IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DARRYL E. GHOLSON,
Appellant,
vs.
THE STATE OF NEVADA; THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS; BRIAN WILLIAMS, WARDEN; GABRIELA GARCIA, CASEWORKER SPECIALIST III; GILLIAN LAMBEY, CASEWORKER, SPECIALIST II; VANZETTE LEWIS, CASEWORKER, SPECIALIST II; AND WILLIAM LLOYD, CASEWORKER, SPECIALIST 1,
Respondents.

No. 76926-COA

FILED

JUN 20 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Darryl E. Gholson appeals from a district court order dismissing a civil rights action. Eighth Judicial District Court, Clark County; Mark B. Bailus, Judge.

In a second amended complaint and demand for jury trial filed on June 29, 2018, Gholson claimed the respondents violated his Fourteenth Amendment due process rights by taking away statutory credits he had already earned without notice and a hearing. Gholson alleged that between January 2015 and June 2015 he received credit for work he did while on an extra job work list, and in October 2015, 30 days before his prison release date, the respondents took 48 days of good time credit from him without any notice. Gholson sought an award for damages resulting from the alleged due process violation.

Respondents filed a motion to dismiss the complaint pursuant to NRCP 12(b)(5). First, respondents argued dismissal was warranted

because Gholson did not make personal allegations against any defendant. Second, respondents stated Gholson's projected release date was readjusted because he was not employed during the entire period of his incarceration and, therefore, he did not earn all potential good time credit. Respondents argued, Gholson did not have a liberty interest and could not establish a due process violation based on the readjustment of his release date because there is no right to good time credit and no right to employment. Because Gholson did not oppose the motion to dismiss, respondents filed a notice asserting that pursuant to EDCR 2.20(e) the motion should be granted and Gholson's case should be dismissed.

The record indicates that, at a hearing on the motion to dismiss, the district court granted the motion without prejudice pursuant to EDCR 2.20(e) and directed respondents' counsel to prepare an order consistent with the motion. In the written order granting the motion to dismiss, the district court found there was "substantial evidence to support the [respondents'] positions" and "there was no Due Process violation regarding [Gholson] not being credited with good time credits, when [he] failed to obtain employment." The district court concluded that Gholson failed to state a claim upon which relief may be granted because he had no constitutional right to employment while in prison and he had no constitutional right to parole or classification status.

Gholson claims the district court erred by granting respondents' motion to dismiss pursuant to NRCP 12(b)(5) because he asserted a claim upon which relief can be granted. Specifically, he points out an inmate has a liberty interest in credit that he has earned and he alleged he was entitled to damages because respondents violated his constitutional rights by taking away statutory credit he had already earned without notice and a hearing.

Respondents argue the district court's order should be affirmed because the court properly granted the motion to dismiss pursuant to EDCR 2.20(e) when Gholson failed to file an opposition to the motion. Respondents argue Gholson's failure to oppose the motion was an admission that the motion was meritorious and there is nothing at the district court level to support Gholson's claim that the Nevada Department of Corrections took away any credits. Alternatively, respondents argue this court can affirm the dismissal of Gholson's petition because the district court reached the right result, even if for the wrong reason.

In reply, Gholson states respondents' argument addresses his imprisonment during 2017-18, not his imprisonment during 2015, which is the basis for the allegation in his complaint.

"We rigorously review a district court order granting an NRCP 12(b)(5) motion to dismiss, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief." *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014) (citing *Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008)). "A complaint should be dismissed for failure to state a claim 'only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.'" *Id.* (quoting *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672). We review the district court's legal conclusions de novo. *Id.* However, "a de novo standard of review does not trump the general rule that '[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010)

(quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Nevertheless, "[t]he ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established." *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (citation omitted). An error is "plain" if "the error is so unmistakable that it reveals itself by a casual inspection of the record." *Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1983).

Initially, we agree the district court had discretion to grant respondents' motion to dismiss pursuant to EDCR 2.20(e) based on Gholson's failure to oppose the motion. And, we acknowledge that, by failing to file an opposition to the motion to dismiss, Gholson waived his right to challenge the district court's decision. *See Schuck*, 126 Nev. at 436, 245 P.3d at 544. However, because the error in dismissing the complaint pursuant to 12(b)(5) is so unmistakable from a casual inspection of the record, we conclude the waiver does not operate as a bar to addressing Gholson's claim. We further conclude that, because, as discussed below, Gholson stated a claim upon which relief could be granted and respondents' arguments in the motion to dismiss did not establish a basis for dismissing the complaint pursuant to NRCP 12(b)(5), the district court abused its discretion by relying on EDCR 2.20(e) to dismiss the complaint.

As noted above, Gholson's complaint provided a short and plain statement of the claim showing that he was entitled to relief. Specifically, he alleged respondents took away credit he had earned without notice or a hearing in violation of his due process rights. Gholson's claim implicated a protected liberty interest, because it is well established "that prisoners have a liberty interest in good behavior time credits, provided they have earned the credits under applicable state statutes and procedures." *Bergen v.*

Spaulding, 881 F.2d 719, 721 (9th Cir. 1989) (citing *Wolff*, 418 U.S. at 556-57); *see also Reynolds v. Wolff*, 916 F. Supp. 1018, 1022-23 (D. Nev. 1996). And Gholson made a demand for damages based on the alleged violation. *See* NRCP 8(b).

Respondents' first argument, that Gholson's claim was legally deficient because it did not allege the respondents were acting in their personal capacities, lacked merit. Although Gholson did not specifically cite 42 U.S.C. § 1983 in the complaint, based on the nature of Gholson's claim, it is clear the claim can only be raised in the context of a 42 U.S.C. § 1983 action. And, where a plaintiff seeks damages against a state official in a 42 U.S.C. § 1983 action, it is presumed that the state official is being sued in his or her personal capacity. *See Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016); *Romano v. Bible*, 169 F.3d 1182, 1186 (9th Cir. 1999); *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278, 1284 (9th Cir. 1994); *Cerrato v. S.F. Cmty. Coll. Dist.*, 26 F.3d 698, 673 n.16 (9th Cir. 1994); *see also Craig v. Donnelly*, 135 Nev., Adv. Op. 6 at *6, 439 P.3d 413, 416 (2019) ("[N]either the State nor state employees in their official capacities can be proper defendants to 42 U.S.C. § 1983 claims."). Because this argument lacked merit, it did not provide a basis for dismissing the complaint pursuant to NRCP 12(b)(5).

Respondents' second argument, that Gholson did not have a liberty interest and could not establish a due process violation based on the readjustment of his release date because there is no right to good time credit and no right to employment, did not address the claim raised in the complaint. Although it is true there is no right to good time credit and no right to employment, this is not what Gholson argued. Rather, Gholson claimed he had earned credit and the credit he had earned was taken away

without notice or a hearing. As noted above, Gholson has a liberty interest in credit he has earned. Therefore, respondents' argument did not establish Gholson failed to state a claim upon which relief can be granted and did not provide a basis for dismissing the complaint pursuant to NRCP 12(b)(5).

Because respondents' arguments did not provide a basis for dismissing Gholson's complaint pursuant to NRCP 12(b)(5), and reliance on EDCR 2.20(e) to dismiss the complaint resulted in the dismissal of Gholson's complaint on a clearly erroneous basis, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[1]

_____, C.J.
Gibbons

_____, J.
Bulla

Tao, J., dissenting:

Gholson appeals from the grant of a motion to dismiss his section 1983 claim that he failed to oppose in writing below. Normally, when a party fails to oppose a motion in district court via a written opposition containing cogent legal argument supported by legal authority, that party waives any right to appeal the granting of the motion to us. This

[1]We deny Gholson's request for sanctions.

rule is so well-settled that three separate doctrines of appellate review require it.

The first is the doctrine that holds that a party who fails to lodge a timely objection to the district court's action generally waives any appeal of that issue. Quite to the contrary, rather than being allowed to appeal, a party who utterly fails to oppose a motion is deemed to have affirmatively consented to it and cannot later complain about it being granted. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479, 215 P.3d 709, 717 (2009) (by failing to promptly object to district court action, party "did not preserve the issue for appeal" and "his consent" waives any appeal).

The second is the doctrine that holds that an appealing party is usually limited to raising only the same issues and arguments that it previously asserted below. "A point not urged in the trial court, unless it goes to the jurisdiction of the court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). "[P]arties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010) (internal quotation marks and citation omitted). *See Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (on appeal an appellant cannot change his theory underlining an assignment of error). But when a party failed to even oppose a motion below, then the party asserted no issues or arguments below—and therefore preserved none for appeal—that we can properly review. *See Carroll v. Mandel*, Docket No. 68114, 2016 WL 6651508 (Ct. App. November 2, 2016) (unpublished disposition) (appellant's request for continuance "cannot be considered an opposition as appellant suggests because it did not contain a

memorandum of points and authorities" and "appellant failed to file even an untimely opposition").

The third is that, in the Eighth Judicial District Court, a party who fails to file an opposition supported by legal authority has failed to comply with the applicable local rules and cannot expect us to rescue it from its own errors. *See* EDCR 2.20(e) (non-moving party "must" serve and file a written notice of non-opposition or opposition thereto, "together with a memorandum of points and authorities and supporting affidavits"; failure to serve and file a written opposition "may be construed as an admission that the motion is meritorious and a consent to granting the same"); EDCR 2.20(i) (opposition unsupported by legal argument "does not comply" with rules and court may decline to consider it). *Cf. King v. Cartlidge*, 121 Nev. 926, 928, 124 P.3d 1161, 1162 (2005); *Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996); *Nye Cty. v. Washoe Med. Ctr.*, 108 Nev. 896, 899-900, 839 P.2d 1312, 1314-15 (1992). My colleagues conclude that the application of these local rules is discretionary. But I'm not sure that's true when the local rule mandates that parties "must" file either a written opposition or notice of non-opposition, and Gholson did neither. EDCR 2.20(e). The rule can be read to give the district court some discretion, i.e., the district court is not required to grant an entirely frivolous motion just because it is unopposed. But it didn't give Gholson any: he violated a mandatory rule, and I don't see much reason to bail him out after he shirked the process. In the end, we sit to review the correctness of judgments, not the contents of the district court's internal reasoning. "A bedrock principle upon which our appellate review has relied is that the appeal is not from the opinion of the district court but from its judgment." *United States v. Rivera*, 613 F.3d 1046, 1051 (11th Cir. 2010) (internal quotation marks and

citations omitted). Thus, when a district court has multiple grounds available to it on which it could have granted a motion, we normally affirm the district court's decision even if (perhaps even *especially if*) some of those grounds lay within the district court's discretion. *See generally Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("[We] will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

The purpose of requiring parties to make timely objection and adequate argument first before the district court before coming to us isn't just to identify and preserve the right to appeal. It's to allow the district court a full opportunity to get it right the first time so that there is no need for a subsequent appeal. If a party fails to explain to the district court why it shouldn't grant a particular motion, it can hardly complain to us on appeal that the district court didn't do what the party never asked it to do.

Here, the district court granted a motion that Gholson did not bother to oppose. On appeal, Gholson presents a number of arguments why he thinks the district court should have denied the motion anyway despite the lack of opposition, but after we subtract those arguments that he waived by never raising them below or allowing the district court to consider first, and those arguments that we do not usually reach under our normal rules and procedures, we are left with no grounds to reverse. Accordingly, I would affirm.

_____, J.
Tao

cc: Chief Judge, Eighth Judicial District Court
Darryl E. Gholson
Attorney General/Las Vegas
Eighth District Court Clerk