DIVISION ONE
FILED: 2/28/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CHRISTINA ACKER,	)	1 CA-CV 12-0236
	)	
Petitioner/Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
STATE OF ARIZONA,	)	Rule 28, Arizona Rules
	)	of Civil Appellate
Respondent/Appellee.	)	Procedure)
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. LC2011-000703-001

The Honorable Edward W. Bassett, Judge

AFFIRMED

Christina Acker — Goodyear
In Propria Persona

Thomas C. Horne, Attorney General — Phoenix
By Joseph D. Estes, Assistant Attorney General
And Daniel P. Schaack, Assistant Attorney General
Attorneys for Respondent/Appellee

K E S S L E R, Judge

¶1 Petitioner/Appellant Christina Acker ("Acker") appeals the superior court's order dismissing her petition for a writ of habeas corpus. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Acker, an Arizona inmate, filed several documents in the superior court including a "Petition for Writ of Habeas Corpus Ad Testificandum" and a "Memorandum of Law in Support of Motion for [Temporary Restraining Order ("TRO")] and [Preliminary Injunction ("PI")]" against the State of Arizona. In her motion for TRO and PI, Acker claimed she was being 1) denied access to her legal records due to prison policies; 2) denied access to "legal mail, regular mail, and inter-office mail"; and 3) retaliated against by prison personnel because of her continued litigation against them. In her motion, Acker requested the State either "[re-try] the petitioner, make the [legal documents] available, or release petitioner."

¶3 Acker originally filed these documents under the case number for the criminal matter for which she was convicted. Several weeks later, the superior court issued a minute entry order referring to the action as a "Writ of Habeas Corpus," assigning it a new case number, ordering the State to respond, and assigning the action to Judge McClennan.

¶4 The State filed a response, which argued Acker's petition should be treated as a special action in that it sought to "have state officials 'do something,'" and as such, the superior court should dismiss it for several reasons. Acker filed a motion for extension of time for which to file a reply

to the State, but the court never ruled on this motion. Although Acker eventually filed a reply to the State, the court stated in its minute entry that "[n]o reply or response to the Motion to Dismiss has been filed by Petitioner," which indicated that the court was unaware that Acker had filed a reply. Without considering Acker's reply, the court dismissed the action:

> [T]he Petition sets forth claims that were previously raised and decided against Petitioner . . . . The Superior Court's dismissal of that action was affirmed by the Arizona Court of Appeals, Division One, in *Acker v. Paralegal Chacon, et al*. . . . . Petitioner's claims are barred by the doctrine of res judicata and/or claim preclusion.

Acker timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101 (Supp. 2012).

DISCUSSION

¶5 On appeal, Acker asserts the court erred by: 1) failing to address the merits of her claims and finding that her claims were barred by *res judicata;* 2) failing to consider her petition as a petition for writ of habeas corpus when all of the issues she raised would either directly or indirectly affect the length of her sentence; 3) preventing her from requesting a change of judge pursuant to Arizona Rule of Civil Procedure

42(f); and 4) failing to consider her response to the State's motion to dismiss before making its ruling.[1]

¶6 In response, the State argues that 1) the court properly dismissed Acker's claims based on *res judicata*, 2) a petition for habeas corpus was not the appropriate vehicle for relief, and 3) Acker's petition should have been treated as a special action, over which the court could have properly denied jurisdiction.

I. Acker's claims are properly raised in a petition for special action.

¶7 Acker's allegations all center on her claim that she was being denied access to her legal documents and her mail, and thus, she was being denied access to the courts. Acker argues in her opening brief that "[a]ll of the substantive issues in the case are employed to stop access to documents and ultimately to all courts." "Denial or undue restriction of reasonable access to the courts is a denial of due process of law guaranteed to state prison inmates by the Fourteenth Amendment to the United States Constitution." *Salstrom v. State*, 148 Ariz. 382, 385, 714 P.2d 875, 878 (App. 1986).

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[1] Acker also argues for the first time on appeal that the respondents denied her medical treatment and forced her to work despite her medical issues. This Court "generally [does] not consider issues, even constitutional issues, raised for the first time on appeal." *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000). We will not address this claim.

¶8 When an appellant claims she "is being denied access to the courts, release from prison pursuant to a writ of habeas corpus is not the appropriate relief. Rather, a special action which encompasses the common law writ of mandamus would be appropriate." *Id.* at 384, 714 P.2d at 877; *see also Bustamonte v. Ryan*, 175 Ariz. 327, 328, 856 P.2d 1205, 1206 (App. 1993) (holding that "[t]he proper method for an inmate to secure access to a law library is to seek special action relief in the nature of the common law writ of mandamus"); *Knight v. Superior Court (Ybarra)*, 161 Ariz. 551, 553-54, 779 P.2d 1290, 1292-93 (App. 1989) ("It is well established in Arizona that, when an inmate is denied access to the courts . . . the appropriate remedy is to seek special action relief, which encompasses the common law writ of mandamus.").

¶9 Acker argues that because denial of access to the courts affects the length of her sentence, habeas corpus relief is appropriate. Pursuant to A.R.S. § 13-4121 (2010), "[a] person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may petition for and prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." The purpose "of habeas corpus is to test the legality and correctness of a prisoner's judgment and confinement." *Griswold v. Gomes*, 111 Ariz. 59, 62, 523 P.2d 490, 493 (1974). Habeas corpus is not an appropriate method to

seek any remedy short of absolute release; thus, it is not the proper means to obtain a remedy for denial of access to the courts. *Long v. Ariz. Bd. of Pardons and Parole*, 180 Ariz. 490, 494, 885 P.2d 178, 182 (App. 1994).

¶10 What Acker sought from the superior court was not absolute release, but rather a court order that ADOC modify its policies regarding inmate mail and the storage of and access to legal documents. In her motion for TRO and PI, Acker asserted that the "State must either [re-try] the petitioner, make [legal documents] available, or release petitioner." While Acker mentions the possibility of release if she cannot obtain her legal documents, we do not see that as a legal challenge to the legality of her confinement. Because Acker sought a remedy other than absolute release, a writ of habeas corpus was not the proper method to obtain relief.

¶11 Furthermore, contrary to Acker's assertion, resolution of her claims would not affect the length of her sentence, and even if it did, habeas corpus was still not the appropriate vehicle for relief. *See Escalanti v. Dep't of Corr.*, 174 Ariz. 526, 527 n.1, 851 P.2d 151, 152 n.1 (App. 1993) (stating that habeas corpus relief for a petitioner who alleged a miscalculation of his parole eligibility date was inappropriate because absolute release would not have been an appropriate remedy and because the petitioner was not claiming that he was

"unlawfully committed, detained, confined or restrained of his liberty" (citing A.R.S. § 13-4121)).

¶12 Although Acker was not entitled to habeas corpus relief, the superior court was able to consider her petition as one for special action. *See Brown v. State*, 117 Ariz. 476, 477-78, 573 P.2d 876, 877-78 (1978) ("Despite the fact that the petitioner is not entitled to relief by habeas corpus we have held in the past that where relief may be granted by extraordinary writ (special action), this court may grant the appropriate relief even though the writ applied for or the motion made is not aptly titled. We look to substance, not to form."). The court dismissed Acker's claims without explicitly stating that it was treating Acker's petition as one for special action.[2] We can infer, however, that the court considered Acker's petition as one for special action insofar as it dismissed her petition on the basis of *res judicata* even though she had not raised the same claims in a previous petition for habeas corpus, but rather in a previous special action petition. *See Sanders v. United States*, 373 U.S. 1, 8-9 (1963) (holding that *res judicata* is inapplicable in habeas proceedings, but a court has discretion to dispose of a petition for habeas corpus

[2] In its November 9, 2011 minute entry order, the court assigned Acker's petition with the following case number: LC2011-000703-001. The Maricopa County Superior Court designates both special actions and petitions for habeas corpus with a case number beginning in LC.

when the petitioner seeks to retry a claim formerly considered and decided in a previous habeas petition). Thus, to the extent the court treated Acker's petition as one for special action, we find no error.

II. The superior court properly dismissed Acker's claims because it was bound to do so by a previous decision of this Court.

¶13 We review for an abuse of discretion a superior court's decision to decline jurisdiction of a special action or to rule on the action's merits. *Files v. Bernal*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App. 2001). Generally, a court abuses its discretion when it commits an error of law in reaching its decision or fails to provide substantial support. *Id.* However, we will affirm the superior court even when it reached the correct result for the wrong reason. *See City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985).

¶14 The superior court, in its February 2012 minute entry order, noted that Acker had already set forth the same claims in a previous action. The case to which the court refers is *Acker v. Paralegal Chacon, et al.*, LC2010-000492-001, *affirmed*, *Acker v. Paralegal Chacon*, 1 CA-CV 10-0643, 2011 WL 4801914 (Ariz. App. Oct. 11, 2011) (mem. decision) ("2010 special action"). In that earlier case, the superior court declined to accept special action jurisdiction, finding that either Acker already brought or planned to bring the same claims in a federal action and that

federal court was a more appropriate forum. The claims Acker raised in her 2010 special action are essentially the same claims she raised in this case. In her 2010 petition, Acker alleged that she was being denied access to the courts by being denied access to her legal documents and supplies. She also claimed that she was being retaliated against by prison personnel, that prison personnel were violating ADOC policies regarding access to documents, and that ADOC policies were "illegal." Acker raised these very same claims in her petition to the superior court in this case. *See supra* ¶ 2. In her 2010 petition, Acker sought to have the ADOC adopt new policies regarding storage of and access to legal documents, comply with existing policies, and cease enforcement of unconstitutional polices. Acker sought the same relief from the superior court in this case.[3]

¶15 We cannot agree with the superior court that even though the claims raised in the 2010 special action and this petition are almost identical, the claims here are barred by *res judicata*. To invoke *res judicata*, the earlier decision must be one on the merits. *See In re Gen. Adjudication of All Rights to*

[3] Acker's form of order, which was filed with her petition, asked the trial court to order the respondents "to provide daily access to legal documents," to "cease their unconstitutional obstruction to petitioner's fundamental right to access the courts," and to change existing ADOC policies regarding inmate mail and the storage and availability of legal documents.

Use Water in the Gila River Sys. & Source, 212 Ariz. 64, 69, ¶ 14, 127 P.3d 882, 887 (2006) ("[T]he doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, 'it is a finality as to the claim or demand in controversy . . . .'" (citations omitted)). The superior court in the 2010 special action and this Court on appeal did not rule on the merits of Acker's petition. Rather, we concluded that the superior court did not abuse its discretion in declining special action jurisdiction based on Acker's statements that she had raised these claims in federal court. This was not a decision on the merits.[4] *See Bilagody v. Thorneycroft*, 125 Ariz. 88, 92, 607 P.2d 965, 969 (App. 1979) (stating that when the superior court declines in its discretion to assume special action jurisdiction, there exists no trial court determination of the merits for this Court to review on appeal).

¶16 While *res judicata* does not apply, we will affirm the superior court if it reached the correct result for the wrong reason. *See Geyler*, 144 Ariz. at 330, 697 P.2d at 1080. A lower court is bound by the decision of a higher court in this

[4] In her petition for review to the Arizona Supreme Court in the 2010 proceeding, Acker claimed that this Court had misquoted her special action petition because she had never actually filed a case in federal court raising these claims and that she had to exhaust her state remedies before seeking federal habeas relief. The supreme court denied her petition for review. Nothing in this decision or this Court's 2011 decision precludes Acker from raising these claims in an action pursuant to 42 U.S.C. section 1983.

state and has no "authority to modify or disregard [the appellate court's] rulings." *State v. Smyers*, 207 Ariz. 314, 318 n.4, ¶ 15, 86 P.3d 370, 374 n.4 (2004); *see also McKay v. Indus. Comm'n*, 103 Ariz. 191, 193, 438 P.2d 757, 759 (1968) ("Whether prior decisions of the highest court in a state are to be disaffirmed is a question for the court which makes the decisions. Any other rule would lead to chaos in our judicial system."); *Pac. Greyhound Lines v. Brooks*, 70 Ariz. 339, 343, 220 P.2d 477, 479 (1950) ("A judgment of this court imports absolute verity. It must be regarded as free from all error. It is final and conclusive upon the superior courts and the judges thereof, and they may not question such judgment . . . ." (citation omitted)). Thus, the superior court was bound by this Court's decision in the 2010 special action and was obligated to deny jurisdiction of Acker's claim. Therefore, we find no abuse of discretion.[5]

III. Acker may not raise the issue of her right to file a notice of change of judge for the first time on appeal.

¶17 Acker alleges that she was denied the ability to exercise her right to object to the assignment of Judge Bassett pursuant to Rule 42(f)(1)(A). Rule 42(f)(1)(A) provides that

[5] Whether Acker can bring an action under 42 U.S.C. § 1983 for the conduct alleged here and in the 2010 special action is not before us and we render no opinion on the merits or availability of such relief, nor do we imply that such a claim would be barred by our decision.

"[i]n any action pending in superior court . . . each side is entitled as a matter of right to a change of one judge and of one court commissioner." A party who wishes to exercise her right to a change of judge must file a "Notice of Change of Judge." Ariz. R. Civ. P. 42(f)(1)(A).

¶18 In November 2011, the court issued a minute entry order which assigned Acker's petition a new case number and assigned the case to Judge McClennen. On January 18, 2012, the court, through Judge Bassett, not Judge McClennen, issued a minute entry order granting the State's motion for an extension of time for which to file its response to Acker's petition. On February 13, 2012, the minute entry order dismissing Acker's petition was filed and signed by Judge Bassett. Thus, Acker was on notice of the change of judge when the court's January 18, 2012 minute entry order was filed. Acker never filed a notice of change of judge, and she failed to raise this issue in a motion for new trial, a motion for reconsideration, or a motion for relief from the judgment. "It is settled that an appellate court cannot consider issues and theories not presented to the court below." *Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982).

IV. The issue Of Acker's reply memorandum is moot.

¶19 Acker alleges the court erred by failing to consider her reply to the State's response to her petition before making

its ruling. Because the superior court did not have the authority to accept jurisdiction of Acker's claims, the issue is moot, and we need not decide whether the court erred in failing to consider Acker's reply.

CONCLUSION

¶20 For the foregoing reasons, we affirm the superior court's denial of special action jurisdiction over Acker's claims.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
JOHN C. GEMMILL, Presiding Judge

/S/
JON W. THOMPSON, Judge