IN THE COURT OF APPEALS OF IOWA

No. 5-491 / 94-1904

FILED
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IOWA SUPREME COURT

BYRON MILLER,

Appellant.

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Lee County, John C. Miller, Judge.

Miller challenges the denial of his application for postconviction relief from prison disciplinary action. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, and William A. Hill, Special Assistant Attorney General, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HAYDEN, P.J.

Byron Miller sent a letter to the deputy director of the department of corrections indicating if he was not transferred from the Iowa Men's Reformatory (IMR) "in time" he would "kill someone." The letter was apparently sent in frustration over IMR's failure to properly treat Miller's stomach ailment. As a result of sending the letter, prison authorities disciplined Miller for violating disciplinary rule 14 (threats/intimidation). After exhausting his administrative remedies, Miller filed an application for postconviction relief. The district court denied the application. Miller appeals.

I. Standard of Review.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards, we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.*

Miller makes two arguments. First, he argues his due process rights were violated because the conduct for which he was punished was not the type prohibited by rule 14. In the alternative, he argues, if rule 14 prohibits the type of conduct involved in this case, the rule violates his First Amendment free speech rights. Because Miller's claims involve constitutional safeguards, our review is de novo.

II. Due Process.

The rule under which Miller was punished, rule 14 (threats), states the following:

> An inmate commits a threat when the inmate communicates a determination or intent to injure another person or to commit a crime of violence or an unlawful act dangerous to human life, and the probable consequence of such threat or threats (whether or not such consequence in fact, occurs) is:
>
> (a) To place another person in fear of bodily injury, or,
> (b) To cause damage to property
> (c) Is to take place in the future after released from confinement.

Miller argues his conduct does not fit within the definition of threats as set out in rule 14. *Gross v. State*, 460 N.W.2d 882, 884 (Iowa App. 1990), is determinative of this issue; therefore, Miller's conduct does constitute a threat under rule 14. In *Gross* an inmate wrote a letter to his mother which stated in part, "If they don't clear me for transfer there is only one way for me to get there and that's to go off on a guard." *Id.* The court found the inmate's expressions set forth in the letter clearly indicated the intent to injure a guard. *Id.* As such, the court found the act fell within the purview of the rule against threats and sustained the disciplinary action taken by prison officials. *Id.*

First, like the letter in *Gross*, the comments made in Miller's letter clearly indicate an intention to injure someone. In the case at bar, Miller wrote a letter to the deputy director of the department of corrections which stated in part, "I feel its like this, either you send me "anywhere" (sic) Fort Madison, Oakdale, CCF, I don't care, just out

of here. If you refuse to see my request I will kill someone in time. Because I have nothing to loose (sic) . . . ." There is no significant difference between the comments made in the letter by Gross and those in the letter by Miller. Both letters say they will harm someone, yet they do not indicate who they will harm or when they will harm them. The court in *Gross* found such threats sufficiently indicate an intent to injure someone. We agree.

Additionally, regardless of whether fear of bodily injury resulted, the probable consequence of Miller's threat was to cause fear. Appellant argues the discipline should be set aside because the threat did not put an *intended* victim in actual fear of bodily injury. The rule does not require an intended victim to exist and does not require any one person to actually fear Miller's acts. The rule merely requires an inmate communicate his or her *intent to injure some other person*. The probable consequence of the threat, regardless of whether such result in fact occurs, must be to place another person in fear of bodily injury. It is not necessary for fear to actually occur.

A disciplinary decision should be upheld if there is some evidence to support the decision. *James v. State*, 479 N.W.2d 287, 291 (Iowa 1991). The threshold for determining whether some evidence exists is low, and can be satisfied by the report of a correctional officer. *Mahers v. State*, 437 N.W.2d 565, 569 (Iowa 1989). The *Gross* court held the record clearly provided "some evidence" Gross violated the rule against

threats. *Gross* 460 N.W.2d at 884. Similarly, in the case at bar, there is "some evidence" to support the disciplinary action taken by prison officials. We affirm.

III. First Amendment.

Before postconviction relief is available to a prisoner who challenges a decision of prison disciplinary committees, the prisoner must first exhaust his or her administrative remedies. *Bonds v. State*, 447 N.W.2d 135, 136 (Iowa 1989). Even issues of constitutional magnitude will not be addressed on an application for postconviction relief if not presented in the trial court. *Fryer v. State*, 325 N.W.2d 400, 405 (1982). However, if a prisoner has failed to assert a ground for relief in this process, the court may consider it if the prisoner shows "sufficient reason" for failing to assert the claim. *Bonds*, 447 N.W.2d at 136.

The district court held Miller was not entitled to assert his First Amendment claim because he failed to exhaust administrative remedies. Miller contends, however, he had good cause for his failure to exhaust administrative remedies. Miller gives two reasons for his failure to exhaust. First, Miller argues it was futile to assert his First Amendment claim at the administrative level because the department of corrections does not review substantive constitutional violations. Second, Miller asserts he could not have raised the First Amendment issue because he had neither counsel nor counsel-substitute during the administrative process.

We determine Miller did not have good cause justifying his failure to exhaust administrative remedies and therefore cannot assert his First Amendment claim on appeal. First, we determine a prisoner does not have good cause for failure to present claims merely because he or she feels it is futile to do so. The purpose of requiring a person to preserve issues is to allow those involved an opportunity to rule on the merits of an alleged error. *Aschan v. State*, 446 N.W.2d 791, 793 (Iowa 1989). In this case, the warden and the Iowa Department of Corrections should have been given the chance to render a decision concerning Miller's First Amendment claim. If they erred in their decision, Miller would have been allowed to appeal to the district court and then the court of appeals. Miller failed to present his First Amendment claim at the administrative level and does not have good cause for the failure.

Miller also asserts he had good cause for his failure to exhaust administrative remedies because he did not have counsel during the administrative process. Inmates in the prison disciplinary process do not have a right to attorneys during the administrative process. *Howard v. State*, 439 N.W.2d 193, 194 (Iowa 1989). If the lack of counsel was proper cause for failure to exhaust administrative remedies, we would systematically eliminate the exhaustion requirement from postconviction proceedings.

Beyond holding Miller had not exhausted his administrative remedies, the district court went on to state even if administrative remedies had been exhausted.

Miller was not entitled to relief because there was no First Amendment violation. Because we hold Miller did not exhaust his administrative remedies, we will not reach the merits of his First Amendment claim

IV. Conclusion.

Review of the record reflects Miller's conduct did fall within the purview of rule 14, and there is "some evidence" to support the disciplinary committee's decision. Furthermore, Miller failed to preserve the First Amendment issue for appeal and therefore cannot assert it on appeal. We affirm.

AFFIRMED.