

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23-0162

ROBERT L. ROSE,
Petitioner/Appellant,

FILED

JUN 17 2024

Bowen Greenwood
Clerk of Supreme Court
State of Montana

vs.

MONTANA DEPARTMENT OF CORRECTIONS,
BRIAN GOOTKIN, Director; and
JAMES SALMONSEN, Warden of the
Montana State Prison,

Respondents/Appellees.

APPELLANT'S MOTION FOR STAY AND REMAND

Appellant in the above entitled cause hereby respectfully moves this honorable Court to stay the appellate proceedings and remand this case to the District Court for the reasons set forth in the legal analysis below.

RELEVANT BACKGROUND

The Appellant, hereinafter ("Rose") brought "Right to Know" and "Right to Participate" claims in the District Court, as well as constitutional rights claims under Article II, Sections 8, 9, and 28 of the Montana Constitution.

The Appellees (Defendants) filed a motion to dismiss in the district court, primarily arguing that because Rose is an inmate confined at the Montana State Prison, he has no standing. The crux of the Defendants' argument hinged on the DOC's position that:

Rose has not been injured by the Defendants' alleged actions, because he is not a member of the public—he is an incarcerated felon who cannot participate in government meetings or vote in a general election.... Rose is currently serving an eighty-year sentence at the Montana State Prison. As such, his ability to participate in the government process is considerably more limited than a non-incarcerated citizen because he has no liberty to travel to government meetings, sit in a crowd, or provide relevant live testimony. In reality, the list of public meetings or hearings that Rose has liberty to attend—for the foreseeable future—only includes his own parole hearings.

(Defs' Motion to Dismiss, pp. 3-4).

The Defendants further argued that because Rose has no right to vote until he leaves prison, and for this reason alone, any possible participation in any public meeting would be irrelevant. Id., p. 4.

Defendants asserted that DOC is not required to follow the mandates of MAPA pursuant to § 2-4-102(2)(a)(ii), and as a result, Montana State Prison is not governed by the rule-making process set forth in MAPA, including the notice, hearing, and submission of views requirements of the Code. See (Mot. to Dismiss, pp. 5-6):

Because the Department is not required to provide inmates with the ability to participate in the adoption and amendment of its prisons' own internal procedures, Counts I - III of Rose's Complaint fail to state a claim upon which relief can be granted. As a result, these counts must be dismissed.

Defendants clarified their position in their conclusion, as follows:

Prison inmates are not members of the public because they do not have the liberty to perform the tasks that non-inmates do, e.g., participation in live government meetings and voting. As a result, Rose does not have standing to bring suit against the Defendants via constitutional right to participate and clauses of the open meeting statutes. Also, the Department is not statutorily required to entertain public comment on issues related to procedures that govern its own internal management.

Id. Appellant responded to Defendants' position in part as follows:

The Defendants have implemented draconian visitation and mail policies that harm inmates and the public seeking to visit and communicate with inmates, under the cover of darkness, and this is precisely the type of secret government activity that the Open Meeting Act is intended to prevent. Plaintiff has standing to have his comments recorded into the minutes and to

void the decision [sic] made at non-open meetings.... [A]ttendance at the meeting is unnecessary. Inmates have a right to know, and this right goes hand in hand with the right to provide public comment and to have that comment incorporated into the record. Simply because Plaintiff is incarcerated and cannot attend a meeting in public does not mean that he cannot comment through alternative methods, or that he cannot vindicate the right to ensure that governmental decisions are made in the light of day. The Department goes so far as to claim that "any possible participation in any public meeting would be irrelevant because he is not a voting citizen." Brief in Support, pg. 4. This is unsupported by any case law. The right to vote is not a necessary predicate to participate.

(Pl.'s Resp. to Defs' Mot. to Dismiss, p. 5).

The District Court specifically recognized and supported the DOC's argument regarding its claim that Rose has no standing or right of participation:

DOC request this Court dismiss Rose's petition because: (1) Rose lacks standing, and (2) the DOC is not required to allow public participation when adopting policies governing internal management of its prison. Rose counters that no authority prohibits inmates from making claims for open meeting violations, and that the PIB is subject to open meeting law.

(Order at p. 9).

The parties appear to agree that MAPA is inapplicable in this proceeding, since it does not apply to "the supervision and administration of a penal institution with regard to the institutional supervision, custody, control, care, or treatment of youth or prisoners. MCA § 2-4-102(2)(1)(ii) (2021).

(Order at p. 5).

Although the Court found that "the parties appear to agree that MAPA is inapplicable in this proceeding...." such is not the case. Rose cited Bitterroot River Protection Association v. Bitterroot Conservation District, 2008 MT 377, ¶¶ 25-26, 346 Mont. 507, for the proposition that "Notice and Participation are fundamental rights of citizens, and just because a government body is not exempt from MAPA does not mean they are exempt from the right to know and participate enshrined in the Montana Constitution." Also see citation to Missoulia v. Bd. of Regents, 207 Mont. 513, 528, 675 P.2d 962, 970 (Pl's Resp. to Defs' Mot. to Dismiss, p. 11); (Appellant's Op. Br., pp. 10, 13).

The DOC filed its Response Brief on appeal, arguing again that:

Rose lacks standing because he has no right to participate in DOC's internal policy drafting.... [T]he District Court correctly found that Rose lacks standing to bring his claim because he has no personal stake or right in the implementation of or amendment to Montana State Prison procedures 3.3.6 and 3.3.8. 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 and procedures. 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.

(Resp. Br. at p. 5).

During District Court proceedings in this case, Counsel for the Defendant's (DOC Legal Dept.) convinced Rose, through their asserted legal strategy, that his request to be placed on DOC's "interested persons list" was an exercise of futility. (Rose Aff. at pp. 1-2)

The Defendant's collectively asserted that Rose was not allowed as a prison inmate to participate in any DOC noticed public hearing, to include the PIB. During the district court proceedings, there was no indication that he could receive notice or participate by way of his request to submit written comments. (Rose Aff. at pg.2)

Then, after notice of appeal was filed, and following the filing of Appellant's Opening Brief, and the filing of the Defendant's Response Brief, the DOC's Legal Department sent a certified letter to Rose in where he is expressly invited to participate in DOC's adoption and amendment of its RULES. This was in direct response to Rose's written request to be placed on DOC's "interested persons list. (Rose Aff. at pg. 2-3). The cover letters (Aff. Exhibits 1-2 specifically encourage Rose to participate in a DOC publically noticed meeting by way of zoom, telephone, and/or written comment. Id.

TO: INTERESTED PERSONS

State agencies' administrative rulemaking projects provide members of the public with an opportunity to make their opinions known on rule topics in which they have expressed an interest. Attached or enclosed with this

letter is a copy of an administrative rules proposal notice MAR 20-7-72. Please read the notice for information concerning the opportunity to submit written data, views, and arguments to the Department within the comment period specified in the notice. The enclosed notice also contains information about the date, time and place of a public hearing that will be conducted to receive comments from the public. Persons may appear at the hearing virtually via Microsoft Teams, telephone, or another videoconferencing service to orally present their views and arguments and/or submit written data. (Exhibit-1, p. 2, and Exhibit-2, p. 2, Rose Affidavit).

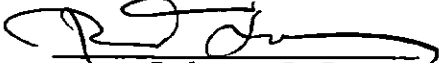
DISCUSSION

DOC Defendants should not be rewarded by finding cover under their false representations to the District Court and Rose. Had Rose and the Court been informed that Rose was indeed on the DOC's interested persons list, Rose would have been able to present such very relevant evidence to the lower Court. The lower Court, in light of such evidence, most likely would not have granted the Defendants' 12(b)(6) Motion in its entirety. Likewise, this new evidence is very relevant during this appeal. The entire thrust of the Defendants' defense in this case is that Rose is prohibited by the DOC from participating in any of its public meetings when involving matters of participation in RULE and POLICY changes before finalization.

In reality, this new evidence not only demonstrates that the DOC has for a long time allowed Rose to be an invited participant in its RULE making process by way of participation in an open public forum, but it is relevant evidence that the DOC has misled the lower Court and this Court to get a favorable ruling. Such circumstances should compel this Court to remand this case so the district court can weigh its effect in the first instance. Ironically, Affidavit Exhibit-2 is the proposed adoption of a NEW rule regarding internal procedures.

This Court has previously granted a remand in light of new evidence that was relevant to district court findings and dismissal orders. See McClure v. McClure, 2015 Mont. LEXIS 654 (dismissed without prejudice); Rosenthal v. County of Madison, 2007 MT 277, ¶ 21.

June 11th 2024
Date



Robert L Rose

CERTIFICATE OF SERVICE

I, Robert L. Rose, hereby certify that I mailed a true and correct copy of the foregoing Appellant's Motion for Stay and Remand to opposing counsel at the address listed below on the date listed below:

Kyle Chenoweth
DOC Legal
P.O. Box 201301
Helena, MT 59620

DATED this 11th day of June, 2024.


Robert L. Rose