IN THE COURT OF APPEALS OF IOWA

No. 7-062 / 95-2199

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RUSTIN C. HARVEY,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

FILED
MAY 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Jones County, David M. Remley, Judge.

A prison inmate appeals from the district court's order sustaining the State's motion for summary judgment and dismissing the inmate's postconviction relief application because his administrative appeal was untimely. **AFFIRMED.**

Kelly A. Phipps of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, and Kristin W. Ensign, Assistant Attorney General, for appellee.

Considered by Sackett, P.J., and Cady and Vogel, JJ.

SACKETT, P.J.

Applicant-appellant Rustin C. Harvey, a prison inmate, appeals the dismissal on summary judgment of his action for postconviction relief challenging prison discipline.[1] The district court, in dismissing, found Harvey failed to exhaust his administrative remedies. We affirm.

On May 5, 1995, a prison disciplinary committee determined Harvey violated prison rule 16 prohibiting unauthorized possession. Harvey testified he appealed to the warden and received a response on May 17, 1995, and he sent an appeal to the Department of Corrections on June 3, 1995. He filed this application for postconviction relief on July 6, 1995.

The State filed a motion for summary judgment. After a hearing involving the July 6, 1995 petition for postconviction relief and a second one not at issue in this appeal, the court ruled Harvey's notice of appeal, even if delivered to be mailed, was not timely. Harvey's petition was dismissed.

Harvey on appeal contends the trial court was not correct and his appeal was not timely because of staff interference.

On May 15, 1995, Harvey was placed in administrative segregation. He asked to go to his cell and get his files. His legal work was taken. Two days later, on May 17, Harvey received a response to his appeal from the warden.

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[1] The case was referred to in the prison as No. 050512.

While in administrative segregation, Harvey sent several requests for an interview[2] to the warden asking for the return of his legal files. On May 18, 1995, Harvey sent the warden a new request[3] for his files. The warden told Harvey to let them know if he had any court deadlines. Harvey sent another request on May 24, 1995. The warden responded as follows:

> The procedure to obtain property is clearly outlined in a copy of the rules given you. Sergeant Rindy advises that as of 5-23-95 you had not submitted a written request.

Harvey submitted a written request for the return of his property on May 31, 1995. His property was returned to him on June 1, 1995.

On June 3, 1995, Harvey claims he appealed the warden's decision of May 17, 1995 to the Department of Corrections. The department had no record of his appeal.

Harvey admits he did not file an appeal with the department within fourteen days, as required by prison rules. He contends prison staff interference prevented him from timely filing his appeal. He states although he made many requests, prison staff would not return his legal files. He testified he needed his files to file an appeal of the warden's decision. He claims his appeal should not be considered untimely.

Postconviction actions are law actions, triable to the court, and are reviewed on error. *Kinnersley v. State,* 494 N.W.2d 698, 699 (Iowa 1993). Before seeking

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[2] These requests are known as "kites."

[3] *Id.*

judicial review of an administrative decision, an aggrieved party must exhaust all administrative remedies. *Aschan v. State,* 446 N.W.2d 791, 792 (Iowa 1989). A failure to do so deprives the court of jurisdiction of the case. *Id.*

If a prisoner fails to exhaust his or her administrative remedy because of interference from prison authorities, the administrative remedy is rendered inadequate. *Bugely v. State,* 464 N.W.2d 878, 880 (Iowa 1991). In this circumstance the exhaustion doctrine does not come into play, and the court should remand the case for completion of the administrative process. *Id.* The district court should order such a remand only if convinced by a preponderance of the evidence that (1) the prison authorities did indeed interfere, and (2) such interference prevented completion of the administrative appeal process in a timely manner. *Id.*

Harvey bears the burden of proving by a preponderance of the evidence the institution prohibited or hindered his ability to appeal. Harvey testified he had other disciplinary matters before and knew the procedure. Harvey did not follow rules and file a written request for the return of his property until May 31, 1995. Once a proper request was received, the authorities acted promptly and returned his legal files. His earlier communications made no mention of a court deadline.

We affirm the decision of the district court finding Harvey's appeal to the Department of Corrections was untimely. We conclude he failed to exhaust his administrative remedies.

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We affirm the decision of the district court denying Harvey's request for postconviction relief. Costs of this appeal are assessed to Harvey.

AFFIRMED.