

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERIC D. MONTOYA,
Appellant,


vs.

THE STATE OF NEVADA
DEPARTMENT OF CORRECTIONS; D.
TRISTAN, DEPUTY DIRECTOR NDOC;
D. NEVEN, ACTING DEPUTY
DIRECTOR/WARDEN; AND J. NASH,
ASSOCIATE WARDEN NDOC/HDSP,
Respondents.¹

No. 76489-COA

FILED

AUG 15 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Eric D. Montoya appeals from a district court order dismissing a civil rights action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Montoya—who is incarcerated—filed an amended complaint under 42 U.S.C. § 1983 against the Nevada Department of Corrections (NDOC) and multiple NDOC employees alleging violations of his Fourteenth Amendment rights to due process and equal protection, as well as his Eighth Amendment rights. He filed multiple motions below that the district court initially set for a hearing on a particular date. However, the district court ultimately ordered that the motions be removed from its calendar for that date on grounds that Montoya had not yet served all of the

¹The record on appeal reflects that Montoya failed to timely serve all of the defendants named in his amended complaint with process, and thus, the unserved defendants never became parties to this action. *Angel v. Cruse*, 130 Nev. 220, 224 n.2, 321 P.3d 895, 898 n.2 (2014) (noting that an individual “was never made a party in district court because he was not served with process”). Accordingly, we direct the clerk of the court to amend the caption for this case to conform to the caption on this order.

defendants with process and that he would need to seek an extension of time to do so if he wished to properly serve his motions. Meanwhile, the respondents moved to dismiss Montoya's complaint for failure to state a claim. The district court granted the motion and dismissed the case, primarily on grounds that the respondents' supposed fabrication of disciplinary charges against Montoya did not amount to a constitutional violation for purposes of Section 1983 liability. This appeal followed.

As an initial matter, to the extent Montoya challenges the district court's decision to consider respondents' motion to dismiss without him being present in court for the proceedings, his argument is without merit. An incarcerated person does not have the right to be personally present for civil proceedings in a case in which he or she is the plaintiff. See *Hernandez v. Whiting*, 881 F.2d 768, 770 (9th Cir. 1989) ("[I]mprisonment suspends the plaintiff's usual right to be personally present at judicial proceedings brought by himself or on his behalf." (citing *Price v. Johnston*, 334 U.S. 266, 285-86 (1948), *abrogated on other grounds by McCleskey v. Zant*, 499 U.S. 467, 495 (1991))). Moreover, Montoya fails to otherwise demonstrate how his absence in court violated any of his rights, especially in light of the fact that he had notice of the various hearings and submitted a written opposition to the motion to dismiss. See *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir. 1985) (concluding the district court did not abuse its discretion in denying plaintiff's request to attend a hearing on defendant's summary judgment motion where plaintiff had notice of the hearing and submitted a written opposition). Accordingly, we reject his argument on this point.

We now consider the merits of the district court's order dismissing Montoya's complaint.² We review an order granting an NRCP 12(b)(5) motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Our review is rigorous, with all alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Id.* Dismissal under NRCP 12(b)(5) is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672.

Montoya argues that the allegations in his amended complaint—that prison staff and administration fabricated and/or filed false disciplinary reports, which resulted in NDOC imposing sanctions against him—stated a claim for the violation of his Fifth and Fourteenth Amendment due process rights under 42 U.S.C. § 1983. However, as the district court correctly concluded, allegations that prison officials

²Montoya does not present any arguments on appeal challenging the dismissal with respect to his Eighth Amendment claim or his Fourteenth Amendment equal protection claim. *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). Moreover, we note that Montoya only asserted claims under 42 U.S.C. § 1983 and not under any state-law theory, and thus, NDOC was not a proper defendant. *See Craig v. Donnelly*, 135 Nev., Adv. Op. 6, 439 P.3d 413, 416 (Ct. App. 2019) (noting that states and state agencies are not "persons" subject to liability under § 1983). Likewise, to the extent Montoya asserted claims for money damages against individual state employees in their official capacities, they too were not proper defendants. *See id.* (noting that actions against individual employees in their official capacities "are effectively against the state itself"); *N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys.*, 107 Nev. 108, 114-16, 807 P.2d 728, 732-33 (1991) (holding that plaintiffs may sue individual employees in their official capacities under § 1983 for injunctive but not compensatory relief). Thus, we necessarily affirm the dismissal with respect to the foregoing.

deliberately falsified disciplinary charges do not state a claim for a constitutional violation unless the officials filed the charges in retaliation for the plaintiff's exercise of some right or the plaintiff was deprived of procedural due process. *See Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989); *see also Sandin v. Conner*, 515 U.S. 472, 487 (1995) (holding that a prison disciplinary scheme must deprive an inmate of a protected liberty interest before he or she is entitled to procedural due process). Montoya does not allege any retaliation, nor does he allege that he did not receive notice of the charges, a written statement of the evidence relied upon by the fact finder and the reasons for the charges, or an opportunity to present witnesses and evidence (i.e., procedural due process). *See Wolff v. McDonnell*, 418 U.S. 539, 563-66 (1974) (describing what disciplinary procedures are required to satisfy procedural due process). Accordingly, the district court properly dismissed Montoya's complaint for failure to state a claim.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

³To the extent Montoya raises additional arguments not expressly addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

In light of our disposition, we deny Montoya's requests to remand the case to a different judge and to sanction the respondents.

cc: Hon. Ronald J. Israel, District Judge
Eric D. Montoya
Attorney General/Las Vegas
Eighth District Court Clerk