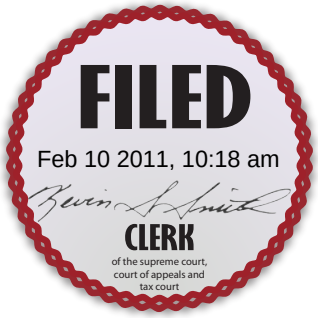
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

CHARLES E. JUSTISE, SR.
Carlisle, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHARLES E. JUSTISE, SR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 77A01-1009-MI-511
	)	
JERRY HUSTON, ET AL.,	)	
	)	
Appellees.	)	

APPEAL FROM THE SULLIVAN CIRCUIT COURT
The Honorable P. J. Pierson, Judge
The Honorable Ann Smith Mischler, Magistrate
Cause No. 77C01-1009-MI-350

February 10, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Charles E. Justise, Sr. ("Justise") appeals the Sullivan Circuit Court's dismissal of his pro se complaint against Jerry Huston and Karen Richards ("the Defendants").

We affirm.

Facts and Procedural History

At the time relevant to this appeal, Justise was a prisoner in the custody of the Indiana Department of Correction ("DOC") at the Wabash Valley Correctional facility. In September 2010, Justise filed a Complaint for Damages and Request for Injunctive Relief, in which he claimed, *inter alia*, that the Defendants were denying him access to legal research materials, not copying his legal filings, and causing delay in the filing of his legal documents. As a result, Justise claimed, several of his other lawsuits and appeals and been dismissed for failure to meet certain deadlines.

On September 13, 2010, the trial court reviewed Justise's complaint pursuant to Indiana Code section 34-58-1-2 and determined that the complaint should be dismissed for the following reasons: (1) because Justise had failed to provide proof that he had exhausted his administrative remedies; (2) because Justise failed to plead facts sufficient to state a claim against the Defendants personally; (3) that the trial court lacked the authority to grant the requested relief; and (4) because Justise had failed to comply with the trial court's earlier order that he provide the court with a list of his previously-filed lawsuits in Sullivan County, along with the disposition of these cases, so that the trial court could ensure that Justise was not filing repetitive suits. Appellant's App. pp. 62-63. Justise filed his notice of appeal on September 22, 2010.

Discussion and Decision

Pursuant to Indiana Code section 34-58-1-1 (2004), if a trial court receives a complaint or petition from an offender, "the court shall docket the case and take no further action until the court has conducted the review required by section 2 of this chapter." In turn, section 2 of the chapter provides:

> (a) A court shall review a complaint or petition filed by an offender and shall determine if the claim may proceed. A claim may not proceed if the court determines that the claim:
> (1) is frivolous;
> (2) is not a claim upon which relief may be granted; or
> (3) seeks monetary relief from a defendant who is immune from liability for such relief.
> (b) A claim is frivolous under subsection (a)(1) if the claim:
> (1) is made primarily to harass a person; or
> (2) lacks an arguable basis either in:
> (A) law; or
> (B) fact.
> (c) A court shall dismiss a complaint or petition if:
> (1) the offender who filed the complaint or petition received leave to prosecute the action as an indigent person; and
> (2) the court determines that the offender misrepresented the offender's claim not to have sufficient funds to prosecute the action.

Ind. Code § 34-58-1-2 (2004).

Here, the trial court reviewed Justise's complaint pursuant to this statute and concluded that it should be dismissed for four different reasons. We affirm the trial court's dismissal of Justise's complaint because we find one of these reasons to be dispositive, namely, Justise failed to prove that he exhausted his administrative remedies.

Justise's argument on this particular issue is brief. He first claims that the exhaustion of administrative remedies is an affirmative defense that must be raised by the Defendants. In so doing, he first cites Wright v. Universal Maritime Service Corp., 525

U.S. 70 (1998). But in that case, the Court simply noted in its recitation of the procedural history of the case that the defendants' answer had asserted various affirmative defenses, including the plaintiff's failure to exhaust his administrative remedies. Id. at 75. Wright did not hold that the failure to exhaust administrative remedies must be raised by a defendant. Justise's citation to Day v. McDonough, 547 U.S. 198 (2006), is similarly unavailing. In that case, the Court noted that the failure to exhaust state remedies is an affirmative defense to federal habeas corpus petitions. Id. at 208.

In Indiana, a claimant who has an available administrative remedy must pursue that remedy before being allowed access to the courts, and a claimant's failure to exhaust administrative remedies deprives the trial court of subject matter jurisdiction. Higgason v. Lemmon, 818 N.E.2d 500, 503 (Ind. Ct. App. 2004), trans. denied. The lack of subject matter jurisdiction can be raised at any time, and if the parties do not question subject matter jurisdiction, the court may consider the issue *sua sponte*. Georgos v. Jackson, 790 N.E.2d 448, 451 (Ind. 2003). We have noted before that it is the offender's burden to "show what the relevant DOC procedures are and that he has exhausted them at all levels." Burks-Bey v. State, 903 N.E.2d 1041, 1043 (Ind. Ct. App. 2009) (citing Young v. State, 888 N.E.2d 1255, 1257 (Ind. 2008)).

Justise argues on appeal that he "did not have to submit proof to the trial court that he exhausted his administrative remedies, although he did submit the proof with his complaint as an exhibit." Appellant's Br. p. 8. Justise refers to a certain exhibit he filed with his complaint, which appears to show that he did file formal grievances with the DOC regarding his alleged lack of access to necessary legal materials and the delays in

his legal filings allegedly caused by the Defendants. See Appellant's App. pp. 51-58. However, Justise refers to no case law, statute, rule, or regulation which would show what the available DOC administrative remedies are or that his exhibits prove that he exhausted these remedies. Justise's complaint is similarly deficient, stating with regard to the administrative remedies only, "See also exhausted grievance, as exhibit E," with no citation to any case law, statute, rule, or regulation. Appellant's App. p. 10.

We remind Justise that it is his burden to show what the DOC procedures are and show that he has exhausted them on all levels. Burks-Bey, 903 N.E.2d at 1043; Young, 888 N.E.2d at 1257. Here, Justise simply attached documentation of his grievances without any further explanation. Under these facts and circumstances, we cannot fault the trial court for concluding that Justise did not prove that he exhausted his administrative remedies. Without such proof, the trial court properly dismissed Justise's complaint.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.