

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KENNETH WAYNE REED, *Plaintiff/Appellant*,

v.

S. NEGRON, et al., *Defendants/Appellees*.

No. 1 CA-CV 20-0484
FILED 9-30-2021

Appeal from the Superior Court in Maricopa County
No. CV2020-003240
The Honorable Randall H. Warner, Judge

AFFIRMED

APPEARANCES

Kenneth Wayne Reed, Tucson
Plaintiff/Appellant

Arizona Attorney General's Office, Phoenix
By Michael E. Gottfried
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge D. Steven Williams delivered the decision of the Court, in which Judge David B. Gass and Judge James B. Morse Jr. joined.

WILLIAMS, Judge:

¶1 Kenneth Reed, an inmate at the Arizona Department of Corrections (“DOC”), appeals the superior court’s order dismissing his complaint against the State of Arizona and David Shinn, the director of DOC. For reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Reed was convicted in a prison disciplinary proceeding of violating a prison regulation. As a sanction, Reed’s television privileges were temporarily revoked. Reed filed a complaint against several DOC employees, the State of Arizona, and director Shinn, in his official capacity, alleging DOC did not afford Reed due process in the disciplinary proceeding. Reed asserted a federal civil rights claim under 42 U.S.C. § 1983 and state law tort claims. He sought compensatory and punitive damages and injunctive relief. Reed served the complaint on the State and director Shinn but not on the other named defendants.

¶3 The State and director Shinn moved to dismiss the complaint under Arizona Rule of Civil Procedure 12(b)(6). They argued Reed’s claims under 42 U.S.C. § 1983 could not be asserted against the State or director Shinn and A.R.S. § 31-201.01(L) barred Reed’s tort claims. After briefing, the superior court granted the motion to dismiss.

¶4 We have jurisdiction over Reed’s timely appeal under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶5 The superior court may grant a motion to dismiss if the plaintiff is not entitled to relief “under any facts susceptible of proof in the statement of the claim.” *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 289, ¶ 5 (App. 2010) (quoting *Mohave Disposal Inc. v. City of Kingman*, 186 Ariz.

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343, 346 (1996)). We review de novo the court's dismissal of a complaint for failure to state a claim. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012).

¶6 Reed does not advance his claims under 42 U.S.C. § 1983 on appeal. Accordingly, they are waived. See *Van Loan v. Van Loan*, 116 Ariz. 272, 274 (1977) ("The failure to raise an issue . . . in briefs on appeal constitutes waiver of the issue.").

¶7 Reed, however, contends the superior court erred when it concluded A.R.S. § 31-201.01(L) barred his claim. We review questions of statutory interpretation de novo. *Tripati v. State*, 199 Ariz. 222, 224, ¶ 2 (App. 2000).

¶8 A.R.S. § 31-201.01(L) provides:

A person who is convicted of a felony offense and who is incarcerated while awaiting sentence or while serving a sentence imposed by a court of law *may not bring a cause of action seeking damages or equitable relief* from the state or its political subdivisions, agencies, officers or employees for injuries suffered while in the custody of the state or its political subdivisions or agencies *unless the complaint alleges specific facts from which the court may conclude that the plaintiff suffered serious physical injury or the claim is authorized by a federal statute.*

(Emphasis added.) By its plain terms, the statute establishes that Reed may seek damages or equitable relief from the State or director Shinn only if (1) he alleges a serious physical injury, or (2) his claim is authorized by a federal statute.

¶9 On appeal, Reed neither contends he suffered a serious physical injury, nor does he contend a federal statute authorizes his claim. Rather, citing the following applicability provision of the 1993 amendment to § 31-201.01, Reed argues the statute applies only to inmates who committed their felonies after 1994:

Laws 1993, Ch. 255, § 99, as amended by Laws 1994, Ch. 236, § 17, effective July 17, 1994, retroactively effective to January 1, 1994, provides:

Sec. 99. Applicability

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The provisions of §§ 1 through 86 and §§ 89 through 95 of *this act* apply only to persons who commit a felony offense after the effective date of *this act*.

1993 Ariz. Sess. Laws, ch. 255, § 99 (1st Reg. Sess.) (S.B. 1049) (emphasis added). Thus, because he is serving a sentence based on an offense “which was alleged to have been committed . . . in 1989,” Reed asserts that § 31-201.01(L) does not apply to him.

¶10 Reed’s argument fails because current subsection (L) of § 31-201.01 was not added in the 1993 amendment. *See* 1993 Ariz. Sess. Laws, ch. 255, § 57 (1st Reg. Sess.) (S.B. 1049). Because the applicability provision covers only the provisions of the 1993 amendment, it has no effect on subsection (L), which was added to § 31-201.01 as subsection (G) the following year. *See* 1994 Ariz. Sess. Laws, ch. 358, § 3 (2nd Reg. Sess.) (S.B. 1111) (adding subsection (G)); 1995 Ariz. Sess. Laws, ch. 129, § 1 (1st Reg. Sess.) (H.B. 2367) (amending and moving subsection (G) to subsection (L)). Reed’s claim is therefore precluded by § 31-201.01(L).

CONCLUSION

¶11 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA