COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2478 **Cir. Ct. No. 2011CV2236**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

PRINCE ATUM-RA UHURU MUTAWAKKIL A/K/A NORMAN GREEN,

PLAINTIFF-APPELLANT,

V.

GARY HAMBLIN, PETER HUIBREGTSE, LEBBEUS BROWN, JUDITH HUIBREGTSE, DIANE ALDERSON, CHAD LOMEN, ELLEN RAY, KELLY TRUMM, CHRISTINE BEERKIRCHER, BRIAN KOOL, MELANIE HARPER, LT. CRAIG TOM, JANE DOE AND JOHN DOE 1-10,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. This appeal arises from a civil rights lawsuit filed against various Department of Corrections personnel by a prison inmate who

wishes to send and receive mail labeled solely with the spiritual name he has been using for years, Prince Atum-Ra Uhuru Mutawakkil, without any reference to his given birth name, Norman Green, under which he was originally convicted and committed to the custody of the department. The appellant's core contentions are that a prison policy that allows inmates who have had their names changed in court by a statutory mechanism to use only their new legal names on external correspondence, but does not grant the same privilege to those inmates who have taken spiritual names otherwise recognized under common law, misinterprets relevant administrative code provisions and violates rights guaranteed under the United States and Wisconsin Constitutions. Alternatively, the appellant contends that a prior judicial ruling adding his common law spiritual name to his judgment of conviction should have either preclusive effect on disputed facts in this lawsuit or the same legal effect as a statutory name change.

¶2 The appellant also raises a number of procedural issues relating to the summary judgment methodology employed by the circuit court, including what materials were properly before the court and the order in which the court addressed several motions filed by the appellant. Because the resolution of the appellant's procedural issues impacts our analysis of the appellant's substantive claims, we will address those procedural issues and any facts necessary to understand them in the context of the applicable standard of review for summary judgment decisions. We will then set forth additional facts relevant to this appeal and discuss the substantive claims set forth in the appellant's complaint. For the reasons we will explain below, we reject the appellant's procedural challenges and conclude that the circuit court properly dismissed his constitutional and state law claims on summary judgment.

STANDARD OF REVIEW

¶3 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. We first examine the pleadings to determine whether the complaint states a claim and whether the answer joins an issue of fact or law. ***Frost v. Whitbeck***, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325, *aff'd*, 2002 WI 129, 257 Wis. 2d 80, 654 N.W.2d 225. If an issue has been joined, we examine the parties' submissions in support and opposition to the summary judgment motion to determine whether the movant has made a prima facie case for judgment and, if so, whether there are any material facts in dispute that would entitle the opposing party to trial. ***Id.***; *see also* WIS. STAT. § 802.08(2).[1]

¶4 Here, the appellant failed to submit a separately labeled response to the prison officials' motion for summary judgment and attached materials. Instead, he filed a series of motions seeking to strike affidavits of one of the respondents, to compel a deposition and/or other additional discovery, and to stay the summary judgment proceedings pending further discovery either based upon the appellant's medical condition or as a sanction for the respondents' treatment of him in prison. The appellant's motions contained a number of allegations that conflicted with factual assertions made in the prison officials' summary judgment materials, particularly with respect to how the prison's policy on changed names had evolved since a prior lawsuit and whether the appellant was a member of a

[1] All references to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

gang or his chosen name was gang-related. The appellant contends that the circuit court erroneously exercised its discretion by proceeding to evaluate the prison officials' summary judgment materials without first addressing the appellant's motions and without taking into consideration whether allegations made in his motions created any material factual disputes, or whether the appellant would be able to establish a factual dispute if he were permitted to conduct additional discovery.

¶5 We begin by noting that, when a motion for summary judgment is made and supported with appropriate evidentiary materials, "an adverse party may not rest upon the mere allegations or denials of the pleadings." WIS. STAT. § 802.08(3). If the adverse party does not respond with affidavits made upon personal knowledge, answers to interrogatories, and other documents or materials that would be admissible in evidence, summary judgment shall be entered against such party. ***Id.*** We therefore agree with the circuit court that any allegations the appellant made in his three motions, which also were not accompanied by sworn affidavits based upon personal knowledge, were akin to allegations in the complaint and did not satisfy the requirements for summary judgment materials. In other words, nothing the appellant merely asserted in the motions themselves could be used to create a material factual dispute.

¶6 We do agree with the appellant, however, that some of the documents the appellant attached to his motions would have been considered proper summary judgment materials if they had been labeled as such. Specifically, the answers to interrogatories and internal Department of Corrections

documents presumably provided by the prison officials through discovery,[2] as well as prior decisions issued by the circuit court and this court, are the sort of materials upon which courts routinely rely in summary judgment proceedings. We will therefore ignore the motion labels affixed to those documents and deem them as the appellant's response in opposition to summary judgment. It is not necessary for us to remand to have the circuit court consider those additional materials, however, because this court reviews the summary judgment materials de novo.

¶7 As to the appellant's requests for additional time to conduct a deposition, a circuit court has authority under WIS. STAT. § 802.08(4) to order a continuance or permit depositions to be taken when it appears from the affidavits of the party opposing summary judgment that the party requires discovery to establish facts essential to create a material dispute of facts. As we have just noted, however, the appellant did not submit any sworn affidavits based upon personal knowledge. Therefore, this provision was not actually triggered. In any event, the court *did* consider whether a continuance was warranted to allow the appellant to conduct additional discovery, but concluded that it was not because the appellant had not provided any feasible mechanism by which he would be able to take the depositions he was requesting. That was a reasonable determination based upon the information provided to the court.

¶8 Since the appellant's motion to strike affidavits of one of the prison officials was largely based upon the premise that additional discovery would establish that the affiant was lying about the appellant's involvement in gang

[2] It is not clear from the record before us whether the Department of Corrections turned over the internal documents attached to the appellant's motions during the present lawsuit or during prior litigation. We conclude that it makes no difference for purposes of this opinion.

activity, and the court determined that the appellant had no feasible plan for obtaining the additional discovery even if a continuance were granted, there was also no basis in the record to strike the affidavits. In any event, under summary judgment methodology, when parties' materials show conflicting facts, we assume to be true those that support the party opposing summary judgment—in this case, the appellant. Therefore, it was not necessary to strike affidavits by one of the prison officials in order to disregard the facts averred in them.

¶9 To the extent that the appellant was making additional allegations of mistreatment in prison, those assertions were outside the scope of this case. The fact that the court addressed the appellant's procedural motions after it had already discussed the merits of the appellant's complaint did not affect the substance of the court's decision on those issues.

¶10 Accordingly, to determine whether the appellant was entitled to a trial on any of the claims raised in his complaint, this court will proceed to apply summary judgment methodology to the materials that we conclude were properly before the circuit court when the court made its decision.

BACKGROUND

¶11 The following facts were asserted in the appellant's complaint and admitted by the prison officials in their answer or in interrogatory responses, or else were set forth in the documents apparently provided to the appellant in discovery or by the prison officials' own summary judgment materials.

¶12 In 1991, the appellant was convicted of first-degree intentional homicide under his birth name Norman Green, and was committed to the custody

of the Department of Corrections (DOC). He was moved to the Wisconsin Secure Program Facility (WSPF) in 1999.

¶13 In 2001, a DOC administrative provision on false names went into effect, prohibiting an inmate from using a "name other than the name by which the inmate was committed to the department unless the name was legally changed." WIS. ADMIN. CODE § DOC 303.31(2) (Cr. Register, December, 2000, No. 540, eff. Jan. 1, 2001).[3]

¶14 In 2003, the WSPF Records Office revised an internal procedure relating to name changes that had been in place since 1983. The revised Procedure No. 19 directed records office personnel in relevant part:

> 1. Receive the court order indicating the legal name change.
>
> ....
>
> [Document the order and notify various departments of the name change.]
>
> 6. Offender will be allowed to use the new legal name for the following:
>
> - mail
> - visits
> - notary
> - financial and business purposes
>
> NOTE: The name is changed on the records **only** when the judgment of conviction is amended to reflect the name change, or the court order changing the legal name indicates the change of <u>all</u> records. It is not necessary to go

[3] Effective January 1, 2015, WIS. ADMIN. CODE § 303.31(2) is renumbered as WIS. ADMIN. CODE § 303.35(2).

> back and change all documents contained in the file prior to the date of the legal name change.

¶15 Following an unsuccessful attempt to have his name changed according to the statutory procedure, the appellant petitioned the circuit court to amend his judgment of conviction. The circuit court initially denied the request, but this court reversed on appeal. We noted that the record was "devoid of any evidence that amending the judgment … would burden the prison authorities in keeping track of Green or in maintaining appropriate prison discipline." ***State v. Green***, No. 2005AP289-CR, unpublished slip op. ¶7 (WI App Nov. 15, 2005). We remanded for an evidentiary hearing to allow the department an opportunity to produce such evidence, and further directed the circuit court to incorporate the "sufficient cause … to the contrary" standard of WIS. STAT. § 786.36(1) (i.e., the name-change statute) into its analysis of whether to amend the caption on the judgment of conviction to include the appellant's spiritual name as an alias. *See* ***Green***, No. 2005AP289-CR, ¶¶4-8.

¶16 On remand, the state presented several concerns that it argued constituted "sufficient cause" to deny the appellant's request to amend his judgment of conviction—including that allowing inmates to change their names frequently (or potentially to the same name) could cause confusion for prison staff, making it more difficult to quickly recognize inmates posing high security risks; allow the offender to mislead members of the public, or make it more difficult for victims to follow the offender's status; that amending the judgment would be administratively burdensome because prison staff would be required to change the appellant's name on numerous prison records and databases, and parole agents and law enforcement would subsequently need to expend additional time to find relevant records; and the name the appellant was proposing could have gang

significance because the appellant had some past gang affiliations. The circuit court apparently rejected those concerns or gave them limited weight because, in March of 2006, it issued an order amending the appellant's judgment of conviction to add his spiritual name, Prince Atum-Ra Uhuru Mutawakkil, as an alias.

¶17 When notifying DOC about the circuit court's decision, an assistant attorney general explained in an e-mail that the circuit court had determined that the appellant "provided legitimate reasons for the amendment request" and advised that the appellant "must be allowed to use [the name on his amended judgment of conviction] on his correspondence." The assistant attorney general's e-mail was forwarded to a number of DOC personnel with an additional summarizing comment, "So, the inmate gets to be known by an additional name."

¶18 In February and April of 2007, Offender Records Supervisor Diane Alderson sent to at least three inmates who had obtained a statutory name change a memorandum stating that each of them was allowed to use just his legally changed name with his DOC number on mail going in to or out of WSPF, but was still required to use his incarcerated name along with his legally changed name and DOC number on internal prison documents.

¶19 On September 21, 2009, Alderson sent the appellant a memorandum entitled, "Proper Use of Name," advising him in relevant part that:

> The proper use of your Judgment of Conviction (JOC) name and your A/K/A has been reviewed.
>
> It has been determined that you will be allowed to use your A/K/A with the stipulation that you also need to use your incarcerated name of Norman Green and your DOC number as indicated below (for receiving and sending mail, visits, legal transactions, such as notary and for business purposes):

> Norman Green A/K/A Prince Atum-Ra Uhura Mutawakkil #228971-A
>
> What this means is that you **must** use your incarcerated name on ***all*** correspondence, whether it's going in or out of the institution OR if it's being mailed in any capacity "within" the institution. You **MAY** use your "spiritual name," but *only* as an AKA, along with your incarcerated name and DOC number.

Alderson sent similar memoranda to the appellant and several other inmates on October 29, 2009. It is the policy set forth in these 2009 memoranda that the appellant challenges in the lawsuit underlying this appeal.

DISCUSSION

¶20 We have already addressed several of the appellant's ten numbered issues and fifteen lettered subissues in the context of the applicable summary judgment methodology and standard of review. Because many of the remaining issues and subissues overlap substantially, we have consolidated and reorganized them around six of the main points that the appellant is advancing, which we will address largely in the order each of them is first presented. Any additional arguments that we do not explicitly address were not sufficiently developed to warrant individual discussion, but are also rejected.

¶21 First, the appellant contends that the circuit court erroneously exercised its discretion "when it granted [the respondents'] forum shopping motion without holding [a] cause hearing and allowing [the appellant an] opportunity to object." The circuit court did not, however, grant any such motion. Rather, a federal district court acted upon the respondents' notice that the respondents were exercising their federal statutory right of removal to federal court. In other words, it was the United States District Court for the Western District of Wisconsin—not the Dane County Circuit Court—that accepted removal

of the appellant's claims alleging violations of the appellant's rights under the free speech, free exercise, and equal protection clauses of the United States Constitution, the Religious Land Use Act, and the Institutionalized Persons Act; dismissed those federal claims on their merits; and then remanded the state law claims to the circuit court. Neither the circuit court nor this state appellate court has the authority to review the decisions of a federal district court. Therefore, the circuit court properly limited its summary judgment analysis to the appellant's state law claims, and this court will do the same.

¶22 Second, the appellant contends that the circuit court erroneously exercised its discretion "when it did not hold and address [the appellant's] claim of Stare Decisis" relating to prior decisions issued by the Milwaukee County Circuit Court and the Wisconsin Court of Appeals. He later makes a very similar argument under the heading of res judicata. These claims are premised upon an allegation that, after the appellant's prior case was remanded, the circuit court held a hearing at which it orally rejected DOC's contention that "Prince Atum-Ra Uhuru Mutawakkil" was a gang name; accepted the appellant's contention that there was an unwritten DOC policy allowing prisoners who had obtained statutory name changes to send and receive mail labeled solely with their new legal names; and stated that there was no sufficient cause to treat prisoners who took common law spiritual names any different than those who used the statutory procedure to change their names.[4]

[4] The appellant did not provide a transcript of the remand hearing on the prior case. However, he did provide the circuit court with documentation showing that he was entitled to have the transcript produced at public expense, and alleged that prison officials had delayed processing his paperwork to order the transcript. For purposes of this opinion, we will assume that the circuit court on the prior remand made findings similar to those alleged by the appellant, (continued)

¶23 Under the doctrine of stare decisis, a court will adhere to a principle of law adopted after argument as binding precedent where the very point is again in controversy. That doctrine is not directly applicable here because neither this court's prior unpublished decision nor the circuit court's decision on remand constituted binding precedent. The res judicata doctrine (now called claim preclusion) is also inapplicable because this lawsuit does not raise the identical cause of action that was at issue in the prior lawsuit. However, because the appellant is proceeding pro se and we review summary judgment decisions de novo, we will liberally construe his complaint based upon the substance of his allegations rather than on the label he gave to his claims.

¶24 It appears that the principle applicable to the substance of the appellant's contention on this point is that of issue preclusion, rather than stare decisis or res judicata. The doctrine of issue preclusion (formerly known as collateral estoppel) bars parties from relitigating a factual or legal issue that was: (1) actually litigated in a prior proceeding and (2) was essential to a valid judgment rendered therein, so long as (3) application of the doctrine comports with principles of fundamental fairness. ***Harborview Office Ctr., LLC v. Nash***, 2011 WI App 109, ¶7, 336 Wis. 2d 161, 804 N.W.2d 829.

¶25 We agree with the appellant that, if the parties actually litigated whether "Prince Atum-Ra Uhuru Mutawakkil" was a gang name, the prior circuit court's alleged oral finding that it was a spiritual name rather than a gang name was integral to the court's decision to allow the caption of the judgment of

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which would be consistent with both this court's directive and the circuit court's ultimate action of amending the judgment of conviction.

conviction to be amended. Similarly, if the circuit court addressed as part of its "sufficient cause … to the contrary" analysis whether allowing the appellant to use his spiritual name on correspondence constituted a safety threat or an unreasonable administrative burden, that decision would also appear to be integral to the court's decision on amending the judgment of conviction. It does not follow, however, that the circuit court in this case was required to give the prior circuit court's decision allowing the amendment of the judgment of conviction the preclusive effect that the appellant desires regarding the current policy being challenged.

¶26 The flaw in the appellant's logic is that the prior case addressed only whether allowing the appellant to use an *additional* name would present a safety threat or an unreasonable administrative burden. Neither this court's opinion nor the circuit court's written order amending the judgment of conviction addressed whether allowing the appellant or those similarly situated to him to use *solely* a spiritual name and *omit* the offender's birth name, either on internal prison documents or external communications, would present a safety threat or unreasonable administrative burden. Those are separate issues that were outside the scope of the prior case and, therefore, were not fully litigated or necessary to the decision therein, even if the circuit court did make some comment or comments that could be construed as supporting the appellant's current position. Therefore, the doctrine of issue preclusion does not compel a determination that inmates who have had their judgments of conviction amended to reflect common law spiritual names must be allowed to omit the birth names under which they were convicted from external correspondence in the same manner as inmates who have changed their name through the statutory procedure are allowed to do.

¶27 Third, the appellant contends that requiring him to include his birth name from his judgment of conviction on external correspondence violates his

constitutional rights to free speech and free exercise of religion under the Wisconsin Constitution. However, under ***Lomax v. Fiedler***, 204 Wis. 2d 196, 209, 554 N.W.2d 841 (Ct. App. 1996) (adopting federal test from ***Turner v. Safley***, 482 U.S. 78 (1987), for interpretation of analogous provisions under Wisconsin Constitution), some degree of encroachment on the constitutional rights of prisoners is allowed when it is related to "'legitimate penological interests.'" The court must consider: (1) whether there is a connection between the challenged regulation and the asserted government interest; (2) whether the regulation permits an alternative means of exercising the right; (3) whether accommodation of the inmate's right would harm other inmates, prison employees, or prison resources; and (4) whether alternatives to the regulation exist. ***Lomax***, 204 Wis. 2d at 209-11.

¶28 The appellant contends that the prison's stated concerns regarding mail processing and suppressing gang activity are exaggerated, speculative, and pretextual, rather than legitimate penological objectives. He points out that the prison already allows inmates who have had their names changed according to the statutory mechanism to omit their birth names on external correspondence, and that inmates who adopt common law spiritual names still must have those names added to their judgment of conviction before DOC officials are required to acknowledge them. However, as the appellant's petition for a statutory name change and petition to amend his judgment of conviction demonstrate, it is more difficult to obtain a statutory name change while in prison than to obtain recognition of a spiritual name on a judgment of conviction. Because there are a

limited number of inmates who have obtained statutory name changes,[5] or are likely to be able to do so, inmates in that category may not present the same logistical challenges as the greater number of inmates who have or could adopt common law spiritual names and have them added as aliases to their judgments of conviction. Additionally, we note that the existing records of inmates who have obtained statutory name changes are more likely to already reflect the new name.

¶29 The appellant also challenges the legitimacy of the prison's asserted objective of fighting gang activity on the grounds that prison officials have acknowledged in depositions that they had no factual basis for their prior assertion that his spiritual name could be gang-related, and he contends that discovery could provide additional evidence that prison officials perjured themselves, which would undermine their credibility regarding any asserted objectives for their policy. However, this court has already accepted as true for summary judgment purposes the appellant's allegations that his common law name is spiritual; that the appellant has no current gang affiliations; and that he has not been involved in gang activity while in custody. Even so, the fact remains that, in the absence of the policy, other inmates who are involved in gang activity could adopt spiritual names and use the omission of their names of conviction on external correspondence to avoid closer scrutiny.

¶30 We therefore conclude that all four of the ***Turner-Lomax*** factors are satisfied here because: (1) swift and accurate identification of inmates is a legitimate penological interest, and having an inmate's legal birth name on

[5] A 2007 memorandum in the summary judgment materials identifies three inmates who had, at that time, obtained statutory name changes, and at least one of those inmates had changed his name six years prior to his conviction.

correspondence serves that interest; (2) an inmate with a spiritual name can still express himself and exercise his religion by *adding* that spiritual name to his correspondence; (3) allowing all inmates who adopt spiritual names to omit their names of conviction on external correspondence would burden prison resources by slowing down mail processing, and could adversely affect staff or other inmates if gang-related correspondence were permitted to pass through due to staff's lack of recognition that a spiritual name corresponds to an inmate whose gang-related activity is known to staff or is listed in prison records under the inmate's birth name; and (4) the appellant has not proposed an alternative to the policy of requiring names of conviction on correspondence that would adequately address the prison's legitimate penological interest in swift identification.

¶31 Fourth, the appellant makes several related arguments that the circuit court misconstrued WIS. ADMIN. CODE § DOC 303.31; that the policy actually being enforced according to the department's memoranda differs from the policy that is set forth in the administrative rule; that the de facto policy being enforced was not itself properly promulgated as an administrative rule under WIS. STAT. § 227.40; and that the de facto policy was adopted in retaliation for the appellant's and others' prior successful lawsuits.

¶32 We agree that the current policy reflected in the memoranda deviates from the plain language of WIS. ADMIN. CODE § DOC 303.31. We do not view the deviation as an unauthorized promulgation of a new rule, however, but rather as a court-ordered modification of the prior rule that was adopted as a response to litigation by inmates. The current policy is not retaliatory because it *benefits* inmates—clarifying that inmates who have obtained statutory name changes or court approval to have common law spiritual names added to their judgments of conviction cannot be found guilty of using "false names."

¶33 Moreover, contrary to the appellant's assertions, the current policy does not require any inmate to use two names. The policy simply requires all inmates on external correspondence to use the legal names shown on their judgments of conviction. In the case of inmates who have obtained a statutory name change, their new names are their legal names. In the case of inmates who have adopted a spiritual name but have not obtained a statutory name change, their birth names are still their legal names. The use of a common law spiritual name in addition to an inmate's birth name is not required, merely permitted.

¶34 Fifth, the appellant claims that treating inmates who have adopted common law spiritual names differently than those who have obtained statutory name changes violates the Equal Protection Clause of the Wisconsin Constitution. *See* WIS. CONST. art. I, § 1. As we have already explained, however, the current policy treats all inmates the same by requiring them to use their legal names. Inmates who have not obtained statutory name changes are not similarly situated to inmates who have done so because they have not undergone court scrutiny as to whether there is "sufficient cause" to require them to continue using their birth names (as opposed to whether there is sufficient cause to prevent them from adding spiritual names as aliases to their judgments of conviction).

¶35 Finally, the appellant contends that he should be "grandfathered in" under the policy that he contends existed following his prior case, rather than that expressed in the current memorandum. We reiterate, however, that the actual holding in the appellant's prior case was limited to the issues presented in the case, namely, that the appellant's judgment of conviction would be amended to add his spiritual name as an alias, and the appellant would be allowed to use that spiritual name in addition to his legal name. The current policy does not prevent him from doing so.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.