

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PAUL JAY MOON,  
Appellant,  
vs.  
ZOHRA BAKHTARY, PUBLIC  
DEFENDER,  
Respondent.

No. 81265-COA

**FILED**

MAR 05 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Paul Jay Moon appeals from a district court order dismissing a tort action. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Following a felony conviction pursuant to a guilty plea, Moon filed a 42 U.S.C. § 1983 civil rights complaint against Zohra Bakhtary, the public defender who represented him in his criminal case. In his complaint, Moon alleged that Bakhtary was negligent in her representation when she advised him to take a guilty plea. However, Moon neither served his complaint on Bakhtary nor filed a motion for extension of time to serve the complaint before the 120-day time limit under NRCP 4(e) expired. In a later hearing, the district court dismissed the complaint, determining that Moon (1) failed to properly serve his complaint and other filings, and (2) cannot maintain a civil action against Bakhtary as he has not been granted appellate or postconviction relief regarding the underlying conviction. Moon now appeals this determination.

On appeal, Moon again seeks relief on the basis that Bakhtary was purportedly negligent when she represented him in his criminal case below. However, Moon fails to present any argument regarding the district

court's grounds for dismissal in his informal brief. Accordingly, any such arguments are deemed waived and the challenged order can be affirmed on that basis. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived); *see also Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued).

But even if Moon had not waived any challenge to the bases on which his complaint was dismissed, affirmance of the challenged order would nonetheless be warranted. Under NRCP 4(e), a district court must dismiss a plaintiff's complaint if the plaintiff fails to serve a defendant with process within 120 days of filing the complaint and fails to move for an enlargement of the time for service. *See NRCP 4(e)(1)* ("The summons and complaint must be served upon a defendant no later than 120 days after the complaint is filed, unless the court grants an extension of time under this rule."); NRCP 4(e)(2) (providing that "[i]f service of the summons and complaint is not made upon a defendant before the 120-day service period . . . expires, the court must dismiss the action").

As Moon neither completed service of process on Bakhtary within 120 days nor filed a motion to enlarge the time for service, we conclude that the district court properly dismissed Moon's complaint based on his failure to serve. *See Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 595, 245 P.3d 1198, 1200 (2010) (reviewing a district court dismissal for failure to timely effect service of process for an abuse of discretion).<sup>1</sup>

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<sup>1</sup>Although Moon makes no arguments regarding his failure to serve in his appellate briefing, he does briefly assert, in his notice of appeal, that completing service of process was impossible because he had exceeded his

The district court was likewise correct in its conclusion that Moon's complaint against Bakhtary fails as he has not been awarded postconviction relief, and he cannot prove that Bakhtary was acting under the color of state law when she represented him in the underlying criminal action. *See Day v. Zubel*, 112 Nev. 972, 978-79, 922 P.2d 536, 539-40 (1996) (requiring plaintiffs in a § 1983 action to show that they have been awarded postconviction relief and that the defendant was acting under the color of state law); *see also Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981) (“[A] public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.”). Thus, dismissal was also warranted based on the fact that Moon’s complaint did not properly state a claim for relief against Bakhtary. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (applying a de novo standard of review for failure to state a claim).

Accordingly, for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

prison copy work limit. Arguments contained in documents such as the notice of appeal are not properly incorporated into appellate briefing, *cf.* NRAP 28(e)(2) (prohibiting parties from incorporating district court documents in their appellate briefs), but even if we were to consider that assertion, it would not provide a basis for relief given Moon’s failure to request an extension of time to complete service of process. *See Saavedra-Sandoval*, 126 Nev. at 595, 245 P.3d at 1200.

cc: Hon. Kathleen E. Delaney, District Judge  
Paul Jay Moon  
Clark County District Attorney/Civil Division  
Eighth District Court Clerk

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