

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-105

JANUARY TERM, 2018

Joseph L. Bruyette v. Andrew Pallito, Commissioner	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Civil Division
	}	
	}	
	}	DOCKET NO. 504-8-14 Wncv

Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Plaintiff inmate appeals the superior court's order granting the State summary judgment in this action filed under Vermont Rule of Civil Procedure 75. We affirm.

Plaintiff is serving a 45-to-85-year sentence for his burglary and sexual assault convictions. In January 2007, the Department of Corrections (DOC) classified plaintiff as Level-C. The Level-C criteria established by DOC directive is reserved for those inmates whose listed offenses are egregiously harmful and who are assessed as high risk for future violent criminality. That determination is based on considerations such as whether the offender used or threatened violence against the victim, whether the harm inflicted was substantial, and whether the behavior could be considered particularly cruel or brutal. The use of a weapon is a factor in determining whether there was a threat of violence. In this case, a DOC employee indicated, based on the affidavit of probable cause, that plaintiff used a weapon to threaten or coerce the victim.

In September 2013, plaintiff filed two informal grievances with DOC. In one, he asserted that his LSI-R¹ assessment was done without his input, resulting in an incorrect score. He asked that the assessment be redone with his input. In the other, he complained that his Level-C classification prevented his participation in programs that could lead to his release upon serving his minimum sentence. He asked that the Level-C classification be expunged from his file and that he be allowed to participate in those programs.

On October 16, 2013, plaintiff filed a formal grievance that referred to his prior informal grievances. On November 14, 2013, plaintiff filed with the corrections executive an appeal that also referred to his prior grievances. On December 18, 2013, before receiving a response from the corrections executive, plaintiff filed two appeals to the DOC Commissioner. On December 30, 2013, the corrections executive responded, stating that the LSI-R would be redone following an in-person interview, but that the Level-C classification was appropriate. On January 6, 2014, the Commissioner responded to plaintiff's appeal, concluding that plaintiff met the criteria for Level-

¹ LSI-R stands for Level of Service Inventory-Revised, which is a risk-assessment tool used by DOC.

C and that the classification would be reviewed upon completion of his minimum sentence and every two years thereafter.

Plaintiff then filed this Rule 75 action with the superior court. In his original complaint, plaintiff suggested that his Level-C classification was due to retaliation by DOC staff and that the classification criteria were not followed. After obtaining counsel, plaintiff filed a two-count amended complaint. The first count incorporated allegations in the original complaint and further argued that DOC abused its discretion in considering as part of its Level-C classification that plaintiff refused to provide a DNA sample and used a weapon in the commission of his crimes. Count two alleged that plaintiff's re-classification to Level C violated the ex post facto clause of the United States Constitution.

The State filed a motion for summary judgment, arguing that plaintiff had failed to exhaust administrative remedies with regard to the DNA and ex-post-facto claims, that the petition was not timely filed, that the issues raised in the petition were unreviewable, and that, even if they were reviewable, DOC did not abuse its discretion. Plaintiff withdrew his ex-post-facto claim, which was dismissed from the case, but otherwise opposed the motion, arguing that his grievance was general enough to cover the issues raised in the petition, that his complaint was timely filed, that the challenged decisions were reviewable, and that there were disputed material facts.

The superior court granted the State summary judgment primarily on the ground that plaintiff failed to exhaust his administrative remedies by not raising in the DOC administrative proceedings the issues he was raising in his Rule 75 complaint. The court found that plaintiff's grievances raised only two matters—his belief that he had a binding right to his prior classification level and his objection that his LSI-R assessment was conducted without his participation. The court found that the former issue evolved into his ex-post-facto claim, which he had withdrawn, and that the latter issue had been resolved by the corrections executive's offer to redo the assessment with his participation. The court found that plaintiff had not alleged retaliation in his administrative grievance and that his claims in that regard were purely conclusory. Moreover, the court found that nothing in the grievance history revealed any reference to an improper reliance on the use of a weapon or plaintiff's unwillingness to provide DNA samples. The court further noted that plaintiff had appeared to drop any claims concerning those points. As for other issues raised regarding the Level-C classification, the court found that defendant had not raised them during the administrative grievance procedures and that DOC had not had an opportunity to respond to them.

On appeal, an attorney for the Defender General's Office initially entered an appearance on plaintiff's behalf but then moved to withdraw, stating that she had reviewed the case and had not found any non-frivolous claims. We granted her motion to withdraw and denied plaintiff's motion for the appointment of new appellate counsel. In his pro se brief, plaintiff states that, as an out-of-state prisoner, he did not have the same legal resources as in-state prisoners. He also notes that the exhaustion doctrine does not apply if exhausting administrative remedies would be futile and he asks this Court review how DOC's grievance procedures are applied to out-of-state prisoners. He further contends that the State waived its opposition to his amended complaint by not timely opposing it. Finally, he moves for a limited remand so that the superior court can address his court-appointed attorney's failure to seek a stay in that court to allow him to exhaust his administrative remedies before the DOC.

We find no basis to overturn the superior court's decision. The superior court's grant of summary judgment to the State was more in the nature of plaintiff's failure to preserve certain issues in the DOC administrative proceedings rather than his failure to exhaust administrative

remedies. See Pratt v. Pallito, 2017 VT 22, ¶¶ 12-16 (comparing related but distinct exhaustion and preservation doctrines and stating that “to properly preserve an issue, a party must present the issue to the administrative agency with specificity and clarity in a manner which gives the [agency] a fair opportunity to rule on it” (quotation omitted)). In that regard, plaintiff does not dispute the superior court’s determination that he failed to preserve in the administrative proceedings the issues he raised before the superior court. See id. ¶¶ 16, 19 (stating that preservation in administrative appeal “is critical to subsequent judicial review” and that “we will not address issues that were not properly preserved before the relevant administrative agency”). Nor does plaintiff make any showing that raising those issues in the DOC proceedings would have been futile. To the extent plaintiff is suggesting that he was entitled to a default judgment due to the State’s failure to file an answer to his Rule 75 complaint, no answer is required under the rule. See V.R.C.P. 75(b) (“No responsive pleading need be filed unless required by statute or by order of the court.”).

As for plaintiff’s remand request, we find no basis for this Court to remand the matter to the superior court to consider whether plaintiff’s counsel should have sought a stay in the superior court proceeding to allow him to raise additional arguments in DOC administrative proceedings. Although “[p]reservation does not implicate a court’s subject matter jurisdiction over an entire case,” it does “affect[] a court’s authority to hear and decide an issue.” Pratt, 2017 VT 22, ¶ 16. Plaintiff does not suggest that there was some sort of an error in the administrative proceedings that warranted a remand for further consideration; rather, he contends only that he should have been given another opportunity to add arguments not raised in administrative proceedings that were final.²

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice

² The Commissioner seeks dismissal based on plaintiff’s inadequate briefing. Although the brief is sparse, even given the latitude afforded pro se litigants, we decline to dismiss on that basis in this instance.