

IN THE COURT OF APPEALS OF IOWA

No.3-433 / 92-1755

ERNEST ALAN DOUGLAS,

Appellant,

vs.

IOWA DISTRICT COURT FOR JONES COUNTY,

Appellee.

Appeal from the Iowa District Court for Jones County, Thomas Koehler, Judge.

Plaintiff claims the district court exceeded its jurisdiction by denying his application for postconviction relief. **WRIT ANNULLED.**

Philip B. Mears of the Mears Law Office, Iowa City, for appellant.

Bonnie J. Campbell, Attorney general, and R. Andrew Humphrey, Assistant Attorney General, for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

CADY, J.

On April 22, 1991, Ernest Douglas received a disciplinary notice which alleged that while he was an inmate at the Mt. Pleasant Correctional Facility, he conspired with another inmate, Lonnie Cole, to start a fire in the room of a third inmate, Deeson. The notice alleged Douglas offered Cole money and/or other items of personal gain to set Deeson's bed on fire.

While the proceeding was pending, Douglas was transferred to the Iowa State Men's Reformatory at Anamosa. The disciplinary proceedings were dismissed on June 24, 1991, due to insufficient evidence connecting Douglas to the fire. Prison officials subsequently conducted further investigation of the incident. Additional evidence connecting Douglas to the fire was obtained from confidential informants.

On June 28, 1991, a new disciplinary notice was issued to Douglas which made the same allegations as the earlier notice. The new notice also alleged Douglas had threatened or offered money to other inmates at Anamosa to change their statements about his involvement in the fire.

On July 2, 1991, the disciplinary committee concluded Douglas had violated the prison rules concerning arson, complicity, obstructive conduct, and threats or intimidation. It found the confidential information from informants was credible. Douglas was sanctioned with thirty days disciplinary detention, 365 days of

disciplinary detention I, and sixteen days loss of good conduct time. Douglas's appeals to the Warden and Department of Corrections were denied.

Douglas filed an application for postconviction relief pursuant to Iowa Code chapter 663A (1991). Chapter 663A has been designated chapter 822 in the 1993 Code, and we will hereafter use the new numbering system. On October 9, 1992, the district court issued its ruling denying the application for postconviction relief. The court found there was sufficient evidence in the record to support the disciplinary committee's decision. The court rejected Douglas's claim the committee used the wrong burden of proof. Additionally, the court found Douglas was not entitled to counsel or counsel substitute at the administrative proceedings.

Douglas filed a petition for writ of certiorari, pursuant to section 882.9. Under this section, which became effective July 1, 1992, all appeals for loss of good conduct time must be by writ of certiorari. The Iowa supreme court granted certiorari on November 24, 1992.

I. Douglas contends the State should have been barred or estopped from relitigating the disciplinary issue when the original charges against him were dismissed. He acknowledges double jeopardy principles do not apply to prison disciplinary cases. His argument is based on the doctrine of collateral estoppel.

The district court recognized Douglas was claiming the charges against him had been dismissed at an earlier disciplinary hearing and were then refiled a few days later. However, the court did not make any ruling on the claim of double jeopardy or collateral estoppel. Douglas did not file a motion under Iowa Rule of Civil Procedure 179(b).

We determine Douglas has not preserved error on this issue. Issues must ordinarily be presented to and passed upon by the trial court before they can be raised and decided on appeal. Johnston Equipment Corp. v. Industrial Indemnity, 489 N.W.2d 13, 16 (Iowa 1992) (citing State Farm Mut. Auto. Ins. Co. v. Pflibsen, 350 N.W.2d 202, 207 (Iowa 1984)). A rule 179(b) motion to enlarge or amend is necessary for preservation of error when a trial court fails to resolve a matter properly submitted. Id. at 17.

Because Douglas failed to file a rule 179(b) motion requesting the court to enlarge its findings to encompass this issue, this issue was not properly preserved for our review. Failure to preserve error bars our review on appeal. Harper v. State, 397 N.W.2d 740, 743 (Iowa 1986).

II. Douglas claims the district court should have allowed his attorney to have access to the confidential information relied upon by the disciplinary committee. Douglas was represented by counsel before the district court. His counsel requested access to the confidential information relied upon by the committee. The court ruled

it would allow him access to the confidential information upon his professional statement he would not disclose it to anyone. The State then asked for a recess and indicated it would seek an interlocutory appeal. Douglas's counsel withdrew his request for access to the information.

We conclude Douglas has failed to preserve error on this question. The withdrawal of the request for the confidential information precludes us from ruling on whether denial of access to the information rendered counsel ineffective or denied meaningful access to the courts. See Harper, 397 N.W.2d at 743. Failure to preserve error bars our review on appeal. Id.

III. Douglas contends the disciplinary committee's use of the "some evidence" standard violates the due process clause of the Fourteenth Amendment. Douglas did not raise this issue in the administrative proceedings, but raised it for the first time before the district court. In postconviction proceedings, our general rule prevents the court from considering an issue not asserted in the administrative process, absent sufficient reason for such failure. Overton v. State, 493 N.W.2d 857, 859 (Iowa 1992).

An issue concerning the authority to impose a particular sanction may be raised for the first time in postconviction proceedings. Id. To the same end, there must be an administrative remedy for the claimed wrong. James v. State, 479 N.W.2d 287, 292 (Iowa 1991). Douglas

does not claim the committee exceeded its authority in imposing sanctions against him. We conclude Douglas was required to preserve error on his claim the committee used an improper burden of proof, and that he failed to do so.

Furthermore, even if Douglas had preserved error on this claim, the Iowa supreme court recently upheld the use of the "some evidence" standard by State prison disciplinary officials in their initial determination of disciplinary proceedings. Backstrom v. Iowa District Court, 508 N.W.2d 705, 710-711 (Iowa 1993).

IV. Douglas claims the disciplinary committee's failure to appoint counsel substitute violated his right to due process. Douglas did not ask for counsel substitute during the disciplinary proceedings. He raised this issue for the first time in postconviction proceedings before the district court.

As discussed above, in postconviction proceedings, we will not consider an issue not asserted in the administrative process, absent sufficient reason for such failure. Overton, 493 N.W.2d at 859. We determine Douglas has not shown sufficient reason for not raising this issue in the administrative process, and therefore, error has not been preserved on this issue.

V. In summary, we determine the district court did not exceed its jurisdiction and we annul the writ of certiorari. Costs of this appeal are assessed to Earnest Douglas.

WRIT ANNULLED.