

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES EARL GRAY, JR.,

Appellant,

vs.

THE STATE OF NEVADA; THE STATE
OF NEVADA DEPARTMENT OF
CORRECTIONS; OFFENDER
MANAGEMENT DIVISION (NDOC);
BRIAN WILLIAMS, WARDEN; AND
JAMES DZURENDA, DIRECTOR,
Respondents.

No. 82292-COA

FILED

NOV 05 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

James Earl Gray, Jr., appeals from a district court order dismissing his complaint for failure to effect service of process under EDCR 1.90(b)(2).¹ Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

In June of 2018, Gray, an incarcerated pro se litigant, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 against the Nevada Department of Corrections (NDOC) and various other state actors, and contended that he was entitled to money damages because the NDOC

¹The original caption for this matter failed to include several defendants named in Gray's complaint below as respondents in this appeal. As a result, the clerk of this court shall amend the caption for this case to conform to the caption on this order.

violated his rights to due process and equal protection by unlawfully extending his prison sentence. Although Gray styled his filing as a complaint, the district court construed the complaint as a postconviction petition for a writ of habeas corpus and directed a response from the NDOC. After the defendants filed their response, the district court dismissed the petition and denied relief because Gray had already discharged the sentence challenged in his petition. On appeal from that order, this court reversed and remanded the district court's denial of Gray's "petition," determining that the district court erred by construing Gray's civil rights complaint as a habeas petition. *See Gray v. State of Nev. Dept. of Corr.*, No. 78598-COA, 2019 WL 5783881 (Nev. Ct. App. Nov. 5, 2019) (Order of Reversal and Remand). Accordingly, this court "direct[ed] the district court to reconsider Gray's complaint as a civil matter." *Id.*

Thereafter, the supreme court issued the remittitur, and upon receipt of the same, the district court entered a minute order in Eighth Judicial District Court case no. A-18-777317-W, the case involving the purported habeas petition at issue in Docket No. 78598-COA, ordering the Court Clerk to close that case and "re-file Mr. Gray's July 10, 2018, complaint as a civil matter." The minute order further directed that Gray's complaint be "randomly reassigned to a civil department." Thereafter, on December 6, 2019, the Eighth Judicial District Court Clerk's Office electronically filed Gray's 2018 complaint under a new, civil case number, A-19-807169-C. Despite taking these actions, however, there is no indication in the record that the district court informed Gray, who was

incarcerated, that it had complied with the minute order and refiled his complaint under the new case number.

As relevant to this appeal, because Gray did not take any actions to serve the complaint in case number A-19-807169-C (the civil case) after its filing, the district court set this matter for a status check on its May 8, 2020, dismissal calendar. This status check was later continued to December 9, 2020, in accordance with the Eighth Judicial District Court's COVID-19 administrative orders regarding "non-essential" district court hearings by a minute order entered in May 2020. After receiving the minute order scheduling the status check on dismissal for December 9, Gray mailed several letters to the district court, and on or around October 29, 2020, Gray mailed a motion for appointment of counsel, and what he labeled a "motion for summary judgment," which alleged that dismissal of his complaint for lack of service would violate due process as he was never informed by the district court that it had refiled his complaint in the civil case. However, these motions were not stamped as received by the district court clerk's office until November 19, 2020, and were not filed until December 8, 2020.

Having only received letters—which the court did not file—from Gray in the proceeding months, on December 2, 2020, the district court issued a minute order dismissing this case for lack of service of process under EDCR 1.90(b)(2) (allowing the district court to dismiss without prejudice matters not served within 180 days of filing the complaint, or civil cases pending for over 12 months in which no action is taken for 6 months) and on December 8, the district court entered its written order dismissing the case without prejudice on those same grounds. That same day, the

clerk's office filed Gray's motion for appointment of counsel, and "motion for summary judgment," that were received on November 19, but the district court never ruled on these motions. After being served with notice of entry of the dismissal order, Gray now appeals.

On appeal, Gray challenges the dismissal order and contends that the district court's dismissal of his civil case violated notions of fairness and due process, as the district court never informed him that it refiled his original complaint as a separate civil matter on December 6, 2019. Because of this failure, Gray contends that he was unable to take steps to prosecute his complaint, including renewing his petition for in forma pauperis status and completing service of process on defendants.

Having reviewed the record, Gray's informal brief on appeal, and the December 3, 2019, minute order in case number A-18-777317-W directing that his case be refiled,² we conclude that the district court abused its discretion in dismissing Gray's complaint under EDCR 1.90(b)(2) for failure to effect service of process within 180-days of filing the complaint without (1) providing Gray with notice that his case would be dismissed as required by NRCP 4(e)(2); and (2) providing Gray with notice that his complaint had been refiled as a separate action by the clerk's office. See *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 595, 245 P.3d

²Because this appeal is directly related to the proceedings in Eighth Judicial District Court Case No. A-18-777317-W, we take judicial notice of the proceedings in that matter. See *Mack v. Estate of Mack*, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009) (stating that appellate courts may take judicial notice of other state court and administrative proceedings when a valid reason presents itself).

1198, 1200 (2010) (reviewing dismissal for lack of service of process for an abuse of discretion).

Under NRCP 4(e)(2), “[i]f service of the summons and complaint is not made upon a defendant before the 120-day service period . . . the court must dismiss the action, without prejudice, as to that defendant upon motion or upon the court’s own order to show cause.” Similarly, under EDCR 1.90(b)(2), the district court has authority to dismiss “complaints not served . . . within 180 days of filing” through “means of a dismissal calendar held at least monthly in each department.”

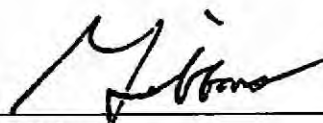
As detailed in NRCP 4(e), a district court can sua sponte dismiss a case for failure to effect proper service, but the court *must* provide the plaintiff with notice that it intends to dismiss the matter. Thus, although EDCR 1.90(b) also allows a court to dismiss an action for failure to effect proper service, that discretion cannot be exercised without following the clear requirements of NRCP 4(e) and providing notice to a plaintiff that the district court intends to dismiss its action for failure to effect service of process on its own volition. *See W. Mercury, Inc. v. Rix Co.*, 84 Nev. 218, 222-23, 438 P.2d 792, 795 (1968) (explaining that local rules must not conflict with the Nevada Rules of Civil Procedure); *see also* NRCP 83 (stating that “[a] judicial district may make and amend rules governing practice therein” but noting that “[a] local rule *must be consistent*” with the NRCP (emphasis added)); *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) (stating that “whenever possible, a court will interpret a [court] rule . . . in harmony with other rules”).


In this case, there is nothing in the record to show that the district court provided the required notice to Gray indicating that the court intended to dismiss this matter on service grounds prior to the entry of the order of dismissal. For these reasons, we conclude that the district court abused its discretion when it dismissed Gray's complaint for failure to complete service of process without first issuing an order to show cause in line with NRCP 4(e)(2) and notifying Gray that his case could be subject to dismissal. *Saavedra-Sandoval*, 126 Nev. at 595, 245 P.3d at 1200.

Moreover dismissal was likewise improper under the circumstances presented here given that there is nothing in the record before us indicating that the district court ever notified Gray that it had electronically refiled his original complaint in the civil case. As Gray argues on appeal, this failure hindered his ability to prosecute his case, including seeking in forma pauperis status or attempting to serve the new complaint. Indeed, without notice that his complaint had been refiled under a new case number, there was nothing to indicate that such actions were even necessary until Gray received the May 2020 minute order regarding the rescheduling of the status check on dismissal until December 2020. And while Gray subsequently submitted motion practice arguing that dismissal on service grounds was improper, albeit under the guise of a "motion for summary judgment," the district court failed to file these submissions until after Gray's case had already been dismissed, even though they were stamped as received several weeks prior to the hearing on the service-based dismissal.

Based on the forgoing analysis, we conclude that the district court abused its discretion in dismissing the underlying case for failure to serve process. *Imperial Credit v. Eighth Judicial Dist. Court*, 130 Nev. 558, 563, 331 P.3d 862, 866 (2014) (stating that judicial discretion is “improperly exercised when the judicial action is arbitrary, fanciful, or unreasonable, or where no reasonable [person] would take the view adopted by the trial court” (internal citations and quotations omitted)); *Saavedra-Sandoval*, 126 Nev. at 595, 245 P.3d at 1200. Accordingly, we reverse the district court’s dismissal of Gray’s case and remand this matter to the district court for further proceedings consistent with this order, including permitting Gray to seek in forma pauperis status and attempt service of the complaint.³

It is so ORDERED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

³Although this court generally will not grant a pro se appellant relief without first providing respondents an opportunity to file a response, the filing of a response would not aid this court’s resolution of this case, and thus, has not been ordered. *See* NRAP 46A(c); *see also* NRAP 34(f)(3).

cc: Hon. Jerry A. Wiese, District Judge
James Earl Gray, Jr.
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk