COURT OF APPEALS
DECISION
DATED AND RELEASED

April 10, 1997

NOTICE

No. 96-1623

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

TONY CHANEY,

PLAINTIFF-APPELLANT,

V.

JEFFERY ENDICOTT, SAM SCHNIETER, AND RAY BERGLUND,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Columbia County: RICHARD L. REHM, Judge. *Affirmed.*

EICH, C.J.[1] Tony Chaney, a prison inmate, appeals from a summary judgment dismissing his action against several prison officials seeking to

[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

recover $42.00 in damages for the destruction of a pair of stereo headphones he had purchased several years earlier. We affirm.[2]

Chaney filed this small-claims action against Jeffrey Endicott, the superintendent of the Columbia Correctional Institution, Sam Schnieter, Columbia's security director, and Ray Berglund, a corrections officer, claiming that they "wrongfully destroyed" his headphones. The defendants moved for summary judgment, claiming, among other things, that Endicott had nothing whatsoever to do with Chaney's headphones and could not have damaged or destroyed them, and that Schnieter and Berglund were also entitled to dismissal because they are not subject to suit for acts undertaken in carrying out their duties as public officials. The trial court agreed that Endicott was not subject to suit for the headphones, and concluded that the other defendants were also entitled to dismissal for the reasons they put forth.

In summary judgment cases, we apply the same methodology as the trial court, and we consider the issues *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We first consider the pleadings to determine whether the complaint states a claim for which relief may be granted and if the answer states a defense. If those questions are answered in the affirmative, we then look to the evidentiary facts stated in the moving party's affidavits or other proofs to see whether the party has made a *prima facie* case for summary judgment—or, if the moving party is a defendant, whether he or she has stated a defense. If so, we then examine the opposing party's affidavits and proofs

[2] This court originally stayed Chaney's appeal pursuant to his request that a transcript of the summary judgment hearing be transcribed at county expense. Because the trial court granted the request, the stay is no longer appropriate and is lifted.

to see whether a genuine issue exists as to any material fact, or whether reasonable conflicting inferences may be drawn from undisputed facts. ***Id***. If such factual issues exist, summary judgment is improper. If there is no dispute as to the material facts or inferences, we then consider the motion on its merits. ***State Bank v. Elsen***, 128 Wis.2d 508, 511, 383 N.W.2d 917, 917-18 (Ct. App. 1986).

The affidavit and proofs filed in support of the defendants' motion for summary judgment set forth the following facts: (1) the headphones, which had accompanied Chaney to Columbia when he was transferred there from another institution, were considered contraband; (2) under Department of Corrections rules, inmates are given three choices with respect to the disposition of contraband—to mail it out of the institution, to give it to a visitor, or to have it destroyed; and (3) because Chaney had insufficient funds in his account to mail the headphones, and, when advised of his other options "declined to cooperate," the headphones were destroyed.

Opposing the motion, Chaney submitted an affidavit stating that: (1) the headphones were "wrongfully and negligently destroyed by defendants"; (2) he filed an inmate complaint regarding the matter, which was dismissed; (3) "[d]efendant[']s acts were in violation of clearly established law and ministerial duties"; (4) defendants knew the administrative code prohibited them from disposing of the headphones the way they did; and (5) he was deprived of due process "before destroyal of property."

Chaney's affidavit, which, as indicated, states only conclusory, rather than evidentiary facts as required by § 802.08,(3), STATS.,[3] does not dispute the fact that the headphones were contraband, and the trial court so found.

Beyond that, we agree with the trial court—and Chaney does not offer any facts or even any argument on the issue—that Endicott was properly dismissed from the case because he had nothing to do with any of the events of which Chaney complains. As for Schnieter and Berglund, the documents attached to the affidavit filed in support of their summary judgment motion set forth the procedures adopted at Columbia for processing property determined to be contraband. As indicated above, the inmate is advised that he has the option to mail the property out of the institution at his expense, or to send it out with a visitor, and if neither option is exercised, the property is to be destroyed. The affidavit and proofs indicate that Schnieter and Berglund followed all applicable institutional and DOC procedures when they classified the headphones as contraband, informed Chaney of the classification and the alternatives available to him under prison rules and policies, and then, after it became clear that Chaney lacked funds to mail the headphones out of the institution and receiving no further information or cooperation from him, had them destroyed. Because Chaney's opposing affidavit supplies no contrary evidentiary facts, the trial court properly granted summary judgment dismissing the action against all three defendants.

By the Court.–Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[3] Because the affidavits submitted on motions for summary judgment must contain *evidentiary* facts, § 802.08(3), STATS., hearsay or other inadmissible evidence is not properly before the court. ***Fritz v. McGrath***, 146 Wis.2d 681, 689, 431 N.W.2d 751, 755 (Ct. App. 1988).