IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID AUGUST KILLE, SR.,
Appellant,
vs.
THE STATE OF NEVADA; NEVADA BOARD OF PRISON COMMISSIONERS; BRIAN SANDOVAL; ADAM LAXALT; ROSS MILLER; CATHERINE CORTEZ MASTO; THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS; JAMES GREG COX; HOWARD SKOLNIK; NEVADA PAROLE BOARD; CONNIE S. BISBEE; THE STATE OF NEVADA DEPARTMENT OF PUBLIC SAFETY; AND JAMES WRIGHT,
Respondents.

No. 77265-COA

ORDER OF AFFIRMANCE

David August Kille, Sr., appeals from a district court order dismissing his complaint in an inmate litigation matter. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Kille, an inmate, sued respondents, alleging that they refused to apply good time credits against his minimum sentence and that they thereby delayed his parole eligibility in derogation of his constitutional and statutory rights. Respondents moved to dismiss for failure to state a claim, arguing, among other things, that Kille's complaint was barred by res judicata and NRS 11.190(3)(d), which sets forth the limitations period for "action[s] for relief on the ground of fraud or mistake." Kille opposed that

motion. But after a hearing at which Kille was not present, the district granted respondents' motion. This appeal followed.

On appeal, Kille primarily disputes whether res judicata barred his complaint. But in so doing, Kille failed to address whether NRS 11.190(3)(d) likewise barred his case, and as a result, he waived any argument that dismissal was improper based on that statute. *See 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). And given that Kille waived any challenge to the propriety of the district court dismissing his complaint based on NRS 11.190(3)(d), we need not address his arguments with regard to whether res judicata otherwise barred his action.

Kille also seeks reversal on the ground that the district court took argument regarding respondents' motion at an improper ex parte hearing and thereby violated his due process and confrontation clause rights. But we cannot conclude that an improper ex parte hearing occurred here given that Kille, as an inmate, had no right to appear at hearings arising from his civil lawsuit, *see McKinney v. Boyle*, 447 F.2d 1091, 1094 (9th Cir. 1971) ("When the plaintiff in a civil suit is confined in a state prison at the time of a hearing, he has no right to appear personally."), and because he does not challenge the district court's handling of his request to appear at the hearing on respondents' motion to dismiss. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3. And Kille's constitutional arguments do not otherwise provide a basis for relief, as the confrontation clause does not apply in civil proceedings, *see* U.S. Const. amend. VI ("In all criminal

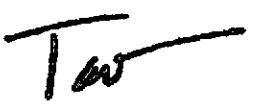
prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."); *see also United States v. Zucker*, 161 U.S. 475, 480-82 (1896) (concluding that the confrontation clause does not apply to civil forfeiture proceedings), and the record reflects that he filed an opposition to respondents' motion to dismiss, which the district court considered. *See Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (recognizing that procedural due process requires meaningful notice and an opportunity to be heard).

Lastly, insofar as Kille contends that reversal is warranted based on waiver principles because respondents' did not reply to his opposition to their motion to dismiss, relief is unwarranted, as his opposition did not raise any new issues that necessitated a response. *Compare* EDCR 2.20(e) (requiring the nonmoving party to file and serve an opposition within 10 days after service of the underlying motion and authorizing the district court to construe the nonmoving party's failure to do so as an admission that the motion is meritorious), *with* EDCR 2.20(h) (providing that the moving party *may* file a reply to an opposition and imposing no penalty for the moving party's failure to do so); *cf. Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding, in the context of an appeal, that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge cannot be regarded as unwitting and in our view constitutes a clear concession by appellants that there is merit in respondents' position"). Thus, given the foregoing, we conclude that the district court did not err in dismissing Kille's complaint.

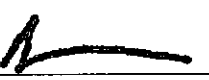
See Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (reviewing an NRCP 12(b)(5) dismissal de novo). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. Eric Johnson, District Judge
David August Kille, Sr.
Attorney General/Las Vegas
Eighth District Court Clerk