

**NOTICE**

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2016 IL App (4th) 150740-U

NO. 4-15-0740

**FILED**

September 28, 2016  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

WINFRED OLIVER,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
GUY PIERCE, Warden, Pontiac Correctional Center;	)	No. 10MR380
DONALD J. GISH, Chairperson of the Adjustment	)	
Committee at Pontiac Correctional Center; SHERRY	)	
BENTON, Administrative Review Board of the	)	
Department of Corrections; JEFFREY GABOR, Internal	)	
Affairs Officer for the Department of Corrections;	)	
PATRICK HASTINGS, Grievance Officer at Pontiac	)	
Correctional Center; and MICHAEL P. RANDLE,	)	Honorable
Director of the Department of Corrections,	)	John P. Schmidt,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.  
Justices Harris and Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in denying plaintiff's second amended petition for a writ of *certiorari*.

¶ 2 On November 8, 2011, plaintiff, Winfred Oliver, filed a petition for a common law writ of *certiorari* in the trial court. Thereafter, Oliver filed amended petitions for common law *certiorari* and included a claim based on section 1983 (42 U.S.C. § 1983 (2012)). On August 12, 2015, the trial court denied Oliver's second amended petition for a writ of *certiorari* and dismissed his section 1983 claim. Oliver appeals. We reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 On December 9, 2009, Oliver, a prisoner at Pontiac Correctional Center, received a prison disciplinary ticket alleging he violated Illinois Department of Corrections Rule 501, which prohibits violating a State or federal law, and Illinois Department of Corrections Rule 601, which prohibits attempting to violate a State or federal law. 20 Ill. Adm. Code 504 App. A (eff. May 1, 2003). The underlying offense on which the disciplinary ticket was based was section 11-24 of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/11-24 (West 2008)). Section 11-24 deals with child photography by a sex offender and makes it unlawful for a sex offender to knowingly:

"(1) conduct or operate any type of business in which he or she photographs, videotapes, or takes a digital image of a child; or

(2) conduct or operate any type of business in which he or she instructs or directs another person to photograph, videotape, or take a digital image of a child; or

(3) photograph, videotape, or take a digital image of a child, or instruct or direct another person to photograph, videotape, or take a digital image of a child without the consent of the parent or guardian." 720 ILCS 5/11-24(b)(1) to (b)(3) (West 2008).

The ticket alleged Oliver had unlawfully requested images of children from an Internet search company called Website Request. Oliver is currently serving a 50-year sentence for predatory criminal sexual assault.

¶ 5 Oliver pleaded not guilty at a disciplinary hearing on January 18, 2010. He submitted a written response asserting no evidence supported a finding he had committed, solicited, or attempted to commit the alleged charge. The adjustment committee found Oliver

guilty and recommended revoking one year of good-conduct credit. The final summary report provided the following basis for its decision:

"Based on the observation of the reporting employee that offender Oliver sent a letter to 'Website Request' attempting to purchase images of cute pre-teen, girls or boys in swimwear, beach, swimming pools, or kiddies beauty pageants; offender also stated 'I'll try a small order to see if my institution will allow them in'; the reporting employee's positive identification of the offender by face and state [identification] card; the copy of the offender's letter to Website Request verifying that the offender was trying to conduct business with the company. The committee is satisfied that the violation occurred as reported."

Oliver filed a grievance regarding the decision, which was denied. Oliver then appealed the decision to the director of the Illinois Department of Corrections. The director denied Oliver's appeal.

¶ 6 On June 21, 2010, Oliver filed a petition for a common law writ of *certiorari* in the trial court, challenging the disciplinary committee's guilty finding. Oliver claimed the committee's finding was based on an inapplicable statute.

¶ 7 On August 19, 2010, defendants filed a motion to dismiss Oliver's petition. On November 15, 2010, the trial court granted defendants' motion to dismiss. This court reversed the dismissal and remanded the case for further proceedings. *Oliver v. Pierce*, 2012 IL App (4th) 110005, 964 N.E.2d 666.

¶ 8 On September 24, 2013, Oliver requested leave to file an amended petition. On July 7, 2014, the trial court allowed the amendment. On August 6, 2014, defendants filed a brief in response to Oliver's amended petition.

¶ 9 On September 26, 2014, Oliver requested leave to file a second amended petition/complaint pursuant to section 1983. The trial court allowed this amendment on April 21, 2015.

¶ 10 In the second amended petition/complaint, Oliver argued his actions did not violate section 11-24 of the Criminal Code (720 ILCS 5/11-24 (West 2008)). According to his petition:

"My possessing or attempting to possess, as a sex offender, such pre-existing, innocuous, non-pornographic and non-obscene images of children as a consumer product from Website Request—an internet search service for inmates whose business model does not include photography or image production—is not a criminal offense per 720 ILCS 5/11-24 that is synonymous with a sex offender who takes real-world photos of a child(ren); or actively engages in 'conducting' or 'operating' a business entity to produce such images; or instructs another to do the same as set forth in the underlying statute."

¶ 11 On May 20, 2015, defendants filed a motion to dismiss, pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-619(a)(9) (West 2014)), the portion of Oliver's second amended complaint filed pursuant to section 1983 (42 U.S.C. § 1983 (2012)). According to the motion: "Because Plaintiff is seeking to attack the due

process and validity of discipline where he lost good time and because the discipline has not been overturned or expunged, Plaintiff is barred from filing such a suit for damages pursuant to §1983."

¶ 12 In addition, defendants filed a brief in response to Oliver's second amended petition for a common law writ of *certiorari*. Defendants argued:

"In reviewing an agency's decision under common law *certiorari*, the standard applied is whether there is any evidence in the record which fairly tends to support the decision. *Kraft, Inc., Dairy Group v. City of Peoria*, 177 Ill. App. 3d 197, 204, 531 N.E.2d 1106, 1111 (3d Dist. 1988). A reviewing court will not reweigh the evidence but may set aside the agency's finding if against the manifest weight of the evidence. *Id.*"

Citing *Walpole v. Hill*, 472 U.S. 445, 456 (1985), defendants argued courts should not overturn decisions made by prison administrators that have some factual basis. According to defendants:

"Plaintiff complains that there was insufficient evidence for the Adjustment Committee to find him guilty of the offense as charged, but the record shows that there was sufficient evidence in the record for the prison discipline. Plaintiff was charged with attempting to possess or solicit violation of a state statute. The underlying statute prohibits a child sex offender from knowingly: conducting businesses where he or she photographs children; or conducting or operating a type of business in which he or she instructs another person to photograph a child; or instructing or

directing another person to photograph a child without the consent of the parent or guardian. 720 ILCS 5/11-24(b). Plaintiff claims that he was not engaged in activity that would have violated the statute, but that is not plainly apparent. Plaintiff is a child sex offender under the statute and he did not ask that he only be sent photographs already in existence. Plaintiff's letter shows that he knew he was engaging in improper conduct and could be considered a step in directing or soliciting someone else to violate the statute by taking photographs of pre-teens. There was some evidence in support of the Adjustment Committee decision and the Adjustment Committee's decision was not against the manifest weight of the evidence."

¶ 13 On July 30, 2015, Oliver filed a motion to stay his section 1983 claim. Oliver asked the court to stay his section 1983 claim until his *certiorari* claim was fully adjudicated. Oliver did not dispute defendants' position presented in their motion to dismiss.

¶ 14 That same day, Oliver also filed a motion to strike defendants' brief and admit the allegations in his second amended petition for a writ of *certiorari*.

¶ 15 On August 12, 2015, the trial court entered a docket entry, stating, in relevant part: "Cause called on for motions. Arguments heard. Defendants['] motion to dismiss is allowed as to both parts. Plaintiff's motion to strike is denied. Motion to dismiss contained in brief is allowed. Case dismissed. Cause stricken." The court did not rule on Oliver's motion to stay proceedings on the section 1983 claim.

¶ 16 This appeal followed.

¶ 17

## II. ANALYSIS

¶ 18 Oliver first argues the brief defendants filed in response to his second amended petition for a writ of *certiorari* was not an answer and should have been stricken. According to Oliver, when the trial court granted defendants 30 days to respond to his second amended petition, defendants were required to either file a dispositive motion or file an answer pursuant to section 2-610 of the Procedure Code (735 ILCS 5/2-610(a) (West 2014)). Instead, defendants filed a brief opposing the petition for a writ of *certiorari*. Oliver provides no analysis as to why defendants were required to file either an answer or a dispositive motion instead of a brief. Further, Oliver provides no analysis as to why the trial court did not have discretion to deny his motion to strike. Because this court is not a depository for an appellant to dump the burden of argument and research (*Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 522 (2001)), we find this argument forfeited.

¶ 19 Oliver also states the trial court should have granted his motion to strike because defendants' brief was not responsive to the material allegations in his amended petition. As support for this argument, Oliver cites *J.R. Watkins Co. v. Salyers*, 319 Ill. App. 369, 49 N.E.2d 288 (1943), and *Joppa High School District No. 21 v. Jones*, 35 Ill. App. 3d 323, 341 N.E.2d 419 (1976). However, both of those cases were dealing with "answers." This case is distinguishable because defendants here did not file an answer. Instead, they filed a brief, which provided the court information showing why it should deny Oliver's petition and requested the same.

¶ 20 In addition, citing section 2-610 of the Procedure Code (735 ILCS 5/2-610 (West 2014)), Oliver argues all of the allegations in his petition should have been deemed admitted and taken as true. Oliver cites *Hiram Walker Distributing Co. v. Williams*, 99 Ill. App. 3d 878, 426 N.E.2d 8 (1981), and *In re Adoption of McFadyen*, 108 Ill. App. 3d 329, 438 N.E.2d 1362

(1982), as support for this argument. However, he provides this court with no analysis to show why these cases or section 2-610 of the Procedure Code support his claim the allegations in his amended petition for a writ of *certiorari* should have been deemed admitted and taken as true when defendants filed a responsive brief instead of an answer. As noted above, this court is not a depository for an appellant to dump the burden of argument and research. (*Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 522 (2001)). As a result, we find this argument forfeited.

¶ 21 Oliver next argues defendants are collaterally estopped from raising issues in their responsive brief that had been previously determined by the trial court. According to Oliver's brief, "It is evident here that the defendants are trying to take a proverbial second bite at the apple by filing a duplicate motion to dismiss disguised as a 'brief.'" "Collateral estoppel bars a claim when (1) the issue decided in the first proceeding is identical with the one presented in the current action; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior adjudication." *Terry v. Watts Copy Systems, Inc.*, 329 Ill. App. 3d 382, 389, 768 N.E.2d 789, 796 (2002). However, the prior ruling Oliver relies on was in the same proceeding. As a result, collateral estoppel does not apply here.

¶ 22 Oliver next argues the trial court erred in dismissing his petition for a writ of *certiorari* because dismissal is not cognizable at this stage of the proceeding. He quotes language from a federal decision stating a petition for a writ of *certiorari* is not subject to dismissal if the petition alleges a violation of procedural and substantive rights. *Piekosz-Murphy v. Board of Education Community High School District No. 230*, 858 F. Supp. 2d 952, 962-63 (N.D. Ill. 2012). The court in *Piekosz-Murphy* relied on this court's decision in *Tanner v. Court of Claims*, 256 Ill. App. 3d 1089, 1098, 629 N.E.2d 696, 698-99 (1994). In *Tanner*, this court



stated: "Where a plaintiff brings into issue the alleged violation of his procedural and substantive rights, the petition is not subject to dismissal, as such issue cannot be determined as a matter of law upon the bare allegations of the petition. 14 C.J.S. *Certiorari* § 76, at 111 (1991)." *Tanner*, 256 Ill. App. 3d at 1092, 629 N.E.2d at 698-99.

¶ 23            However, this is not an absolute rule. We note *certiorari* review does not exist as a matter of right, and the issuance of the writ is within the sound discretion of the trial court. *Stratton v. Wenona Community Unit District No. 1*, 133 Ill. 2d 413, 428, 551 N.E.2d 640, 646 (1990). In *Tanner*, this court noted a petition for a writ of *certiorari* relief is properly denied if a petitioner cannot prevail or is not entitled to the review he seeks. *Tanner*, 256 Ill. App. 3d at 1092, 629 N.E.2d at 699. In other words, in certain situations, a court might have all the information necessary, even absent the certified record from the lower tribunal, to determine the petitioner cannot prevail. In that situation, a court could deny the petition.

¶ 24            However, the information the trial court had in this case did not establish Oliver could not prevail. Oliver's disciplinary ticket charged him with violating section 11-24 of the Criminal Code (720 ILCS 5/11-24 (2008)). However, the trial court had no evidence defendant actually violated this statute. Perhaps his actions violated some other administrative rule or statute. However, he was charged with violating a specific statute. Based on the record in this case, the trial court abused its discretion in denying Oliver's petition for a writ of *certiorari*. Once the certified record is submitted to the trial court pursuant to the writ of *certiorari*, the court will need to determine whether to quash the writ if the administrative body had sufficient evidence or quash the underlying administrative proceeding if sufficient evidence did not exist. *Tanner*, 256 Ill. App. 3d at 1091-92, 629 N.E.2d at 698.

¶ 25 Finally, we address Oliver's argument the trial court erred in not considering his motion to stay his section 1983 claim before dismissing it at the same time the court denied his petition for a writ of *certiorari*. Because we are reversing the trial court's denial of Oliver's petition for a writ of *certiorari*, we also reverse the dismissal of Oliver's section 1983 claim.

¶ 26 The trial court did not state why it was dismissing Oliver's section 1983 claim. However, it appears likely the claim was dismissed in large part because the court denied Oliver's petition for a writ of *certiorari* and, therefore, the disciplinary determination would not be overturned. See *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). As we are now ordering the trial court to grant Oliver's petition for a writ of *certiorari*, it is unclear whether the administrative finding will stand. On remand, Oliver is free to ask the trial court to stay his section 1983 claim. However, we make no judgment as to the merits of Oliver's motion to stay or the section 1983 claim itself.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we reverse the denial of Oliver's second amended petition for a writ of *certiorari* and the dismissal of Oliver's section 1983 claim and remand this case for further proceedings. We direct the trial court to grant Oliver's second amended petition for a writ of *certiorari*.

¶ 29 Reversed and remanded with directions.