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IN THE
COURT OF APPEALS OF INDIANA

ERIC D SMITH	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 33A01-0812-CV-607
	)	
J. DAVID DONAHUE, JEFF WRIGLEY,	)	
JENNIFER SMITH, MRS. TESTER and	)	
OTHER UNKNOWN OFFICIALS,	)	
	)	
Appellees-Defendant.	)	

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable Michael D. Peyton, Judge
Cause No. 33D01-0809-PL-20

June 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Eric D. Smith, an inmate in the Indiana Department of Correction ("DOC"), appeals the dismissal of his complaint.

We affirm.

ISSUE

Whether the trial court erred in dismissing Smith's complaint.

FACTS

On September 12, 2008, Smith, pro se, filed a complaint in Henry Superior Court against Commissioner J. David Donahue, Jeff Wrigley, Jennifer Smith, a Mrs. Tester, and unknown DOC employees. The GEO Group, Inc. operates and manages the New Castle Correctional Facility on behalf of the State. Jeff Wrigley, Jennifer Smith, and Mrs. Tester (collectively, "GEO") are not employees of the DOC but rather are employed by, or have subcontracted with, the GEO Group, Inc.

Smith asserted a 42 U.S.C. § 1983 claim based on the First and Fourteenth Amendments to the United States Constitution. Specifically, he alleged that he has been denied "an adequate, effective, and meaningful law library and assistance from a legal assistant" while an inmate in a segregated unit of New Castle Correctional Facility.

(App. 10). He further alleged that he has been prevented from posting mail and otherwise has been treated differently than other inmates.

According to Smith, who "has over 15 active cases going on in courts," Jennifer Smith, a library supervisor, refused to provide him with adequate supplies of paper. (App. 16). He also maintains that Wright, Jennifer Smith, and Mrs. Tester refuse to bind and copy court documents as required by Indiana Appellate Rules because, as an inmate in the mental health unit, he "cannot have bounded [sic] materials[.]"[1] (App. 20).

Smith also asserts in his complaint that "[a]ll of [his] requests for legal research materials gets [sic] denied." (App. 19). He complains that as an inmate in a segregated unit, he is limited to using a "cell-delivery system" to obtain legal materials and advice. (App. 18).

Smith contends that he has not been provided with a reasonable amount of envelopes and free postage pursuant to Indiana Code section 11-11-3-5,[2] receiving only two postage-paid envelopes per month. He argues that he cannot purchase additional postage because he is indigent; however, he acknowledges that he is indigent because he has been placed in a segregated unit, which prevents him from working in the correctional facility.

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[1] We note that his appellate brief in this case is adequately bound and a sufficient number of copies has been provided.

[2] Indiana Code section 11-11-3-5 provides that the DOC "shall provide a confined person, without cost, a reasonable amount of stationery, envelopes, and postage for transmission of correspondence, and shall make available for purchase additional stationery, envelopes, and postage."

Smith also contends that he is refused free envelopes and postage with which to solicit legal representation, purportedly in violation of Indiana Code section 11-11-7-2.[3] According to Smith, Donahue has instituted a policy whereby free postage will not be provided to solicit counsel; rather, Donahue requires that the postage provided or earned under Indiana Code section 11-11-3-5 be used for such purposes.

Smith therefore sought "$10,000 in compensatory damages against each defendant"; "$10,000 in punitive damages against each defendant"; the appointment of counsel; and an award of future attorney fees and costs. (App. 23).

On October 14, 2008, GEO filed a motion to dismiss Smith's complaint pursuant to Indiana Code sections 34-58-1, *et seq*., and 34-13-7, *et seq*. The trial court granted the motion to dismiss on October 17, 2008, and ordered that Smith's complaint be dismissed with prejudice.

DECISION

Smith contends that the trial court erred in dismissing his complaint pursuant to Indiana Code section 34-13-7-1. Specifically, he argues that the statute violates Article 1, Section 23 of the Indiana Constitution. In the alternative, he argues that it does not apply to GEO employees or its subcontractors.

"[C]ourts are traditionally loath to address constitutional issues when they are otherwise avoidable." *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 870 N.E.2d 12, 20 (Ind. Ct. App. 2007), *trans. denied*; *State v. Brown*, 840 N.E.2d 411, 414 (Ind. Ct. App. 2006) (stating that courts will not decide constitutional questions where cases can be

[3] Indiana Code section 11-11-7-2 provides that the DOC "shall provide an indigent confined person with free stationery, envelopes, postage, and notarial services for legal correspondence."

concluded upon other grounds). We decline to address Smith's constitutional claim as this case can be concluded upon the grounds set forth below.

In this case, GEO asserted two bases for dismissal of Smith's complaint: Indiana Code section 34-13-7-1[4] and Indiana Code section 34-58-1-2.[5] Although the trial court

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[4] Indiana Code section 34-13-7-1 provides:

> In addition to any other requirements under law, before filing a civil rights action or tort claim action against a public employee or government entity, an offender must submit to the trial court:
>
> (1) a copy of the complaint the offender wishes to file;
> (2) a list of all cases previously filed by the offender involving the same, similar, or related cause of actions; and
> (3) a copy of all relevant documents pertaining to the ultimate disposition of each previous case filed by the offender against any of the same defendants in a state or federal court. The relevant documents include:
> (A) the complaint;
> (B) any motions to dismiss or motions for summary judgment filed by the defendants in the actions;
> (C) the state or federal court order announcing disposition of the case; and
> (D) any opinions issued in the case by any appellate court.
>
> (b) An offender must file with the court a brief that includes:
>
> (1) a legal argument;
> (2) a citation to authority; and
> (3) an explanation to the court why the new action is not subject to dismissal as a matter finally decided on its merits by a court and not subject to litigation again between the same parties.
>
> (c) If the trial court determines that the complaint is frivolous, malicious, or otherwise utterly without merit, or fails to state a claim upon which relief may be granted, the court shall dismiss the complaint.

[5] Indiana Code section 34-58-1-2 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:

subsequently dismissed Smith's complaint, it did not specify upon which basis it was granting the motion to dismiss.

Generally, when a trial court grants a motion to dismiss without reciting the grounds relied upon, we presume on review that the court granted the motion to dismiss on all the grounds in the motion. *Lawson v. First Union Mortgage Co.*, 786 N.E.2d 279, 281 (Ind. Ct. App. 2003). Thus, we presume that the trial court dismissed Smith's complaint pursuant to Indiana Code section 34-58-1-2.[6] Furthermore, we will affirm a trial court's grant of a motion to dismiss if it is sustainable on any theory or basis found in the record. *Smith v. Wal-Mart Stores East, LP*, 853 N.E.2d 478, 483 (Ind. Ct. App. 2006), *trans. denied*.

Other than a footnote suggesting that "there's an arguable basis in law and fact that Indiana Code [section] 34-58-1-2 is unconstitutional," Smith does not challenge the trial court's dismissal pursuant to Indiana Code section 34-58-1-2. Smith's Br. at 9 n.1. Thus, any argument is waived. *See Douglas v. State*, 800 N.E.2d 599, 605 (Ind. Ct. App. 2003) (finding that failure to present arguments in initial briefs to this court results in waiver of appellate review), *trans. denied*; *see also Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) ("Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and

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(1) is made primarily to harass a person; or
(2) lacks an arguable basis either in:
(A) law; or
(B) fact.

[6] This presumption is supported by the fact that "[a] dismissal made pursuant to Indiana Code section 34-58-1-2 is <u>with</u> prejudice." *Smith v. Huckins*, 850 N.E.2d 480, 483 (Ind. Ct. App. 2006). The trial court in this case specifically dismissed Smith's complaint <u>with</u> prejudice.

portions of the record."), *trans. denied*. We therefore affirm the trial court's motion to dismiss based on Indiana Code section 34-58-1-2.

Waiver notwithstanding, the trial court's grant of the motion to dismiss is sustainable because the trial court lacked subject-matter jurisdiction over Smith's complaint. "The lack of subject matter jurisdiction may be raised at any time, and either the trial court or the appellate court is required to consider the issue sua sponte if it is not questioned by the parties." *Severson v. Bd. of Trustees of Purdue Univ.*, 777 N.E.2d 1181, 1193 (Ind. Ct. App. 2002), *trans. denied*.

Before pursuing a 42 U.S.C. § 1983 claim in state court, Smith has an obligation to exhaust his administrative remedies. *See Abdul-Wadood v. Batchelor*, 865 N.E.2d 621, 624 (Ind. Ct. App. 2007) ("Indiana state courts now require exhaustion of administrative remedies before inmates may file § 1983 claims . . . ."), *trans. denied*. A party's failure to exhaust administrative remedies deprives the trial court of subject matter jurisdiction. *Sun Life Assurance Co. of Canada v. Ind. Comprehensive Health Ins. Ass'n*, 827 N.E.2d 1206, 1209 (Ind. Ct. App. 2005), *trans. denied*. This policy avoids premature litigation, permits the compilation of an adequate record for judicial review, and affords agencies the opportunity and autonomy to correct their own errors. *Id.*

Again, we will affirm a trial court's grant of a motion to dismiss if it is sustainable on any theory or basis found in the record. *Wal-Mart Stores East, LP*, 853 N.E.2d at 483. In his complaint, Smith admits that he failed to exhaust his administrative remedies, stating that he "tried to exhaust his remedies, but they wasn't [sic] made available and was [sic] rejected[.]" (App. 30). He therefore argues that "exhaustion is satisfied." *Id.*

> While "exhaustion of administrative remedies may be excused if the exercise would be futile," "the exhaustion requirement . . . should not be dispensed with lightly on grounds of 'futility.'" To prevail upon a claim of futility, "one must show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances."

Johnson v. Celebration Fireworks, Inc., 829 N.E.2d 979, 984 (Ind. 2005) (internal citations omitted). "[T]he mere fact that an administrative agency might refuse to provide the relief requested does not amount to futility." *Id.*

Here, Smith suggests that to pursue administrative remedies would be fruitless as prior grievances have been rejected or no remedies have been provided; therefore, the DOC would inevitably rule against him in the future. Nevertheless, that would not amount to futility. *See id.* Because Smith has failed to exhaust his administrative remedies or show futility, the trial court lacked subject matter jurisdiction over his complaint.[7] Accordingly, it properly dismissed the complaint.

Affirmed.

Robb, J., concurs.

Bailey, J., concurs in result with separate opinion

[7] We note that Smith filed a "Verified Proof of Exhaustion of Administrative Remedies," with attached exhibits, in support of his contention that the pursuit of administrative remedies would be futile. The exhibits, however, only show that Smith did not exhaust the grievance procedures implemented by the DOC. We cannot say that he has explained sufficiently why he failed to complete the grievance process with respect to any of his grievances.

IN THE
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ERIC D. SMITH,	)	
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Appellant-Plaintiff,	)	
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vs.	)	No. 33A01-0812-CV-607
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J. DAVID DONAHUE, JEFF WRIGLEY, JENNIFER SMITH, MRS. TESTER and OTHER UNKNOWN OFFICIALS,	)	
	)	
Appellees-Defendant.	)	

BAILEY, Judge, concurring in result

I concur in result with the majority opinion because I too conclude that Smith's complaint was properly dismissed by the trial court as frivolous litigation. However, I write separately to clarify that the trial court did not lack subject matter jurisdiction, inasmuch as a 42 U.S.C. § 1983 claim is within a general class of cases that the Henry Superior Court was empowered to hear, and the trial court did in fact render a decision on the merits.

I acknowledge that a separate panel of this Court has found a lack of jurisdiction in light of a § 1983 litigant's failure to exhaust administrative remedies. Abdul-Wadood v. Batchelor, 865 N.E.2d 621, 624 (Ind. Ct. App. 2007), trans. denied. However, although the failure to exhaust administrative remedies is fatal, I believe that the discussion of "lack of jurisdiction" is a misnomer and the litigant's omission instead

represents an issue of legal error.[8] In K.S. v. State, 849 N.E.2d 538, 540 (Ind. 2006), our Supreme Court clarified jurisdictional concepts:

> Indiana trial courts possess two kinds of "jurisdiction." Subject matter jurisdiction is the power to hear and determine cases of the general class to which any particular proceeding belongs. Personal jurisdiction requires that appropriate process be effected over the parties. . . . Other phrases recently common to Indiana practice, like "jurisdiction over a particular case," confuse actual jurisdiction with legal error, and we will be better off ceasing such characterizations.

Subsequently, in Wayne County Property Tax Assessment Bd. of Appeals v. United Ancient Order of Druids-Grove #29, 847 N.E.2d 924, 926 (Ind. 2006), the Court held that a petitioner's failure to file the administrative record in the Tax Court within the time required does not deprive the Tax Court of subject matter jurisdiction, explaining:

> The timing of filing the agency record implicates neither the subject matter jurisdiction of the Tax Court nor personal jurisdiction over the parties. Rather, it is jurisdictional only in the sense that it is a statutory prerequisite to the docketing of an appeal in the Tax Court.

"Jurisdiction over the particular case" is something "now abolished." Packard v. Shoopman, 852 N.E.2d 927, 930 (Ind. 2006).

Here, Smith failed to exhaust his administrative remedies before filing his complaint, and thus there existed a procedural impediment to Smith's obtaining the relief he sought. Nevertheless, this legal error did not deprive the trial court of subject matter jurisdiction. Indeed, the trial court rendered a judgment on the merits, dismissing Smith's case with prejudice, upon finding it to be frivolous litigation. See e.g., Smith v. Huckins, 850 N.E.2d 480, 483 (Ind. Ct. App. 2006) (observing that Indiana Code § 34-58-1-2

[8] When a court lacks subject matter jurisdiction, its actions are void ab initio and have no effect whatsoever. Allen v. Proksch, 832 N.E.2d 1080, 1095 (Ind. Ct. App. 2005).

provides for a unique proceeding in which the trial court "looks at the facts in the complaint" and "necessarily look[s] at matters outside the record such as the fact that a judicial record dismissing a case exists" and then "decides as a matter of law whether the case should go forward," and also observing that a dismissal under this statutory provision is a dismissal with prejudice).

For the foregoing reasons, I concur in the result reached by the majority.