2016 IL App (4th) 150741-U

NO. 4-15-0741

FILED
September 28, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WINFRED OLIVER, Plaintiff-Appellant, v. MICHAEL MELVIN, Warden, Pontiac Correctional Center; JEFFREY GABOR, Investigator for Pontiac Correctional Center; DONALD GISH, Adjustment Committee for Pontiac Correctional Center; ANGELICA JOYNER, Adjustment Committee for Pontiac Correctional Center; PATRICK HASTINGS, Grievance Officer for Pontiac Correctional Center; MARVIN REED, Assistant Warden for Pontiac Correctional Center; DAVE LINGLE, Clinical Service Supervisor for Pontiac Correctional Center; EDDIE JONES, Chief of Operations; SHERRY BENTON, Administrative Review Board; JOHN R. BALDWIN, Director of the Illinois Department of Corrections, Defendants-Appellees,	)	Appeal from Circuit Court of Sangamon County No. 11MR688 Honorable John P. Schmidt, Judge Presiding.

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

ORDER

¶ 1 *Held*: The trial court did not err in denying plaintiff's 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. On September 27, 2013, Oliver filed an amended petition for a common law writ of *certiorari*. On August 12, 2015, the trial court "dismissed" or denied Oliver's petition. Oliver appeals, arguing (1) a brief filed by defendants in response to Oliver's amended petition should have been stricken and Oliver's allegations in the amended petition

deemed admitted, (2) defendants were collaterally estopped from raising issues in their responsive brief because of an earlier ruling by the trial court, and (3) the trial court erred in "dismissing" or denying Oliver's petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 8, 2011, Oliver filed a petition for a common law writ of *certiorari*. On January 2, 2012, the trial court found the pleadings frivolous and *sua sponte* dismissed the case. In June 2013, this court reversed the *sua sponte* dismissal because defendants had not been served or issued a summons. *Oliver v. Pfister*, 2013 IL App (4th) 120885-U, ¶ 17.

¶ 5 On September 27, 2013, Oliver filed an amended petition for a common law writ of *certiorari*. According to the amended petition, his prison cell was searched on April 5, 2011, and the following items were confiscated: two adult magazines, a photo album, and "loose materials of young nude men." He received a ticket dated April 6, 2011, charging him with violating an administrative rule because he illegally possessed child pornography (720 ILCS 5/11-20.1 (West 2010)).

¶ 6 Oliver raised a number of issues in his amended petition. According to Oliver, on April 10, 2011, he wrote a letter to the adjustment committee requesting certain evidence be provided to him prior to the disciplinary hearing. He also attached a witness request slip, requesting Investigator Gabor's presence at the hearing. On April 19, 2011, Oliver was called to the adjustment committee for a hearing on his ticket. He was given a continuance to prepare questions for Gabor. That night, Oliver prepared questions for Gabor and mailed them to the adjustment committee.

¶ 7 On April 26, 2011, Oliver was returned to the adjustment committee for a hearing. He argued the confiscated items were not child pornography based on the elements of the

offense. He also argued a relevant section of the child pornography statute was ruled unconstitutional. According to Oliver, because he did not violate the child pornography statute, he could not be found guilty of violating the administrative rule.

¶ 8 On or about May 20, 2011, Oliver received a final summary report from the adjustment committee finding him guilty of possessing child pornography. On May 25, 2011, Oliver filed a grievance claiming the adjustment committee violated his administrative due process rights. He argued he should be given a new hearing or have his ticket thrown out. On July 21, 2011, plaintiff learned his grievance was denied. On July 29, 2011, Oliver appealed the decision to the administrative review board arguing defendant Hastings did not properly review his grievance and also incorporating the defense he made before the adjustment committee. In October 2011, the administrative review board denied Oliver's appeal.

¶ 9 In November 2011, Oliver filed the underlying petition for common law writ of *certiorari* in the trial court. In his September 2013 amended petition, Oliver argued he was found guilty based on an unconstitutional statute (720 ILCS 5/11-20.1(f)(7) (West 2010)). According to Oliver, the images he created by pasting pictures of children's faces onto pictures of naked adults did not constitute child pornography and was protected speech under the first amendment.

¶ 10 Oliver also argued his due process rights were violated because the adjustment committee failed to submit his questions to Investigator Gabor. Oliver alleged the adjustment committee told him his questions would be submitted to Gabor after the hearing. However, the adjustment committee never did so. According to Oliver, "I was not denied my *request* for a witness by the [adjustment committee] nor informed that the testimony solicited would be

irrelevant or cumulative, or cause any hardship to the institution or anyone, as such a claim is not stated in the Final Summary Report." (Emphasis in original.)

¶ 11 Oliver also argued his due process rights were violated because the adjustment committee did not allow him to submit documentary evidence in his defense. The documentary evidence in question concerned what the disciplinary ticket described as "loose materials of young nude men," which Oliver speculated was a catalog of thumbnail-sized images for sale by a company called "Help Beyond the Wall." Oliver claimed he had evidence in his property box, which he had not received from segregation processing at the prison, that established the models in these pictures were of legal age. Oliver alleged the adjustment committee said he would be called back for a subsequent hearing to present this evidence if the "loose material" was in fact the catalog sheet. Oliver stated he was never called back for a subsequent hearing, but the "loose material" was referenced as a basis for the adjustment committee's decision.

¶ 12 Oliver also alleged defendant Gabor failed to specify the offense on the ticket, instead merely identifying the offense. Oliver argued this violated his due process rights. Oliver also claimed defendant Hastings failed to review and consider his grievance.

¶ 13 Further, Oliver claimed his "photo album" of children was an improper basis for his guilt. According to Oliver, "The photo album is nothing more than a 'scrapbook' of children from various general audience consumer magazines." Oliver argued these images did not constitute child pornography. Oliver also argues the adjustment committee ignored the unconstitutionality of the child pornography statute with regard to the "altered magazines." Finally, Oliver argued defendants Sherry Benton and S.A. Godinez failed to properly consider his claims on administrative review.

¶ 14 On July 17, 2014, defendants filed a combined motion to dismiss the amended petition pursuant to section 2-619.1 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-619.1 (West 2012)). Defendants moved to dismiss the amended petition because it was frivolous, failed to state a claim for relief, and the same issues were pending in federal court.

¶ 15 On April 21, 2015, the trial court denied defendants' motion to dismiss. The court granted defendants "30 days to file an answer to [Oliver's] amended petition."

¶ 16 On May 20, 2015, defendants filed a brief in response to Oliver's amended petition. On July 6, 2015, Oliver filed a motion to strike defendants' brief and asked the court to deem the allegations in his amended petition admitted. On August 12, 2015, the trial court denied Oliver's motion to strike and denied his amended petition in the following docket entry: "Cause called on for pending motions. Arguments heard. Motion to strike response brief is denied, Pages 9-10 are allowed. Case dismissed. Cause stricken."

¶ 17 This appeal followed. We note John R. Baldwin succeeded S.A. Godinez as Director of the Department of Corrections; and Michael Melvin succeeded Randy Pfister as Warden of Pontiac. To the extent that Oliver's claims run against Godinez and Pfister in their official capacities, Baldwin and Melvin replace them. 735 ILCS 5/2-1008(d) (2014).

¶ 18 II. ANALYSIS

¶ 19 Oliver's arguments center around the denial of his amended petition for a writ of *certiorari* and how defendants responded to his amended petition. According to Oliver's argument, defendants were required to file an "answer" to his amended petition pursuant to the trial court's April 21, 2015, docket entry, which denied defendants' motion to dismiss. Because defendants filed a brief opposing Oliver's petition instead of an "answer," Oliver argues the trial

court should have granted his motion to strike defendants' brief or treated the brief as an unresponsive answer, thereby admitting all the allegations in his amended petition.

¶ 20 We first address Oliver's argument the trial court should have granted his motion to strike defendants' brief because it was not an "answer." The basis for Oliver's argument is the trial court's April 21, 2015, docket entry, which granted defendants 30 days to file an "answer" to Oliver's amended petition. We note the trial court's April 21, 2015, docket entry did not specifically prohibit defendants from filing something other than an "answer." Without providing any analysis, Oliver states defendants were required by section 2-610(a) of the Procedure Code (735 ILCS 5/2-610(a) (West 2012)) to answer his petition. Further, implicit in his argument is an assertion the trial court had no discretion but to strike defendants' brief. 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.

¶ 21 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 dealt with "answers." This case is distinguishable because defendants here did not file an answer. Instead, they filed a brief, which provided the court with information why it should deny Oliver's petition and requested the same.

¶ 22 In addition, again citing section 2-610 of the Procedure Code (735 ILCS 5/2-610 (West 2012), 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 Alex J. McFadyen, III*, 108 Ill. App. 3d 329, 438 N.E.2d 1632 (1982), as support for this argument. However, again, he provides this court with no analysis 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 stated above, this court is not a depository for an appellant to dump the burden of argument and research (*Elder*, 324 Ill. App. 3d at 533, 755 N.E.2d at 522). As a result, we find this argument forfeited.

¶ 23 Oliver next argues defendants are collaterally estopped from raising issues in their brief that have 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." (Emphasis added.) *Terry v. Watts Copy Systems, Inc.*, 329 Ill. App. 3d 382, 389, 768 N.E.2d 789, 796 (2002). The prior ruling Oliver relies on was the denial of defendants' combined motion to dismiss in the same proceeding not a prior proceeding. As a result, collateral estoppel does not apply here.

¶ 24 We next address Oliver's argument the trial court erred by "isolating pages 9 and 10" of defendants' brief. Oliver relies on *Barrett v. Continental Illinois National Bank & Trust Co. of Chicago*, 2 Ill. App. 2d 70, 75, 118 N.E.2d 631, 633 (1954), for the proposition a trial court is "not justified in isolating any part of [a defendant's] answer by disregarding the rest of

the answer." However, Oliver's argument is based on a false premise because defendants did not file an "answer."

¶ 25 Oliver also argues the trial court could not "dismiss" plaintiff's petition 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/or 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." *Tanner*, 256 Ill. App. 3d at 1092, 629 N.E.2d at 698-99 (citing 14 C.J.S. *Certiorari* § 76, at 111 (1991)).

¶ 26 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* is properly denied if the court finds the 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.

¶ 27 This case is one such situation. Oliver was entitled to procedural due process under our federal constitution because he lost good-conduct credit as a result of the disciplinary proceeding before the adjustment committee. *Lucas v. Taylor*, 349 Ill. App. 3d 995, 1000, 812 N.E.2d 72, 76 (2004). According to the United States Supreme Court, due process is satisfied if a prisoner is given (1) notice of the disciplinary charges a minimum of 24 hours before the

disciplinary hearing, (2) an opportunity to present evidence, including calling witnesses and presenting documentary evidence, if consistent with the safety and correctional goals of the prison, and (3) a written statement stating the evidence relied upon to find the prisoner guilty and the reasons for disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 563-66 (1974). In addition, the decision must be supported by "some evidence." *Knox v. Godinez*, 2012 IL App (4th) 110325, ¶ 16, 966 N.E.2d 1233. Defendants argue Oliver received adequate due process under this standard.

¶ 28 Defendants cite *Gonzalez v. Pollution Control Board*, 2011 IL App (1st) 093021, ¶ 42, 960 N.E.2d 890, for the proposition "[a] court will find a due process violation only if there is a showing of prejudice." Defendants argue Oliver was not prejudiced by any of the alleged errors made during the administrative proceedings. We agree.

¶ 29 In this case, Oliver received one disciplinary ticket for all the material found in his cell. Some of the material seized was, in fact, child pornography. Oliver admitted pasting pictures of children's faces onto the bodies of naked adults in pornographic magazines. He did not argue the materials were not in his possession. Instead, he argued this material was not child pornography. He is wrong. See *Shoemaker v. Taylor*, 730 F.3d 778, 786-87 (9th Cir. 2013); *Doe v. Boland*, 698 F.3d 877, 883-84 (6th Cir. 2012); *United States v. Hotaling*, 634 F.3d 725, 728-30 (2d Cir. 2011); *United States v. Bach*, 400 F.3d 622, 632 (8th Cir. 2005).

¶ 30 Even if defendants believed the other material seized from Oliver's cell was child pornography, which the record does not reflect, Oliver admitted creating and possessing material that falls within the definition of child pornography and not virtual child pornography. As a result, the administrative decision in this case was based on some evidence. The evidence Oliver wanted to introduce was not a defense to his possession of this child pornography. As a result,

he was not prejudiced by his inability to present evidence showing some of the material seized from his cell may not have been child pornography because he only received one disciplinary ticket.

¶ 31 Our decision is supported by the Seventh Circuit's decision involving this same individual and the same set of facts. See *Oliver v. Pfister*, 2016 WL 3434521 (June 17, 2016). In that case, Oliver made the same due process arguments. The Seventh Circuit noted:

> "Oliver brought this suit against ten prison employees, asserting due process violations in connection with his disciplinary proceeding. He alleged that the defendants mistakenly applied the state child pornography law to his conduct when they (1) punished him for having images of children's faces pasted onto naked adult bodies, (2) did not allow him to present documentary evidence that the naked male images found in his cell were of legal-aged adults, and (3) did not allow him to question the reporting officer, either in person or through a written interrogatory he had submitted." *Id.* at *1.

As in this case, Oliver argued no evidence in the record supported the adjustment committee's finding Oliver violated the Illinois child pornography statute. *Id.* at *2.

¶ 32 The Seventh Circuit noted Oliver conceded he "pasted children's faces onto naked bodies of adults, but he argue[d] that this action merely produced 'virtual child pornography,' the prohibition of which the Illinois Supreme Court found unconstitutionally overbroad[.]" *Id.* However, according to the Seventh Circuit's decision:

> "Oliver misapprehends the scope of *Alexander's* holding. In that case, the Illinois Supreme Court held that the criminalization of pornography consisting of computer-generated depictions that appear to be children, or pornography that does not involve any actual, identifiable children, was unconstitutionally overbroad. [*People v. Alexander*, 204 Ill. 2d 472, 478, 482-83, 791 N.E.2d 506, 511, 513-14 (2003)]. The category of pornography that Oliver's altered images falls into—pornography that 'morphs' different parts of actual children's faces with adult bodies—is different from 'virtual pornography' because it uses the faces of real children. [*Id.* at 482-83, 791 N.E.2d at 513-14; see *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242 (2002)]. Based on the incident report and Oliver's own admission that he pasted faces from actual children onto naked adult bodies, we agree with the district court that 'some evidence' in the record supports the disciplinary action taken by the prison." *Oliver*, 2016 WL 3434521, *2.

In a prison disciplinary proceeding, "some evidence" and not proof beyond a reasonable doubt is sufficient to satisfy due process. *Id.*

¶ 33 With regard to Oliver's argument he was not allowed to present certain evidence, the Seventh Circuit noted the evidence in question would not have changed the result in the case. Regarding the testimony of the reporting officer, the Seventh Circuit noted "a prisoner has no right to call a witness whose testimony would be irrelevant, repetitive, or unnecessary." *Id.* at

*3. The court concluded "the officer's testimony was unnecessary because Oliver did not dispute the underlying facts of the charged misconduct." *Id*. As a result, the officer's testimony would not have assisted Oliver. *Id*.

¶ 34 With regard to the documentary evidence about the age of the men in some of the images confiscated from his cell, Oliver claimed his due process rights were violated because he was not allowed to present this evidence. However, the Seventh Circuit stated Oliver presented the information to the committee in his written defense. Further, "because the committee found Oliver guilty based on the pornographic magazine pictures that he altered with the children's faces, the additional evidence involving this other set of images would have done nothing to help his defense." *Id*.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court’s denial of Oliver's amended petition for a writ of *certiorari*.

¶ 37 Affirmed.