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STATE OF MONTANA
Case Number: DA 23-0162

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0162

IN THE MATTER OF:

ROBERT L. ROSE,

Plaintiff and Appellant,

v.

MONTANA DEPT. OF CORRECTIONS; BRIAN GOOTKIN, Director of DOC; and JAMES SALMONSEN, Warden of Montana State Prison,

Defendants and Appellees.

RESPONSE BRIEF OF DEFENDANTS AND APPELLEES

On Appeal from the Montana First Judicial District Court, Lewis and Clark County, the Honorable Michael F. McMahon, Presiding

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STATEMENT OF THE ISSUES

1. Did the District Court correctly dismiss Appellant Robert L. Rose's ("Rose") Second Amended Complaint ("Complaint")?
2. Was any of the District Court's dismissal of Rose's Complaint based on res judicata?
3. Did the District Court correctly determine that Rose's Complaint only contained four statutory claims and did not contain any claims under the Montana Constitution?
4. Did the District Court correctly determine that Rose has never claimed that the Prison Issues Board acted arbitrarily when it allegedly violated statutes found within Montana Code Annotated Title 2, chapter 3, parts 1 and 2?

STATEMENT OF THE CASE

The issues in this matter arise out of discussions that occurred between 2019 and 2022 during meetings of the Department of Corrections' Prison Issues Board relating to Department of Corrections policy changes. Rose's Complaint challenges the Prison Issues Board's handling of the notice, public comment, and meeting minutes requirements found in Montana's open meeting laws.

Counts I-III of Rose's Complaint claim Defendants violated Mont. Code Ann. § 2-3-101 by allegedly amending MSP Procedures 3.3.6 and 3.3.8 without

providing proper notice and without opportunity to comment on June 5, 2019; October 5, 2021; and April 5, 2022; respectively. (CR 13, at ¶¶26-40). Count IV claims the official minutes for the Prison Issues Board's April 7, 2022, meeting do not incorporate a written statement Rose provided to the Board, prior to the April 7th meeting, in violation of Mont. Code Ann. § 2-3-212. (CR13, at ¶¶41-46).

Rose does not claim that he is entitled to attend public meetings. *Appellant's Opening Brief*, at 20. He only claims a right to observe meeting minutes and submit written comments.

STATEMENT OF FACTS

Between 2019 and 2022, Montana State Prison amended its Procedures 3.3.6 ("Inmate Mail") and 3.3.8 ("Inmate Visiting"). Before doing so, certain amendments to these procedures were discussed during meetings of the Prison Issues Board[1]. (CR 13, at ¶9).

STANDARD OF REVIEW

Appellate Courts review a district court's ruling on a motion to dismiss *de novo*. *Plouffe v. State*, 2003 MT 62, ¶8, 314 Mont. 413, 66 P.3d 316. The Supreme Court's standard of review of a decision on a motion to dismiss a complaint as a

1. This Court previously examined the role of the Prison Issues Board in *Rose v. State*, 2012 MT 55N. That decision established that the Board is "composed of individuals who represent the various state and contracted adult secure facilities in Montana and meets regularly 'as a meaningful forum to discuss and resolve issues, adjust, change or create policies and communicate with other wardens and facility administrators.'"

matter of law is whether the trial court's interpretation of the law is correct. *Hall v. Heckerman*, 2000 MT 300, ¶12, 302 Mont. 345, 15 P.3d 869. The Court will only look within the four corners of the complaint when reviewing a district court's decision to grant a motion to dismiss. *Stufft v. Stufft*, 276 Mont. 310, 313, 916 P.2d 104, 106 (1996).

The Court will also affirm decisions when the District Court reaches the right result for the wrong reason. *Talbot v. WMK-Davis, LLC*, 2006 MT 247, ¶6, 385 Mont. 109, 380 P.3d 823.

SUMMARY OF THE ARGUMENT

Rose brings four separate arguments before this Court to reverse the District Court's dismissal of his Complaint. Because all arguments are without merit, the District Court's decision should be affirmed.

Rose first argues that the District Court improperly found that Rose lacks standing. However, Montana law includes no prisoner rights allowing inmates to participate in drafting and amending the Department's internal policies or procedures. Additionally, Montana law provides that the Department need not provide notice or opportunity for public comment when drafting, amending, and implementing internal management policies.

Next, Rose disputes the District Court's single use of the term "res judicata" in its dismissal order and claims the Court improperly applied res judicata. The

District Court, however, did not dismiss Rose's Complaint on res judicata grounds, so this argument is irrelevant and should be disregarded.

Rose's third issue involves his contention that the District Court failed to address his claims under the state constitution. Rose's Complaint, however, contains no state constitutional claims and only includes two passing references to Rose's claimed constitutional rights—but they are only included in the Complaint's introductory paragraphs. As a result, the District Court did not fail to address Rose's state constitution claims because his Complaint contains no constitutional claims.

Finally, Rose takes issue with the District Court finding that Rose never claimed the Prison Issues Board acted arbitrarily in its actions involving the policies at issue. However, Rose's Complaint only claims that the policies themselves are arbitrary and makes no attempt to argue that the Board ever acted arbitrarily in its actions. As a result, the District Court properly found that Rose never claimed that the Board ever acted arbitrarily.

In addition to these four claims, Rose attaches several outside documents to his opening brief. Appellees ask this court to disregard and strike these documents, as they are not contained within the four corners of the Complaint.

Because the District Court properly dismissed Rose's Complaint, its decision should be affirmed.

ARGUMENT

I. Rose Lacks Standing Because He Has No Right to Participate in DOC's Internal Policy Drafting

To establish standing, a plaintiff must "clearly allege a past, present, or threatened injury to a property or civil right." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶30, 360 Mont. 207, 255 P.3d 80. Standing is a threshold justiciability requirement that a plaintiff have a personal stake in a particular case. *Bowen v. McDonald*, 276 Mont. 193, 201, 915 P.2d 201, 2006 (1996); see also *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶14, 340 Mont. 56, 172 P.3d 1232. If a plaintiff lacks standing, a district court can grant no relief because a justiciable controversy does not exist. *Powder River County v. State*, 2002 MT 259, ¶101, 312 Mont. 198, 60 P.3d 357; *Ballas*, ¶16.

In its Order dismissing Rose's Complaint, the District Court correctly found that Rose lacks standing to bring his claims because he has no "personal stake or right" in the implementation of or amendments to Montana State Prison procedures 3.3.6 and 3.3.8. (CR 23, at 12). In support of this finding, the Court found that Montana law contains no prisoner rights allowing inmates to participate in drafting and amending the Department's internal policies or procedures. (CR 23, at 12). The District Court was unable to find any law establishing a right to participate in drafting internal policies because Montana does not require notice or public comment when departments draft or amend internal policies.

Montana's Open Meeting laws bar government agencies from taking "final agency action" on any matter unless specific notice is included on an agenda and public comment is allowed. Mont. Code Ann. § 2-3-103(1)(a) (2021). Within these same laws, the term "agency action" is defined as "the whole or a part of the adoption of an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial thereof." Mont. Code Ann. § 2-3-102(2). Internal policies and procedures are not included in this finite list. They cannot be included within the term "rule" because the statutory definition of "rule" specifically does not include "statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public." Mont. Code Ann. § 2-3-102(3)(a).

Additionally, this Court has found that prison administrators must be afforded wide ranging deference in implementing policies to preserve internal order and discipline among inmates, including 'prophylactic and preventative measures intended to reduce the incidence' of breaches of prison order.'" *Jellison v. Mahoney*, 1999 MT 217, ¶12, 295 Mont. 540, 986 P.2d 1089 (quoting *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986)).

The District Court correctly determined that inmates have no right to participate in drafting and amending the Department of Corrections' internal procedures. This conclusion is supported by Montana law, which specifically

exempts agencies from providing notice and allowing public comment for decisions relating to internal management of the agency that is not "of significant interest to the public." Mont. Code Ann. § 2-3-103(1)(a). The District Court also correctly found that both this Court and the U.S. Supreme Court have recognized that decisions of prison administrators regarding the drafting and amending of internal procedures must be allowed great deference. For these reasons, the District Court's decision should be affirmed.

II. The District Court Did Not Apply Res Judicata

Rose next argues the District Court improperly applied res judicata in its dismissal order. The Court, however, never applied res judicata. As a result, this argument should be disregarded.

In its Dismissal Motion Order, the District Court completed its Material Factual Background section with a block quote from a previous noncite decision in which Rose was a party. (CR 23, at 7 ll. 1-9). The Court attached a footnote to its citation of the noncite case, explaining that Section I, Paragraph 3(c)(ii) of this Court's Internal Operating Rules allows noncite opinions to be cited "when relevant to establishing the application of law of the case, res judicata, or collateral estoppel; or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same person." (CR 23, at 7 n. 1).

The District Court invoked this Court's Internal Operating Rules to justify citing to a noncite case. The exact rule it invoked contains the words "res judicata." The use of that term, however, ends there. The District Court never dismissed any portion of Rose's Complaint via res judicata. Beyond the one footnote supporting its factual background section, the District Court does not mention res judicata, collateral estoppel, claim preclusion, or issue preclusion at any time throughout its order. As a result, Rose's arguments relating to res judicata should be disregarded as irrelevant.

III. Rose Never Brought a Constitutional Right to Rehabilitation Claim Against Defendants

Rose next argues that the District Court failed to consider his constitutional "Fundamental Right to Rehabilitation claim" in its dismissal order. This argument should be disregarded because Rose never addressed this argument in the underlying briefing and because Rose's Complaint failed to include any constitutional counts.

General references to constitutional provisions in the district court are insufficient to preserve those issues for appeal. *See In re G.S.*, 2002 MT 245, ¶48, 312 Mont. 108, 59 P.3d 1063 ("a party must specify in the trial court what authority, rule, statute, or constitutional provision might be violated by a decision contrary to the party's position, and that failure to do so fails to preserve that issue for appeal."); *see also State v. Allen*, 2016 MT 185, ¶15, 384 Mont. 257, 376 P.3d

791 (constitutional references made in passing before the District Court, and not developed into a constitutional argument, cannot preserve a constitutional claim for appellate review). Additionally, it is "fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *City of Missoula v. Campbell*, 2001 MT 271, ¶13, 307 Mont. 286, 37 P.3d 670.

Here, Rose argues that his Complaint's Introduction section states: "[T]his petition is brought to vindicate Rose's rights under Montana Constitution Article II §28 Criminal justice policy rights of the convicted which states: '(1) Laws for the punishment of crime shall be founded upon principles of prevention, reformation, public safety, and restitution for victims.'" (CR 13, at ¶ 3). Although not referenced in his Opening Brief, the Introduction section of Rose's Complaint also claims: "Rose has a right to rehabilitation under Montana law and Montana Constitution Article II § 28, and the restrictions on communications and visitation harm his, and other prisoner's (sic), ability to prepare and reintegrate into society." (CR 13, at ¶17). At no other point does Rose reference Article II § 28 of the Montana Constitution anywhere else in his Complaint.

Further, Rose's Complaint contains four separate counts. The first three involve alleged violations of Mont. Code Ann. § 2-3-101, including failure to give notice and failure to provide an opportunity for public comment on three separate

dates. (CR 13, at ¶¶ 26-40). The fourth claim involves an alleged violation of Mont. Code Ann. § 2-3-212 relating to an alleged failure to incorporate written comments into meeting minutes. (CR 13, at ¶¶41-46). It should be noted that Rose was represented by counsel when his Complaint containing only four clearly labeled statutory claims and no constitutional claims was filed.

Rose's brief allusions to Article II of the Montana Constitution within the Introduction section of his Complaint cannot be interpreted as a successful attempt to bring constitutional claims against the Department. This is especially true considering the fact that Rose failed to make any mention of the Montana Constitution outside of the Introduction section of his Complaint.

Finally, Rose's response to the underlying Motion to Dismiss fails to argue that his Complaint contains constitutional claims not addressed in the Defendants' Brief in Support. (CR 19). It also fails to argue that his Complaint contains any additional counts beyond the four statutory claims that were specifically enumerated within.

Additionally, Rose claims this Court must apply *Worden* and administer the four-part *Turner* analysis in this case. *Appellant's Opening Brief*, at 22-24. In *Worden*, this Court recognized that "the State may limit or abrogate the rights of an Inmate, as long as it is done to prevent further offenses or for reformation of the Inmate." *Worden v. Montana Board of Pardons & Parole*, 1998 MT 168, ¶34, 289

Mont. 459, 962 P.2d 1157. In *Turner*, the Court held that certain regulations can violate a prisoner's constitutional rights if they are not "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Because there is no constitutional element in this matter, this Court should disregard Rose's request that it apply both *Worden* and *Turner.*

As a result, Rose has failed to bring any constitutional claims against the Defendants in this matter and has failed to preserve this issue for appeal. This Court should disregard Rose's arguments on this issue and affirm the District Court's dismissal of his Complaint.

IV. Rose Never Claimed the Department Acted Arbitrarily

Finally, Rose argues the District Court improperly determined he did not claim the Department "acted arbitrarily or discriminatorily in amending policies [or that the policies] were applied arbitrarily or discriminatorily against him." (CR 23, at 10). In support of this argument, and without citation, Rose states his Complaint "plainly" claims the Department's decision to "adopt draconian visitation policies was arbitrary." It does not.

Rose's Complaint uses a form of the word "arbitrary" only once. This occurs under Count I where Rose attempts to support his claim that the Department failed to give notice of a meeting and failed to collect public comment. (CR 13, at 7-8). Specifically, Rose claims the Department "allowed discussion and decision to be

made that effectively and arbitrarily restricted visitation." (CR 12, at 8 ¶31). In doing so, Rose simply alleges that the visitation policy the Board was discussing arbitrarily restricted visitation. He does not claim that the Board or the Department acted arbitrarily by discussing or adopting the policy and he does not claim that the policy was applied arbitrarily against him—only that the policy itself restricts visitation "arbitrarily." As a result, the District Court's statement that Rose never claimed that the Board acted arbitrarily is absolutely true.

Also, Rose's single allegation that the visitation policy is arbitrary is found in a paragraph supporting Claim I, which is a claim for "Failure to Give Notice and Opportunity for Public Comment as Required by M.C.A. § 2-3-101." By claiming that the policy discussed at the Prison Issues Board "arbitrarily restricted visitation," Rose provides no support to the notion that the Department arbitrarily failed to give notice of the meeting or that it arbitrarily failed to provide for public comment. Simply stated, Rose's use of the word "arbitrarily" in this instance provides no support for his stated claims and, most importantly, fails to make any allegations that any specific decision made by the Prison Issues Board was made "arbitrarily."

Rose's Complaint only uses a form of the word "arbitrary" once. His use of that word fails to establish an allegation that the Prison Issues Board acted arbitrarily. As a result, the District Court correctly determined that Rose's

Complaint does not allege "that DOC abused its discretion or acted arbitrarily or discriminatorily in amending policies 3.3.6 and 3.3.8."

V. All External Documents Cited by Rose and Attached to Rose's Opening Brief Must Be Stricken and Disregarded

Several external documents are referenced in Rose's Opening Brief—many of which are attached directly to his brief. Because Rose is appealing a district court decision on a motion to dismiss, he may only reference his own Complaint and no other document. *See Stufft v. Stufft*, 276 Mont. 310, 313, 916 P.2d 104, 106 (1996) ("This Court will look only within the four corners of the complaint in making its decision on review of a Rule 12(b)(6) dismissal). As a result, all other documents must either be stricken from the record, disregarded by this Court, or both.

CONCLUSION

The District Court properly dismissed Rose's Complaint because Montana law establishes no right for inmates to have a say in how prison officials adopt and amend visitation and communication procedures. As a result, Rose has no personal stake or right at issue in this matter.

Additionally, the District Court never applied res judicata when it dismissed Rose's Complaint, Rose never properly brought any constitutional claims against the Defendants, and Rose never alleged that the Prison Issues Board acted

arbitrarily when it discussed changes to Montana State Prison's mail and visiting procedures.

For all these reasons, the District Court's dismissal of Rose's Complaint should be affirmed.

Respectfully submitted this 9th day of April, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2937 words, excluding certificate of service and certificate of compliance.

CERTIFICATE OF SERVICE

I, Kyle Patrick Chenoweth, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-09-2024:

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