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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/30/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LARRY DONNELL DUNLAP,) 1 CA-CV 09-0548
)
Plaintiff/Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Rule 28, Arizona Rules
) of Civil Appellate Procedure)
TIMOTHY C. LAWRENCE; VICTOR)
RUBOYIANES; UNKNOWN BOCK; MARIA)
T. HERNANDEZ; CO II BRITTON,)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-001682

The Honorable J. Kenneth Mangum, Judge
The Honorable Kristin Hoffman, Judge

AFFIRMED

Larry Donnell Dunlap) Florence
In Propria Persona)

Terry Goddard, Attorney General) Phoenix
By A.J. Rogers, Assistant Attorney General)
Attorneys for Defendants/Appellees)

N O R R I S, Judge

¶1 Larry Donnell Dunlap, an inmate in the Arizona Department of Corrections ("DOC"), appeals the superior court's orders dismissing claims for failure to exhaust administrative

remedies and granting Timothy C. Lawrence et al. ("Appellees") summary judgment on Dunlap's claim the DOC disciplinary hearing procedures violated his due process rights. Because the superior court's rulings were factually and legally correct, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On October 18, 2004, prison librarian Ruboyianes issued a written report alleging Dunlap committed a "B05" major violation for lying or presenting false or misleading information in order to obtain legal supplies in excess of those authorized by DOC rules. Disciplinary Coordinator Britton served the charge on Dunlap and further investigated the allegation. On November 10, 2004, Ruboyianes changed the title of the charge to obstructing/hindering staff and referenced major violation number "B09." The narrative of the statement of violation remained unchanged.¹ That same day, Dunlap received the report.

¹According to the statement of violation, Ruboyianes had in August 2004 warned Dunlap about lying to library staff regarding his legal work, and on October 18, 2004, Dunlap "lied about a recent paralegal denial [of a request for photocopies] in an attempt to receive legal supplies in excess of those authorized by D.O. 902." Britton's investigation revealed Dunlap in fact had received all his requested copies, but the paralegal had denied his request for additional supplies because Dunlap was using them for non-qualified purposes. Thus, Dunlap allegedly lied to Ruboyianes when he stated he needed the extra supplies because he had to handwrite copies of legal papers due to the paralegal's denial of his photocopy request.

¶13 On November 18, 2004, Disciplinary Hearing Officer Erbert conducted a hearing on the matter. Erbert did not allow four witnesses² proposed by Dunlap to appear, finding their proposed testimony irrelevant. After considering the amended report and apparently also Ruboyianes's testimony or his written statement,³ Erbert issued her written findings concluding it was more probably true than not that Dunlap committed the violation. Erbert consequently ordered ten days of disciplinary detention, 30 days loss of privileges, and a referral to the Institutional Classification Committee, which subsequently raised Dunlap's institutional score from one to two. Deputy Warden Kimble approved the decision and penalties but removed the ten days of disciplinary detention.

¶14 Dunlap appealed the disciplinary charge. Kimble denied the appeal specifically finding no due process violation and adequate proof. He also found the sanctions were consistent with the penalties prescribed for the violation. Lawrence, the Constituent Services Administrator, denied Dunlap's subsequent appeal to the Director's level.

²One witness was Appellee Hernandez, another prison librarian.

³According to Ruboyianes's written statement, his duties were "hindered/obstructed" because he had to search records to determine whether Dunlap had received legal copies during the time period Dunlap specified.

¶15 On January 26, 2007, Dunlap filed a complaint in superior court pursuant to 42 U.S.C. § 1983 (2006).⁴ He named as defendants seven employees of DOC -- including Britton, Erbert, Ruboyianes, and Lawrence -- and Betty Ulibarri, a contract paralegal for DOC. Dunlap alleged Department Order 902, Inmate Access to the Courts, was unconstitutional ("902 claim"); he had been denied access to the courts ("access claim"); retaliation ("retaliation claim"); and a violation of his due process rights based on the disciplinary action taken against him ("due process claim"). By minute entry filed April 26, 2007, the superior court dismissed the 902 claim, access claim, and retaliation claim because Dunlap had failed to exhaust administrative remedies.⁵

¶16 The superior court subsequently granted Appellees summary judgment on the due process claim, finding Dunlap had not shown he was entitled to due process protection pursuant to *Sandin v. Conner*, 515 U.S. 472 (1995), and alternatively, Dunlap received all the process he was due under *Wolff v. McDonnell*,

⁴Under 42 U.S.C. § 1983, a person may recover damages from any state employee acting under color of law or authority who deprives the plaintiff of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States.

⁵"No action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2006).

418 U.S. 539 (1974).⁶ Dunlap timely appealed, and we have jurisdiction under Arizona Revised Statutes section 12-2101(B) (2003).

DISCUSSION

¶7 In his opening brief, Dunlap lists seven issues presented for review, none of which he adequately develops in his briefing. See *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5,

⁶In *Wolff v. McDonnell*, the Supreme Court addressed the scope of due process protections properly afforded inmates who are subject to a loss of good-time credits for an alleged rule violation, keeping in mind the unique characteristics and purposes of imprisonment. 418 U.S. at 555-63. The Court held such protections include: written notice of the alleged rule violation at least 24 hours in advance of the prescribed hearing; a "'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action"; and a qualified right to present relevant evidence. *Id.* at 563-67 (internal citation omitted). The Court declined to hold that, in such inmate disciplinary proceedings, due process affords the inmate a right to confrontation, cross-examination, or counsel. *Id.* at 567-70.

Twenty-one years later, the Supreme Court in *Sandin v. Conner* addressed "whether disciplinary confinement of inmates itself implicates constitutional liberty interests." 515 U.S. at 486. In that case, a prison disciplinary committee sentenced an inmate to 30 days of segregated confinement, and the inmate claimed he did not receive the process he was due under *Wolff* at the disciplinary proceedings. *Id.* at 475-76. Recognizing that "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law[,]," the Court held the discipline at issue "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." *Id.* at 485-86. Because the 30-day confinement also would not "inevitably affect the duration of his sentence[,]," the Court ultimately concluded the inmate was not entitled "to the procedural protections set forth in *Wolff*." *Id.* at 487.

¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) (appellate courts "will not consider arguments posited without authority").

I. Claims Dismissed for Failure to Exhaust Administrative Remedies

¶8 In his opening brief, Dunlap lists but fails to adequately develop arguments challenging the superior court's dismissal of the 902 claim, access claim, and retaliation claim. This failure constitutes abandonment and waiver of these arguments. *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004).

¶9 But even if not abandoned and waived, the record supports the superior court's finding dismissal was proper. Dunlap did not exhaust the full DOC grievance procedure because he did not appeal these particular claims to the Director level. A memorandum sent to Dunlap by DOC in 2003 informed him of his placement on the "grievance abuse list," but this did not relieve him of the need to exhaust DOC's administrative procedure in the future. The memorandum said "[a]dministrative remedies have been exhausted. Future grievances demonstrating a continued pattern of abuse . . . will be . . . returned . . . unanswered and not subject to appeal." On its face, this memorandum, however, neither prohibited Dunlap from filing future legitimate grievances nor excused him from exhausting administrative remedies for all future grievances. As the superior court found, "[t]he fact that [Dunlap] was on the

inmate grievance list did not preclude him from [appealing to the Director]." As such, the superior court's order dismissing the 902 claim, access claim, and retaliation claim was proper.

II. Other Claims on Appeal

¶10 As for the remaining issues, most notably the issue regarding the grant of summary judgment, Dunlap merely mentions them but develops no argument and presents no authority supporting his contentions.⁷ Nonetheless, we briefly address arguments Dunlap at least somewhat develops.

¶11 Dunlap first appears to argue Ruboyianes violated his due process rights by amending the disciplinary report to reflect an alleged violation of B09 instead of B05. Dunlap contends this amendment shows "he did not violate B05." He further claims "that the due process [sic] requires that he be charged with the correct violation" The record, however, fails to show Dunlap was found not guilty of a B05 violation; rather, the record reflects the disciplinary report was amended to reflect a different rule was violated, while the narrative outlining the basis for the alleged violation remained

⁷We review de novo the grant of a motion for summary judgment. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1).

unchanged. The record also shows Dunlap received timely notice of this change before the disciplinary hearing.⁸

¶12 Dunlap also appears to contend the punishment he received in his disciplinary matter impacted his "liberty interest" to such an extent as to implicate due process concerns. For example, Dunlap claims "the board of clemency will use the information on this ticket to lengthen [his] sentence in this case." The record does not support this assertion, which, in any event, is "simply too attenuated to invoke the procedural guarantees of the Due Process Clause." *Sandin*, 515 U.S. at 487. The record also does not support Dunlap's assertion his level of confinement changed or he was denied opportunities for "church, classes and visitation, and phone calls to his family." Even if the record did show Dunlap experienced this level of discipline, a 30-day loss of privileges does not necessarily implicate due process concerns because the discipline is not a "restraint . . . [that] imposes atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *See id.* at 484.

¶13 Next, Dunlap claims the superior court should have granted him "default against appellee's [sic] Betty Ulibarri in

⁸The record similarly does not support Dunlap's assertions (1) he procured witness testimony showing he was not guilty of a B05 or B09 violation; or (2) Erbert made any improper statements to Dunlap regarding her decision to deny Dunlap's proposed witness testimony as irrelevant.

this case." According to Dunlap, service of "the civil lawsuit, in this case" on Ulibarri's husband provided jurisdiction over Ulibarri. Although the process server served Ulibarri's husband with the complaint at home, the process server did not serve the husband with a summons. See Ariz. R. Civ. P. 4.1(b) ("The summons and pleading being served shall be served together."). It was Dunlap's duty to ensure service of a summons on Ulibarri within 120 days of filing the complaint. *Id.*; Ariz. R. Civ. P. 4(i). Dunlap also did not seek waiver of service pursuant to Rule 4.1(c)(2). Therefore, Dunlap failed to effectuate service of process on Ulibarri. Ariz. R. Civ. P. 4.1(d). Accordingly, the court did not have jurisdiction over Ulibarri, and its implied denial of Dunlap's "default" was not error. *Postal Instant Press, Inc. v. Corral Rests., Inc.*, 186 Ariz. 535, 537, 925 P.2d 260, 262 (1996) ("Completion of service of process is the event which brings the party served within the jurisdiction of the court. Conversely, as long as service remains incomplete, or is defective, the court never acquires jurisdiction.").

¶14 Finally, Dunlap argues the superior court should have addressed his contention DOC staff improperly prevented service on Erbert. Dunlap, however, fails to explain how this purported error affected the superior court's award of summary judgment to Appellees. We find no reversible error.

CONCLUSION

¶15 For the foregoing reasons, we affirm the superior court's orders dismissing claims for failure to exhaust administrative remedies and granting Appellees summary judgment.

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Presiding Judge

/s/

PATRICK IRVINE, Judge