IN THE COURT OF APPEALS OF IOWA

No. 0-490 / 89-1469

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CLERK SUPREME COURT

ERNEST C. HARPER,

Appellant,

vs.

STATE OF IOWA,

Appellee.

143

Appeal from the Iowa District Court for Lee County, Harlan W. Bainter, Judge.

Harper appeals district court dismissal of application for postconviction relief. **REVERSED AND REMANDED.**

Linda del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Gordon E. Allen, Deputy Attorney General, and Layne M. Lindebak, Assistant Attorney General, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

OXBERGER, C.J.

The appellant, Ernest C. Harper is an inmate at the Iowa State penitentiary in Fort Madison. On January 5, 1987, the disciplinary committee of the prison found Harper had violated prison disciplinary rules 16 (unauthorized possession) and 30 (gambling) in an incident occurring on December 28, 1986, and he disobeyed a lawful order in an incident unrelated to the gambling violation.

Harper contends he intended to appeal the decision relating to the gambling violation but not the decision about disobeying a lawful order. Harper also contends that as a result of his own mistakes and mistakes made by prison staff, at least part of the paper work relating to his appeal to the prison warden bears the wrong decision number. Harper asserts he sent several memos to the prison staff about the mix-up and when all the memos are read together it is clear he appealed the gambling decision, not the decision finding he disobeyed an order, to the warden.

Harper also appealed the decision relating to the gambling violation to the Department of Corrections. The Department found that he had waived his right to further appeal by failing to appeal the decision to the warden. Harper filed an application for postconviction relief in Lee County District Court challenging the Disciplinary Committee's decision. The State moved to dismiss the petition alleging that Harper failed to exhaust his administrative remedies because he did not appeal to the

warden and therefore the district court was without jurisdiction to hear his application.

Prior to the June 20, 1989, hearing on his application, Harper served a subpoena on Robert Kreiger, a counselor at the prison, demanding Kreiger appear at the hearing with the prison's memo log book for 1987, the three memos Harper sent to prison staff about the decision number mix-up, and any other correspondence related to his disciplinary reports. At the hearing, the counselor appeared without any documents. The counselor had several reasons for not having any documents, but the main reason presented by the State was that the counselor was not the custodian of the documents.

The trial court granted Harper a continuance stating:

> I'm going to grant a continuance and suggest to counsel for the applicant to serve a subpoena on the warden. Now, he's got custody of everything in this institution and he won't be able to come here and tell me he can't get these documents. We'll just grant a continuance on that basis.

Harper served Warden Nix with a subpoena demanding the same documents the prior subpoena had demanded. Prior to the second hearing the State contacted Harper's counsel and inquired if Warden Nix could send a designee due to his busy schedule. Harper's counsel stated at the second hearing she agreed to the State's request on the condition the designee be able to fully respond to questions about the documents requested.

The second hearing was held on September 18, 1989. Warden Nix sent Debra Nichols as his designee for the hearing. Ms. Nichols produced only one document written by Harper which said in part "As for appeal 86-12-447, this is the one I did not want to appeal." Report 86-12-447 was the disciplinary decision about the gambling violation.

Ms. Nichols testified she was unable to find any other memos, she knew nothing about the log book, memos were expunged from their records on a yearly basis but memos about appeals would not normally be expunged, and the one document she did produce was handed to her by the State just prior to the start of the hearing. When Ms. Nichols failed to provide answers to several questions, Harper's counsel moved for another continuance on the ground the State had not been forthcoming with the evidence requested in the subpoena. The trial court denied the motion and dismissed Harper's application for postconviction relief, finding that Harper had failed to exhaust his administrative remedies.

Harper has appealed the trial court's dismissal arguing he had a right to subpoena Warden Nix and since Nix's designee failed to fully comply with the subpoena, he should have been granted a continuance to secure Nix's presence. Harper asserts the State's failure to produce the requested documents interfered with his ability to show he appealed his gambling violation to the warden. Harper relies on Iowa Code section 622.79 (1987), for his

assertion that he was entitled to a continuance as a matter of right. Section 622.79 provides:

> In addition to the above remedies, if a party to an action in the party's own right, or being duly subpoenaed, fails to appear and give testimony, the other party may, at the other party's election, have a continuance of the cause at the cost of the delinquent.

On appeal, the State failed to address Harper's contention, but rather, stated the one document produced at the hearing "clearly withdrew the appeal on 86-12-447" therefore, Harper failed to bear his burden of proving he exhausted his administrative remedies. We feel this argument begs the issue. Recently the supreme court found that when prison authorities interfere in a prisoner's attempt to pursue their administrative remedies, the exhaustion doctrine does not apply. Bugely v. State, 464 N.W. 2d 878, 880 (Iowa 1991).

Harper concedes he must appeal to both the warden and the Department of Corrections pursuant to Iowa Code sections 663A.2(6) and 903A.3(2) before he can apply for postconviction relief. Harper is not challenging the requirement per se, but challenging the State's failure to comply with his subpoena which interfered with his ability to show he appealed to the warden.

The main problem seems to stem from confusion about the disciplinary reports' numbers. The record supports the finding that the prison staff as well as Harper were confused about which report related to which violation.

The problem seems compounded by the fact numbers instead of descriptions of the violations were used during the appeal process and Harper was not provided with adequate documentation of the disciplinary reports' numbers. After attempting to follow the sequence of memo's and reports merely designated by number, we can sympathize with Harper's confusion. Ms. Nichols testified that she thought an inmate should be able to remember the disciplinary report number they wished to appeal from, but this court is not prepared to make that assumption in Harper's situation. Harper had two separate disciplinary decisions filed the same day with only a single digit difference in their numbers. We can understand the potential for confusion.

We remand to the district court for further proceedings to ascertain whether the prison authorities have interfered with Harper's ability to exhaust his administrative remedies.

Harper's situation calls for the same procedure on remand as that ordered in Bugely:

> The district court shall order remand only if convinced by a preponderance of the evidence that (1) the prison authorities did indeed interfere and (2) that such interference prevented completion of the administrative appeal process in a timely manner. The prisoner, of course, bears the burden of proof on these issues. In any remand order the district court shall set time limits for completing the administrative appeal process. Such time limits shall begin to run from the date of the remand order.

Id.

REVERSED AND REMANDED.