by the statute of limitations.

We affirm.

Facts and Procedural History

Herbst is an inmate at the Indiana Department of Correction ("DOC"). See Herbst v. State, No. 52A02-0507-CV-680, slip op. at 2 (Ind. Ct. App. Jan. 25, 2006). According to Herbst, on October 20, 2002, he was placed in the solitary confinement unit as a disciplinary measure. Id. Herbst alleged his property was not properly inventoried, and, as a result, he lost a pair of athletic shoes, a calculator, magazines, a pair of headphones, and a radio. Id. Herbst first filed a grievance with the DOC, and when the DOC did not reimburse him, Herbst filed a notice of tort claim with the Indiana Attorney General pursuant to the Indiana Tort Claims Act. Id. Herbst was later notified by the Attorney General's office that a settlement was not warranted. Id.

Herbst initially filed a claim under Cause Number 52D01-0306-SC-647 on June 5, 2003. The chronological case summary for that case indicates that on June 27, 2003, the State filed a motion to dismiss. The trial court then dismissed that case with prejudice. Herbst filed a notice of appeal from the dismissal, but that appeal was later dismissed because of Herbst's failure to comply with Indiana Appellate Rule 10(F) and (G).

Herbst then filed another notice of claim based in part upon the same allegations on April 15, 2005.[1] On June 23, 2005, the State responded by filing a motion to dismiss Herbst's claim under Indiana Trial Rule 12(C), along with supporting affidavits. The trial court, without a hearing, dismissed Herbst's claim with prejudice on July 11, 2005. Upon appeal from this dismissal, this court concluded that because the motion to dismiss was accompanied by supporting affidavits, the trial court should have treated the motion to dismiss as a motion for summary judgment under Indiana Trial Rule 56 which, at the time, required a hearing. Id. at 3-4. We therefore remanded the cause with instructions to conduct a summary judgment hearing. Id. On October 27, 2006, the trial court granted summary judgment in favor of the State, concluding that Herbst's October 20, 2002 claim was barred by the applicable statute of limitations. Herbst now appeals.

Discussion and Decision

Summary judgment is appropriate only where the designated evidentiary materials demonstrate that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C) (2007).

The State argues upon appeal that we should affirm the trial court because the October 20, 2002 incident which forms the basis of Herbst's current claim is res judicata. The State notes that, in arguing to the trial court that his claim was timely, Herbst admitted that his current claim is based upon the same October 20, 2002 incident which

[1] Herbst's 2005 complaint also sought relief for two other alleged incidents which occurred on May 22 and October 13, 2003. Herbst does not now challenge the trial court's grant of summary judgment to the State regarding these claims.

formed the basis of his 2003 claim, which had been dismissed with prejudice by the trial court and the appeal therefrom dismissed by this court.

In his reply brief, Herbst notes that res judicata is listed in Indiana Trial Rule 8(C) as an affirmative defense to be pleaded and proved by the party relying thereon. The State directs us to nothing, and our search of the materials before us likewise reveals nothing, which shows that the State pleaded or proved res judicata before the trial court.

Nevertheless, "although a party who has failed to plead or prove a Rule 8(C) affirmative defense has no right to prevail on that basis, the party may nevertheless suggest to the court that procedural default of an issue is an appropriate basis to affirm the judgment below." Bunch v. State, 778 N.E.2d 1285, 1289 (Ind. 2002). Indeed, "an appellate court is not precluded from determining that an issue is foreclosed under a wide variety of circumstances." Id.; cf. Varner v. State, 847 N.E.2d 1039, 1042-43 (Ind. Ct. App. 2006), trans. denied (affirming post-conviction court's denial of relief on basis that petitioner's claim was res judicata even though State had not pleaded res judicata as an affirmative defense). Thus, although the State has no right to prevail upon the basis of res judicata, such does not preclude us from determining whether Herbst's present claim is foreclosed.

Because Herbst's current claim is based upon the same October 20, 2002 incident which formed the basis of his 2003 claim which was ultimately dismissed, his current claim is precluded on the basis of res judicata. We therefore cannot say that the trial court erred in granting summary judgment in favor of the State. See Payton v. Hadley,

819 N.E.2d 432, 438 (Ind. Ct. App. 2004) (noting that court on appeal must affirm summary judgment if it may be sustained on any theory or basis in the record).

Affirmed.

NAJAM, J., and BRADFORD, J., concur.