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2015 IL App (4th) 140415-U

NO. 4-14-0415

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 30, 2015

Carla Bender

4th District Appellate

Court, IL

DONALD A. LEHN,
Plaintiff-Appellant,

v.

GREGG A. SCOTT,
Defendant-Appellee.

) Appeal from
) Circuit Court of
) Schuyler County
) No. 13MR26
)
) Honorable
) Alesia A. McMillen,
) Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court committed no error in dismissing petition for a writ of *certiorari* or *mandamus* filed by defendant, a person civilly detained under the Sexually Violent Persons Commitment Act, where defendant's petition failed to state a cause of action upon which relief could be granted.

¶ 2 Plaintiff, Donald A. Lehn, is an individual being detained by the Illinois Department of Human Services (DHS) at its Rushville Treatment and Detention Facility (Rushville) pursuant to the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 to 99 (West 2012)). He filed a *pro se* petition for a writ of *certiorari* and/or *mandamus* in the circuit court against defendant, Gregg A. Scott, Rushville's program director, seeking judicial "review of administrative policies and/or actions" that concerned his possession and use of various electronic items and which Lehn claimed violated his constitutional rights. Defendant filed a motion to

dismiss Lehn's petition, arguing he failed to state a claim for either a common law writ of *certiorari* or *mandamus*. The court granted defendant's motion and Lehn appeals. We affirm.

¶ 3

I. BACKGROUND

¶ 4

In July 2013, Lehn filed his petition for writ of *certiorari* and/or *mandamus* with the circuit court. He alleged he had been detained by DHS since October 2007 and, prior to August 2012, had approval to possess numerous electronic items that he used for entertainment, education, and treatment purposes. Lehn asserted that on August 1, 2012, Rushville staff members, including Charlotte Morris and Sally Hougas, searched his room and all of his electronic items were taken for review. He acknowledged that the search was "precipitated by the discovery of [electronic] contraband in a 'Summer Holiday Package' " that was sent to him. Lehn described the electronic items in his possession as including a Sony PlayStation 3 game system and various games, compact discs (CDs), digital video discs (DVDs), a Sony PlayStation Portable, and a Zotac Zbox blu-ray player/mini personal computer (PC).

¶ 5

Lehn further alleged that, following the search of his room, Rushville personnel informed him that several of the confiscated electronic items "were considered contraband as a result of policy changes implemented by a memorandum dated February 23, 2012." He attached the February 2012 memorandum, issued by Rushville's then program director, Forrest Ashby, to his petition. The memorandum informed residents of a policy change regarding the possession of electronic storage devices and materials. It stated as follows:

"Please be advised that a number of abuses of approved electronic storage media have come to the attention of administration. Advancements in technology have lead [*sic*] to increased

ability to obtain, store[,] and trade contraband and/or engage in deceptive practices via the use of flash drives as well as re-writable CDs, DVDs[,] and [video home system (VHS)] tapes. Such practices threaten the safety and security of the facility and the community and interfere with the facility's therapeutic purposes.

Therefore, effective immediately, all flash drives, and recordable/rewritable CDs, DVDs[,] and VHS tapes are no longer considered approved items. This memorandum does not apply to a single flash drive with [one gigabyte (GB)] or less storage capability used for the storage of legal documents or to commercially-produced CDs, DVDs[,] or VHS tapes that are incapable of being recorded or rerecorded and which remain in their original, factory-sealed packaging. ***

Residents currently in possession of electronic devices with internal storage capability such as DVD players, flash drives[,] and certain game systems are reminded that such devices remain subject to search at any time by security staff. Discovery of any contraband stored on these devices will result in immediate and permanent loss of the electronic device(s), which must then be disposed of or sent out of the facility."

¶ 6 Lehn alleged, on August 9, 2012, he was given two "tickets," concerning "the

contraband he had attempted to have smuggled in" to Rushville (first "ticket") and the electronic items found in his room (second "ticket"). Lehn attached the "tickets" to his petition. Each "ticket" was entitled as a notice to appear before DHS's Behavior Committee and alleged potential rule violations by Lehn, which were identified as possessing major contraband or lying to staff. The first "ticket" alleged Lehn received a "summer package" on July 31, 2012, that contained items, including a Logitech wireless mouse with Universal Serial Bus (USB) connection, a double AA battery, a 32 GB thumb drive, a BD Solutions DVD with six loaded computer programs, a Zbox Support CD with loaded drivers, two blank recordable CDs, and one rewritable DVD. According to the "ticket," Lehn "admitted that he knew the items were being sent to him." The second "ticket" described Lehn's offending conduct as follows:

"[A] shakedown was conducted on *** Lehn's room. During the shakedown, numerous electronic components and devices were confiscated. Staff asked *** Lehn, 'Do you have anything to declare?' and 'Do you want to turn anything over to us?' *** Lehn responded, 'There is nothing else.' However, Staff found and confiscated more components; *** Lehn responded, 'Well you caught me again.' Staff repeatedly asked *** Lehn if he had anything else to turn over to Staff, and *** Lehn repeatedly told Staff, 'No.' Staff continued to find and confiscate electronic devices."

Both "tickets" informed Lehn that the Behavior Committee would meet to review the incidents at issue, as well as the date and time the meetings were scheduled to occur.

¶ 7 On August 10, 2012, Lehn appeared before the Behavior Committee. He alleged

committee members included property officer David Biermann, treatment team leader Aimee Wylczinski, and Associate Clinical Director Sharlene Caraway. Documents attached to Lehn's petition show that, in connection with his first "ticket," Lehn "admitted that he had contraband." He claimed that although he was permitted to use Rushville's computer lab on the weekends, he had a constitutional right to possess the confiscated items and needed them "to improve his education." With respect to the second "ticket," Lehn argued that he did not intend to use his electronic items for pornography or "inappropriate means." Rather, he intended to use the items to study and educate himself with respect to computers in preparation for his eventual release from DHS's custody.

¶ 8 Lehn alleged he was found guilty of the violations alleged in his first "ticket" and was "dropped to Intermediate B status." On August 24, 2012, a final decision was made with respect to his second "ticket." The Behavioral Committee determined Lehn possessed major contraband, including five rewritable discs and "other electronic components not allowed since the [February 2012] memo." Lehn was given a warning for giving false information to staff and dropped to Intermediate C status. Further, he alleged (and documents attached to his petition show) the Behavioral Committee's decision was "signed off on" by Caraway, Wylczinski, and Hougas.

¶ 9 In his petition, Lehn alleged that, on August 31, 2012, he submitted a grievance, complaining that Hougas had "improperly signed the second ticket and that his punishment and [the] enforcement of policies violated his rights." A copy of the grievance was attached to his petition and showed Lehn grieved only the Behavior Committee's August 24, 2012, decision, which concerned Lehn's second "ticket." Lehn first argued it was "improper and a violation of

[his] due process rights to substitute a committee member without a rehearing." Specifically, Lehn asserted that when he appeared at the hearing before the Behavior Committee, committee members included Biermann, Caraway, and Wylczinski; however, Hougas, rather than Biermann, signed the committee's final decision, along with Caraway and Wylczinski.

¶ 10 Second, Lehn maintained he had a constitutional right to possess all of the electronic items removed from his room. He argued the items were "covered by the First Amendment to the United States Constitution[,] *** the Fourteenth Amendment and free speech [and] property rights provisions of the Illinois Constitution[,] and *** the Illinois Administrative Code [(Code)]." Lehn further asserted he obtained the items to further his intellectual growth and expression, and to exercise his first amendment rights. He requested the return of all of his property, treatment as required by the Code, and that his disciplinary report be "purged."

¶ 11 Lehn also attached a letter he authored on September 16, 2012, to Forrest Ashby to his petition. In the letter, he detailed his unsuccessful efforts to obtain more time in Rushville's computer lab and the denial of his request to purchase his own mini PC. Lehn asserted he "was extremely frustrated that [his] attempts for self education were being stymied." He decided to have the Zotac Zbox blu-ray player/mini PC sent to him in his "winter holiday package" but acknowledged that he "requested it" only as a blu-ray player. Lehn stated that upon receiving the Zotac Zbox blu-ray/mini PC, he obtained a crossover cable from another resident and connected the Zbox to his PlayStation 3 to set up "a private network" and "a web server" so that he could learn to install other software, access information in other databases, create web pages, and set up and maintain a small business network. He further stated that, in the late spring, "the button on the presentation device [he] was using started to fail" and he submitted an order approval

form for a mouse he could use with his PlayStation 3. Lehn asserted his request was denied and he "decided to have [his] cousin smuggle in" various items through his "summer package," including a mouse, a 32 GB flashdrive, an Ubuntu Linux upgrade disk, several blank CDs, and one rewritable DVD.

¶ 12 In his letter, Lehn acknowledged that the items sent in his "summer package" were discovered, his "cell was shaken down," and his electronic items were confiscated. He asked Ashby for the return of his Zotac Zbox and permission to obtain a mouse and keyboard. Lehn asserted he wanted to "continue to utilize the Zbox for educational purposes to develop job skills so [he] could gain employment upon [his] release."

¶ 13 On October 31, 2012, Lehn's grievance was denied. The denial included a notation that Biermann concurred with the Behavioral Committee's decision. On November 5, 2012, he appealed the denial of his grievance with DHS. Although the record fails to reflect the outcome of Lehn's appeal, in his petition, Lehn alleged his appeal was also denied.

¶ 14 In his petition for a writ of *certiorari* and/or *mandamus*, Lehn sought "review [of] administrative policies and/or actions," which he claimed violated his rights under the Code, state and federal law, and the state and federal constitutions. More specifically, he maintained "his rights were violated by the adoption and enforcement of DHS *** rules that restrict far more speech than necessary." Lehn also claimed a violation of his due process rights as a result of the (1) "improper substitution" of Hougas for Biermann "as signer of his second ticket without a rehearing," (2) Behavior Committee's "failure to fully and completely document all of [his] punishment so that he could properly grieve and challenge it," and (3) Behavior Committee's "failure to consider and comment on all of [his] defenses—specifically his 'speech' claims."

¶ 15 On October 18, 2013, defendant filed a motion to dismiss Lehn's petition pursuant to section 2-615 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-615 (West 2012)). He alleged Lehn failed to state a claim for which relief could be granted for either a common law writ of *certiorari* or *mandamus*. Following a hearing on May 13, 2014, the circuit court granted defendant's motion.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Lehn appeals the circuit court's dismissal of his petition for a writ of *certiorari* and/or *mandamus*. He maintains he has a right to challenge DHS's and Rushville's policies and the implementation of those policies against him. Further, he contends the Behavior Committee's decision should be invalidated because it "did not follow due process."

¶ 19 "A section 2-615 motion to dismiss tests the legal sufficiency of a complaint." *Hadley v. Doe*, 2015 IL 118000, ¶ 29, 34 N.E.3d 549. On review, the question "is whether the allegations of the complaint, taken as true and viewed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Turcios v. DeBruler Co.*, 2015 IL 117962, ¶ 15, 32 N.E.3d 1117. "Illinois is a fact-pleading jurisdiction in which the plaintiff must allege specific facts to bring the complaint's allegations within a recognized cause of action." *Schloss v. Jumper*, 2014 IL App (4th) 121086, ¶ 20, 11 N.E.3d 57. "All facts apparent from the face of the pleadings, including the exhibits attached thereto, may be considered." *Cowper v. Nyberg*, 2015 IL 117811, ¶ 12, 28 N.E.3d 768. A dismissal pursuant to section 2-615 is subject to *de novo* review. *Hadley*, 2015 IL 118000, ¶ 29, 34 N.E.3d 549.

¶ 20 A. Writ of *Certiorari*

¶ 21 "The common law writ of *certiorari* was developed to provide a means whereby a petitioner who was without avenue of appeal or direct review could obtain limited review over action by a court or other tribunal exercising quasi-judicial functions." *Stratton v. Wenona Community Unit District No. 1*, 133 Ill. 2d 413, 427, 551 N.E.2d 640, 645 (1990). "The purpose of the writ [is] to have the entire record of the inferior tribunal brought before the court to determine, from the record alone, whether that body proceeded according to the applicable law." *Stratton*, 133 Ill. 2d at 427, 551 N.E.2d at 645. "A common law writ of *certiorari* is a general method for obtaining circuit court review of administrative actions when the act conferring power on the agency does not expressly adopt the Administrative Review Law and provides for no other form of review." *Hanrahan v. Williams*, 174 Ill. 2d 268, 272, 673 N.E.2d 251, 253 (1996).

¶ 22 "Quasi-judicial proceedings are designed to adjudicate disputed facts in a particular case" and hearings in such proceedings "concern agency decisions that affect a small number of persons on individual grounds based on a particular set of disputed facts that have been adjudicated." *East St. Louis School District No. 189 Board of Education v. East St. Louis School District No. 189 Financial Oversight Panel*, 349 Ill. App. 3d 445, 449, 811 N.E.2d 692, 697 (2004). "It is only in this type of proceeding that a sufficient record is developed in the administrative agency to allow review by a writ of *certiorari*." *East St. Louis School District*, 349 Ill. App. 3d at 449, 811 N.E.2d at 697-98. "Therefore, generally, judicial review of an agency action can only occur where there has been a final agency determination, which usually follows some sort of adversarial proceeding involving the parties, a hearing on the controverted facts, and an ultimate disposition rendered by an impartial fact finder." *East St. Louis School District*, 349 Ill. App. 3d at 449, 811 N.E.2d at 698; see also *States Land Improvement Corp. v. E.P.A.*, 231 Ill.

App. 3d 842, 843, 596 N.E.2d 1164, 1165 (1992) (stating "a common law writ of *certiorari* is an available means of judicial review of final decisions of agencies exercising quasi-judicial functions").

¶ 23 "Administrative agencies can also act in a quasi-legislative manner, which actions are not subject to review by a writ of *certiorari*." *East St. Louis School District*, 349 Ill. App. 3d at 449-50, 811 N.E.2d at 698; *Brown v. Duncan*, 361 Ill. App. 3d 125, 131, 836 N.E.2d 78, 84-85 (2005). "Quasi-legislative proceedings are designed to promulgate policy-type rules or standards and involve general facts affecting everyone." *East St. Louis School District*, 349 Ill. App. 3d at 450, 811 N.E.2d at 698.

¶ 24 Both before the circuit court and on appeal, Lehn's overriding claim has been that the adoption and enforcement of rules by DHS and Rushville regarding the possession and use of certain electronic items violates his rights. However, we find this claim is not subject to review by a writ of *certiorari*.

¶ 25 If a person is found by a court or jury to be a sexually violent person under the Act, "the court shall order the person to be committed to the custody of [DHS] for control, care[,] and treatment until such time as the person is no longer a sexually violent person." 725 ILCS 207/40(a) (West 2012). A commitment order may require "institutional care in a secure facility" that is operated by DHS. 725 ILCS 207/40(b)(2), 50(b) (West 2012). The Act further provides that DHS "shall provide by rule for the nature of the facility, the level of care to be provided in the facility, and the custody and discipline of persons placed in the facility." 725 ILCS 207/50(b) (West 2012). Thus, "decisions about the nature of the secure facility belong to the DHS, not to circuit courts." *People v. Rexroat*, 354 Ill. App. 3d 447, 450, 821 N.E.2d 362, 365

(2004).

¶ 26 DHS has promulgated rules, set forth in Title 59 of the Code, "detailing the rights of sexually violent persons detained in a secure residential facility." *Schloss*, 2014 IL App (4th) 121086, ¶ 24, 11 N.E.3d 57. Pursuant to those rules, facility residents "may only acquire personal property in accordance with [DHS's rules] or posted rules established by the Program Director where the resident is assigned." 59 Ill. Adm. Code 299.330(e) (2000). Residents are "permitted to receive, possess and use personal property *** except as provided in posted rules established by the Program Director." 59 Ill. Adm. Code 299.330(e) (2000). DHS's rules further provide as follows:

"1) Possession and use of certain classes of property may be restricted by the Program Director when necessary to protect the resident or others from harm.

2) The professional responsible for overseeing the implementation of a resident's services plan may, with the approval of the Program Director, restrict the right to property when necessary to insure implementation of the services plan, protect such resident or others from harm, or as part of the Resident Behavior Management System." 59 Ill. Adm. Code 299.330(e)(1), (2) (2000).

¶ 27 Here, a writ of *certiorari* is not an appropriate method for seeking review of rules adopted by DHS and Rushville's program director regarding the possession and use of electronic items by Rushville's residents. The agency action at issue concerns the promulgation of policies, rules, or standards that generally affect all Rushville residents and, therefore, constitutes a quasi-

legislative function. Quasi-legislative functions are not subject to review by a writ of *certiorari*.

¶ 28 We note Lehn could challenge DHS's quasi-judicial functions through a petition for a writ of *certiorari*. In this instance, the quasi-judicial functions at issue include the two Behavior Committee decisions, which found Lehn violated facility rules through his receipt and possession of certain electronic items. "The standards of review under a common law writ of *certiorari* are essentially the same as those under the Administrative Review Law" and "courts generally do not interfere with an agency's discretionary authority unless the exercise of that discretion is arbitrary and capricious [citation] or the agency action is against the manifest weight of the evidence." *Hanrahan*, 174 Ill. 2d at 272-73, 673 N.E.2d at 253-54.

¶ 29 DHS's rules provide for a "Resident Behavior Management System," defined as "a milieu treatment program designed to promote a safe and secure environment for treatment." 59 Ill. Adm. Code 299.600 (2000). "As determined by the Program Director, the [Sexually Violent Persons] Program may establish differing management levels (e.g., admission status, secure management status, general status, high privilege status) to provide a greater degree of individualization in the Resident Behavior Management System." 59 Ill. Adm. Code 299.600 (2000).

¶ 30 When "an employee observes a resident engaging in a rule violation, *** discovers evidence of its commission, or receives information from a reliable witness of a rule violation, he or she shall prepare an incident report." 59 Ill. Adm. Code 299.640(b) (2000). The Behavior Committee is required to "review all incident reports involving residents." 59 Ill. Adm. Code 299.660(a) (2000). "Whenever possible a resident who is the subject of an incident report shall be allowed to address the Behavior Committee in order to present his or her views regarding the reported incident." 59 Ill. Adm. Code 299.660(c) (2000). Also, the Behavior Committee

must "document its decision and the reason for that decision in the resident's clinical record." 59 Ill. Admin. Code 299.660(d) (2000). DHS's rules identify both giving false information to an employee and possessing or using unauthorized property as "major rule violations." 59 Ill. Adm. Code 299 App. A (2000).

¶ 31 Here, as discussed, Lehn's main contention before the circuit court was that the rules established or adopted by DHS and Rushville's program director violated his various rights. He did not challenge the Behavior Committee's specific findings that he possessed certain electronic items in violation of Rushville's rules. We note the documents attached to his petition reflect only that he grieved the second "ticket" issued to him. Further, those documents contain acknowledgments by Lehn that he received, possessed, and used electronic items despite the denial of his requests to obtain such items and facility rules, which prohibited him from possessing them. As a result, Lehn's petition and accompanying attachments fail to allege sufficient facts to demonstrate that the Behavior Committee's decisions were arbitrary and capricious or against the manifest weight of the evidence.

¶ 32 Based on Lehn's arguments and the record presented, he failed to state a cause of action for a writ of *certiorari*. Thus, the circuit court committed no error in granting defendant's 2-615 motion to dismiss on that basis.

¶ 33 B. Claim for *Mandamus* Relief

¶ 34 Lehn's petition also sought *mandamus* relief. "*Mandamus* is an extraordinary remedy used to compel a public official to perform a purely ministerial duty where no exercise of discretion is involved." *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 38, 944 N.E.2d 337, 341 (2011). "[T]o obtain a *mandamus* remedy, the plaintiff must establish a clear right to the re-

quested relief, a clear duty of the public officer to act, and clear authority of the public officer to comply with the order." *McFatridge v. Madigan*, 2013 IL 113676, ¶ 17, 989 N.E.2d 165. "A writ of *mandamus* is appropriate when used to compel compliance with mandatory legal standards but not when the act in question involves the exercise of a public officer's discretion." *McFatridge*, 2013 IL 113676, ¶ 17, 989 N.E.2d 165.

¶ 35 Again, with respect to Lehn's overriding challenge to the policies and rules developed by DHS or Rushville's program director, he failed to state a cause of action upon which *mandamus* relief could be granted. The Act permits DHS to "provide by rule for the nature of" its secure facilities, the level of care to be provided in its facilities, and the custody and discipline of persons placed in its facilities. 725 ILCS 207/50(b) (West 2012). Further, DHS's rules allow Rushville's program director to establish rules with respect to the receipt, possession, and use of personal property by Rushville's residents. 59 Ill. Adm. Code 299.330(e) (2000). The establishment of such policies and rules was discretionary and, as discussed, *mandamus* is not appropriate where the exercise of discretion is involved.

¶ 36 However, both before the circuit court and on appeal, Lehn also claims that his procedural due process rights were violated during the proceedings before the Behavior Committee. Specifically, he argues that the Behavior Committee's decision with respect to his second "ticket" was improperly signed by Hougas, whom he alleged had not been an original committee member and had participated in the search of his room. Lehn maintains Hougas was improperly substituted for another committee member, Biermann, without a rehearing.

¶ 37 A plaintiff can state a cause of action in *mandamus* by alleging a due process rights violation. *Dye v. Pierce*, 369 Ill. App. 3d 683, 687, 868 N.E.2d 293, 296 (2006). "The

core of due process is the right to notice and a meaningful opportunity to be heard.' " *World Painting Co., LLC v. Costigan*, 2012 IL App (4th) 110869, ¶ 14, 967 N.E.2d 485 (quoting *LaChance v. Erickson*, 522 U.S. 262, 266 (1998)). In the context of prison disciplinary proceedings, inmates are entitled to the following process:

"(1) notice of the disciplinary charges at least 24 hours prior to the hearing; (2) when consistent with institutional safety and correctional goals, an opportunity to call witnesses and present documentary evidence in their defense; and (3) a written statement by the fact finder of the evidence relied on in finding the inmate guilty of committing the offense and the reasons for the disciplinary action."

Dye, 369 Ill. App. 3d at 687, 868 N.E.2d at 296.

Although an individual held as a sexually violent person is civilly, rather than criminally, detained, he or she "may be subjected to the ordinary conditions of confinement." *Allison v. Snyder*, 332 F.3d 1076, 1079 (7th Cir. 2003). Specifically, civil "detainees may be subjected to conditions that advance goals such as preventing escape and assuring the safety of others." *Allison*, 332 F.3d at 1079.

¶ 38 Here, Lehn failed to state a cause of action for *mandamus* based on a violation of his procedural due process rights. The documents attached to his petition demonstrate (and Lehn does not dispute) that he received advanced notice of the proceedings before the Behavior Committee, was given an opportunity to be heard, presented documentary evidence to support his position, and received a written decision from the Behavior Committee that set forth the evidence relied upon in finding he committed a rule violation. His attachments further contain acknowl-

edgements that he knowingly possessed and utilized unauthorized electronic items. Based on the record presented, Lehn received all the process to which he was due and failed to allege sufficient facts to show a due process violation.

¶ 39 Additionally, to the extent Lehn argues Hougas should not have signed the Behavior Committee's decision because she participated in the search of his room, we note that DHS's rules provide only that the author of an incident report must be excluded from the Behavior Committee. 59 Ill. Adm. Code 299.660(a) (2000) ("For the purposes of incident report review, the writer or writers of pertinent incident reports will be excluded from the Committee."). The documents submitted by Lehn fail to reflect that Hougas was the employee who wrote or signed either of the "tickets" at issue before the circuit court and on appeal.

¶ 40 Based on the circumstances presented, Lehn failed to state a cause of action for *mandamus* relief. The circuit court committed no error in granting defendant's 2-615 motion to dismiss.

41

III. CONCLUSION

¶ 42 For the reasons stated, we affirm the circuit court's judgment.

¶ 43 Affirmed.