IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEVEN BRADLEY HODGES,
Appellant,
vs.
WILLIAM MOORE; RENEE BAKER; TIMOTHY FILSON; JAMES DZURENDA; THE NEVADA DEPARTMENT OF CORRECTIONS; AND THE STATE OF NEVADA,
Respondents.[1]

No. 73840

FILED

JUN 18 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Steven Bradley Hodges appeals from a district court order dismissing his civil rights complaint. First Judicial District Court, Carson City; James Todd Russell, Judge.

Hodges, an inmate, sued respondents the State of Nevada, the Nevada Department of Corrections (NDOC), and various NDOC employees, asserting claims for violation of his First and Fourteenth Amendment rights. For support, Hodges alleged that respondents withheld publications that he received in the mail because they depicted penetration, but that the publications did not depict penetration; and that, because respondents used a boiler plate notice of their decision to withhold the publications, they imposed a blanket ban on materials from the distributors of those publications. Moreover, Hodges alleged that respondents refused to permit him to review the publications to confirm whether they were unauthorized.

Respondents moved for dismissal, arguing that they afforded Hodges all the process that was due and that, regardless of whether the

[1]We direct the clerk of the court to amend the caption for this case to conform to the caption on this order.

publications depicted penetration, they could withhold them without offending the constitution because the publications were sexually explicit, and, therefore, prohibited under the relevant NDOC Administrative Regulation (AR) that was in effect during the events giving rise to this appeal. In particular, respondents cited AR 750.01(1)(O)(2)(h), which prohibits inmates from receiving "sexually explicit" material that "poses a threat to the security[,] good order, rehabilitation or discipline of the institution, or facilitates criminal activity."

The district court ultimately dismissed Hodges' complaint. In so doing, the district court agreed with respondents that Hodges failed to state a First Amendment claim and also found that he failed to file an opposition to refute respondents' arguments on the matter. Likewise, the district court agreed with respondents that Hodges' allegations were insufficient to state a Fourteenth Amendment claim. Confusingly, in making this latter determination, the district court also found that Hodges' opposition was insufficient to refute respondents' arguments on that issue.

On appeal, Hodges first asserts that he filed an opposition to respondents' motion to dismiss, notwithstanding the district court's finding to the contrary, and that the district court improperly entered its dismissal order 41 minutes later. Initially, the district court expressly recognized in its order that Hodges filed an opposition and even indicated that it considered the opposition in the context of Hodges' Fourteenth Amendment claim. Yet the district court also found that Hodges failed to file an opposition to oppose respondents' arguments in favor of dismissing his First Amendment claim. And that finding was clearly erroneous, as the record reflects that Hodges filed an opposition within his time for doing so. *See Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984) (explaining that

findings of fact are clearly erroneous when there is no evidence to support them); *see also* FJDCR 15(3) (setting forth the deadline for opposing a motion); NRCP 6(a), (e) (explaining how to compute time).

But because we conclude, as discussed below, that Hodges failed to address respondents' arguments with regard to his First Amendment claim in his opposition, the district court's error was harmless. *See* NRCP 61 (requiring the court, at every stage of a proceeding, to disregard errors that do not affect a party's substantial rights). And despite Hodges' assertions to the contrary, the timing of the district court's entry of its dismissal order likewise does not provide a basis for reversal in light of the foregoing and because the dismissal order otherwise indicated that the court considered Hodges' opposition in dismissing his Fourteenth Amendment claim.

As to his First Amendment claim, Hodges does not challenge the constitutionality of the ARs governing inmates' receipt of incoming mail. Instead, Hodges asserts that he provided sufficient evidence below to demonstrate that the subject publications did not depict penetration and thus should not have been prohibited. But Hodges' focus in this regard fails to address the sufficiency of the allegations in his complaint in the context of the operative regulation, AR 750.01(1)(O)(2)(h), which as noted above, prohibits inmates from receiving certain sexually explicit materials. Indeed, while respondents argued below that dismissal was required because the publications were sexually explicit, and, therefore, prohibited under AR 750.01(1)(O)(2)(h), Hodges failed to address that argument either below or on appeal. And as a result, we conclude that Hodges waived any challenge to whether respondents properly withheld the publications as prohibited under AR 750.01(1)(O)(2)(h). *See Old Aztec Mine, Inc. v. Brown*,

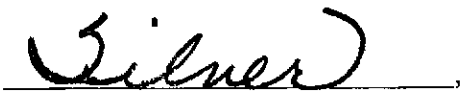
97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."); *see also Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived).

To the extent that Hodges otherwise contends that he stated a First Amendment claim based on his allegation that respondents imposed a blanket ban on materials from the distributors of the subject publications by providing notice of their decision with "boiler plate" forms, his contention likewise fails. *Cf. Pepperling v. Crist*, 678 F.2d 787, 791 (9th Cir. 1982) (explaining that a "blanket prohibition against receipt of [specific] publications by any prisoner carries a heavy presumption of unconstitutionality"). In particular, while Hodges alleged that respondents' notice stated that materials from the distributors typically contain prohibited content, he also alleged that the notice stated that the publications were being withheld because they depicted penetration, which is indicative of an individualized review of the subject publications rather than a blanket ban on materials from their distributors.

Lastly, while Hodges baldly reasserts his allegation from below with regard to respondents refusing to allow him to review the publications, which formed the basis for his Fourteenth Amendment claim and was also incorporated into his First Amendment claim, he does not actually present any argument with regard to that allegation or the associated claims. As a result, we conclude that he waived any challenge as to the district court's determination that this allegation was insufficient to state a First or Fourteenth Amendment claim. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3. Given the foregoing, we conclude that Hodges failed to demonstrate

that the district court erred in dismissing his First and Fourteenth Amendment claims under NRCP 12(b)(5). *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (reviewing questions of law arising from an NRCP 12(b)(5) dismissal de novo). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]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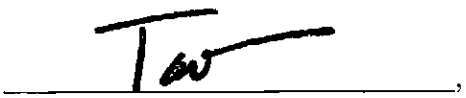
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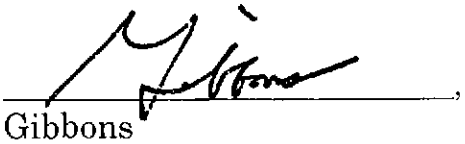
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cc: Hon. James Todd Russell, District Judge
Steven Bradley Hodges
Attorney General/Carson City
Attorney General/Las Vegas
Carson City District Attorney
Carson City Clerk

[2]Having considered Hodges' remaining arguments, we discern no basis for relief.