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FILED
Aug 26 2011, 9:37 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

AARON ISBY,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 77A01-1104-PL-181
	)	
EDWIN BUSS, INDIANA PAROLE BOARD, et al.,	)	
	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE SULLIVAN SUPERIOR COURT
The Honorable Robert E. Springer, Judge
Cause No. 77D01-1102-PL-47

August 26, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Aaron Isby appeals the dismissal of his complaint for declaratory judgment and injunctive relief filed against Edwin Buss, Commissioner of the Indiana Department of Correction ("DOC"), and the Indiana Parole Board ("Parole Board") (collectively "the Defendants"). We affirm in part, reverse in part, and remand.

Issue

Isby raises four issues, and the Defendants raise one issue. We address one consolidated issue, which we restate as whether the Sullivan Superior Court properly dismissed Isby's complaint.

Facts

In 1988, Isby was convicted of robbery and sentenced to thirty years. In 1992, he was convicted of attempted murder and sentenced to forty years.[1] On September 27, 2010, Isby filed a pro se complaint in Allen County seeking declaratory judgment and injunctive relief and asserting that he was entitled to be released on parole. In support of his complaint, Isby attached a copy of a January 28, 2008 letter from the Parole Board, which provided in part, "Enclosed are copies of computer print-outs of your sentences that show you currently have a projected release date to parole on February 25, 2009."

[1] Isby's Appendix contains little information regarding these convictions and sentences, which makes it difficult to review the matter. Further, the Defendants' Appendix consists of a June 17, 2011 print-out from the DOC's website listing Isby's convictions and projected release dates. Although the Sullivan Superior Court referenced the website in the February 24, 2011 order, it does not appear that the Defendants actually presented this information to the trial court. Moreover, the Defendants provide no documentation showing the accuracy of the information on the website. Under these circumstances, we believe it is inappropriate to consider this information on appeal.

Appellant's App. p. 13. It appears that on October 26, 2010, the Allen Superior Court accepted jurisdiction over Isby's complaint.[2]

On November 3, 2010, Isby filed a motion for production of documents, requesting in part various documents relating to his sentence, credit time, and parole status. On November 23, 2010, the Defendants were served copies of the complaint by mail. On December 17, 2010, an attorney entered an appearance on behalf of the Defendants. On January 6, 2011, the Defendants filed a motion to dismiss for incorrect venue pursuant to Indiana Trial Rule 12(B)(3) and requested that the case be transferred to Sullivan County pursuant to Indiana Trial Rule 75. On January 18, 2011, Isby filed a motion in opposition to dismissal or transfer and a motion to compel discovery. On January 31, 2011, the Allen Superior Court granted the Defendants' motion, and the case was transferred to Sullivan County.

On February 24, 2011, the Sullivan Superior Court issued an order stating that it had examined Isby's pleadings pursuant to Indiana Code Section 34-58-1-1 and noting that Isby failed to provide any supporting documents such as his prison disciplinary records to show what credit class he had been during his incarceration. The Sullivan Superior Court also noted that, according to the DOC's website, Isby had been convicted

[2] The Defendants argue that the Allen Superior Court apparently did not perform the screening process. They then acknowledge, "In offender litigation, defendants are not even served a complaint until after the court determines it may proceed." Appellees' Br. p. 12. Although Isby did not provide us with a copy of the chronological case summary from the Allen Superior Court, his Appendix does include a handwritten "Order or Judgment" sheet from that court stating, "The undersigned accepts jurisdiction herein[,]" which was dated October 26, 2010, and the complaint was served on the Defendants thereafter. Appellant's App. p. 18. Because we reverse the dismissal and remand, however, we need not determine whether the case was initially screened by the Allen Superior Court and then rescreened by the Sullivan Superior Court.

of attempted murder in 1992 and sentenced to forty years and that Isby's pleadings did not address this conviction. The Sullivan Superior Court gave Isby thirty days to provide it with disciplinary records along with an explanation as to why he believed he was entitled to parole considering all of his criminal history.

That same day, the attorney for the Defendants filed a motion to withdraw her appearance, which was subsequently granted. On March 4, 2011, Isby filed a motion for change of judge pursuant to Indiana Trial Rule 76(B) and objected to the transfer of the case to Sullivan County. On March 11, 2011, the Sullivan Superior Court issued an order denying Isby's motion for change of judge pending his compliance with its February 24, 2011 order. The order noted that Isby's case had not passed the screening process of Indiana Code Section 34-58-1-1 and that he had not complied with the February 24, 2011 order. The order stated, "If the Plaintiff's cause of action survives the screening process required by I.C. 34-58-1-1, then he would be entitled to request a change of judge pursuant to Trial Rule 76(B)." Id. at 65.

On March 18, 2011, Isby renewed his change of judge motion, arguing that, because he had filed misconduct allegations against the Sullivan Superior Court judge and magistrate on March 14, 2011, a conflict of interest had arisen. On March 21, 2011, another attorney entered an appearance on behalf of the Defendants. On March 23, 2011, Isby filed a motion requesting the Sullivan Superior Court to rule on his complaint for declaratory judgment and injunctive relief or to set the matter for a hearing. Isby attached the Parole Board's January 28, 2008 letter, various computer print-outs of calculated

credit-time, and a January 23, 2008 letter from Isby to the Parole Board, in which Isby sought information regarding his sentence for the attempted murder convictions.

On April 6, 2011, the Sullivan Superior Court issued an order denying Isby's renewed motion for change of judge. The order stated, "The Plaintiff having failed to comply with the Court's order of February 24, 2011, the Court now dismisses this cause of action without prejudice." Appellant's App. p. 97. Isby now appeals.

Analysis

Isby contends that he is entitled to be released on parole. The Defendants respond by arguing that the dismissal was proper and that it should be considered a dismissal with prejudice pursuant to the Indiana Code Section 34-58-1-2, the Frivolous Claims Law. We do not reach the merits of Isby's claim, nor do we agree with the Defendants that Isby's claim was properly dismissed pursuant to the Frivolous Claims Law, which provides in part:

> (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.

Ind. Code § 34-58-1-2.

Even though the Sullivan Superior Court did not expressly say it was dismissing based on the Frivolous Claims Law, we will assume that it was the reason for dismissal. The 2008 letter from the Parole Board was apparently written in response to a letter from Isby referencing his attempted murder convictions and indicated that Isby's projected release date to parole was February 25, 2009. Without any information detailing the robbery and attempted murder sentences or explaining the projected release date in the letter, it is not clear that that Isby's complaint lacks an arguable basis in law or fact. Further, without information such as abstracts of judgment relating to all of Isby's pending sentences, credit time calculations, or other records explaining Isby's projected release date, it would be premature to assess Isby's claim on the merits as he urges us to do. Thus, although Isby's claim may very well be unsuccessful, further assessment of it is required.

Isby also contends that his complaint was improperly transferred from Allen County to Sullivan County. Our supreme court has explained:

> Trial Rule 75 governs venue requirements in Indiana. It contains ten subsections, each setting forth criteria establishing "preferred" venue. A case or complaint may be filed in any county in Indiana, but if the complaint is not filed in a preferred venue, the court is required to transfer the case to a preferred venue upon the proper request from a party. The rule does not create a priority among the subsections establishing preferred venue. If the complaint is filed in a county of preferred venue, then the trial court has no authority

> to transfer the case based solely on preferred venue in one or more other counties.

American Family Ins. Co. v. Ford Motor Co., 857 N.E.2d 971, 973-74 (Ind. 2006). "[F]actual findings linked to a ruling on a motion under Rule 75(A) are reviewed under a clearly erroneous standard and rulings of law are reviewed de novo. If factual determinations are based on a paper record, they are also reviewed de novo." Id. at 973. Because the Allen Superior Court's decision was based on a paper record, our review is de novo.

Indiana Trial Rule 75(A) provides in part:

> Preferred venue lies in:
>
> (1) the county where the greater percentage of individual defendants included in the complaint resides, or, if there is no such greater percentage, the place where any individual defendant so named resides; or
>
> * * * * *
>
> (4) the county where either the principal office of a defendant organization is located or the office or agency of a defendant organization or individual to which the claim relates or out of which the claim arose is located, if one or more such organizations or individuals are included as defendants in the complaint; or
>
> (5) the county where either one or more individual plaintiffs reside, the principal office of a governmental organization is located, or the office of a governmental organization to which the claim relates or out of which the claim arose is located, if one or more governmental organizations are included as defendants in the complaint; or
>
> * * * * *

> (7) the county where the individual is held in custody or is restrained, if the complaint seeks relief with respect to such individual's custody or restraint upon his freedom; or . . . .

Relying on these four provisions of Indiana Trial Rule 75(A), the Defendants argued in their memorandum in support of transfer that Allen County was not the proper venue because the Defendants resided in Marion County and Isby was incarcerated in Sullivan County. The Defendants asserted that, because there was no link between the parties or events and Allen County, Sullivan County was a county of preferred venue and Allen County was not. In response, Isby, referring to his robbery conviction, argued that proper venue was not in Sullivan County because his complaint related to an Allen County conviction and sentence.

Considering the arguments advanced to the Allen Superior Court,[3] we conclude that it did not improperly transfer the case to Sullivan County. After the Defendants argued that Allen County was not a county of preferred venue, Isby did not provide a legal basis showing that it was or otherwise establish that Indiana Trial Rule 75(A) links preferred venue to the county where a conviction occurred. As such, the Allen Superior Court was required to transfer the case to a county of preferred venue. See American Family, 857 N.E.2d at 974.

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[3] On appeal, the Defendants contend that Isby's complaint is in essence a petition for a writ of habeas corpus, giving Sullivan County jurisdiction. After the case was transferred to Sullivan County, Isby argued that, although he is incarcerated in Sullivan County, he remains domiciled in Allen County, making it improper for Allen County to transfer his complaint to Sullivan County. These arguments, however, were not made to the Allen Superior Court before it transferred venue and are procedurally defaulted. See Cavens v. Zaberdac, 849 N.E.2d 526, 533 (Ind. 2006) ("Issues not raised at the trial court are waived on appeal."). Moreover, the parties' general characterization of the issue as jurisdictional is not sufficient to avoid waiver. Cf. Town Council of New Harmony v. Parker, 726 N.E.2d 1217, 1223 (Ind. 2000) (noting that claim of lack of subject matter jurisdiction cannot be waived), amended in part on reh'g, 737 N.E.2d 719.

Finally, because we have concluded that the case was improperly dismissed, we need not decide today whether an offender may move for a change of judge pursuant to Indiana Trial Rule 76(B) before his or her case is screened in accordance with the Frivolous Claims Law. Nevertheless, because we remand for further proceedings, we also reverse the Sullivan Superior Court's decision denying Isby's renewed motion for change of judge and remand for it to consider the merits of that motion.[4]

Conclusion

Although Isby's case was properly transferred to Sullivan County, it was improperly dismissed. Because we remand, the court should also address Isby's motion for change of judge. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

ROBB, C.J., and BRADFORD, J., concur.

[4] Because we remand for further proceedings, we need not address Isby's argument the Sullivan Superior Court improperly dismissed his complaint without conducting a hearing pursuant to Indiana Trial Rule 41(E). Likewise, because of our decision to reverse and remand, we decline the Defendants' request to note that Isby may not proceed as an indigent person in future civil lawsuits pursuant to Indiana Code Section 34-10-1-3.