

Supreme Court Number 20050418
District Court Number 05-C-0714

20050418

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

Reuben Larson,

Plaintiff/Appellant,

FEB 13 2006

vs.

STATE OF NORTH DAKOTA

Timothy Schuetzle, Warden,
N.D. State Penitentiary,

Defendant/Appellee.

APPEAL FROM ORDER DENYING CERTIORARI APPLICATION,
DISTRICT COURT OF BURLEIGH COUNTY

REPLY BRIEF OF APPELLANT

Reuben Larson
P.O. Box 5521
Bismarck, N.D. 58506-5521

Reuben Larson
P.O. Box 5521
Bismarck, N.D. 58506-5521

Ms. Penny Miller
Clerk of N.D. Supreme Court
Judicial Wing, 1st Floor
600 E. Bouelevard Ave., Dept. 180
Bismarck, N.D. 58505-0530
February 13, 2006

20050418
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEB 13 2006

STATE OF NORTH DAKOTA

Dear Ms. Miller:

RE: Larson v. Schuetzle, Appeal #20050418; District Court
#05-C-0714.

Enclosed are seven bound and one unbound original copy of my Reply
Brief. Also enclosed is my certificate of mailing. Please file and forward
on to the Court.

Thank you.

CERTIFICATE OF NONCOMPLIANCE

I declare that this Reply Brief was typed on a typewriter. We have
no computers in this prison. Thus I can provide no diskette of this brief
to this Court.

Sincerely yours,



Reuben Larson

TABLE OF CONTENTS

	page
I. The Warden must produce facts.	1
II. The criteria and arguments can be simplified. . .	3
III. Certiorari does not encompass subject matter jurisdiction.	10
Conclusion	10

TABLE OF CASES AND AUTHORITIES

Herlein v. Higgins, 172 F.3d 1089 (8th Cir. 1999) . .	1, 2
Sandin v. Conner, 515 U.S. 472, 115 S.Ct. 2293 (1995)	4-8
Spruytte v. Department of Corrections, 459 N.W.2d 52 (Mich.App. 1990)	5-8
Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985) . .	3
Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254 (1987)	2, 3
U.S. ex rel. Para-Professional Law Clinic v. Kane, 656 F.Supp. 1099 (E.D.Pa. 1987)	3
Virgili v. Gilbert, 272 F.3d 391 (6th Cir. 2001) . . .	3
Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974)	4
Black's Law Dictionary, Fourth Edition	3
N.D.C.C. 12-47-12	6
N.D.C.C. 12-47	7
Article I, Section 12, North Dakota Constitution . . .	6

I. THE WARDEN MUST PRODUCE FACTS.

The bottom paragraph of page 19 of the Warden's brief claims that he does not need to produce evidence of harm, detriment, threat or invasion of his rights. He says this is because the "Turner v. Safley" criteria requires no facts, no actual evidence or proof of a security problem, citing to the case of Herlein v. Higgins, 172 F.3d 1089, 1091 (8th Cir. 1999).

That a rule needs no actual proof of a security violation to prove it valid is a correct concept, because the rule is made prospectively, not retrospectively.

However, the Warden misconstrues the context. The issue is that the Warden failed to state a claim for his authority, failed to produce facts to show he has jurisdiction to make the rules at issue. The Warden's rule making ability is akin to a plaintiff suing for an injunction--the plaintiff must state facts showing the threat, that there is a threat, which should be enjoined.

In Herlein v. Higgins, id., the fact, the proof, was that the music lyrics were violent or sexually violent or explicit and thus might incite or encourage a deranged mind to violence.

A factual basis, a 'cause of action' for injunctive relief, for the rule, did exist for that rule against violent music.

The issue is that the Warden's rule forbids all altering of property, an activity innocent by definition.

The fact he has to produce is how that innocent activity is a threat to security, not that it actually breached security.

Granted, altering property so as to make an assault weapon or escape tool would be a fact he has to produce to justify his rule (or injunction). But, we are not dealing with this type of a rule. We are dealing with a rule which bans all altering of property. Thus the Warden has to produce facts to show that all altering is a security risk, is a threat. This he can not do.

Note that Herlein v. Higgins, id., did not ban all music, just violent music. Likewise, the Warden can not ban all altering, he can enjoin only altering which could be a security threat.

The Warden already has rules banning altering to make an assault weapon or escape tool. This is covered under his rules condemning attempted assault and escape. By exclusion, the no altering rule means all altering which is not a security threat.

His no altering rule is contrary to due process of law and Turner v. Safley, 482 U.S. 78, 89-90, 107 S.Ct. 2254, 2262 (1987), which says that when a rule is arbitrary or irrational, that is, is contrary to due process of law, it is thus remote to the security concern and thus is not a legal rule. Note that Turner, id., is due process of law.

The Warden must produce facts to show his authority. "Prison officials may not restrict the scope of inmates'

constitutional rights by making automatic and conclusory assertions of discipline and security in the support of restrictive policies." U.S. ex rel. Para-Professional Law Clinic v. Kane, 656 F.Supp. 1099, 1107 (E.D.Pa. 1987), affirmed 835 F.2d 285, certiorari denied 485 U.S. 993, 108 S.Ct. 1302).

His claim is insufficient. He fails to state a claim. His rule is unfounded in fact. It is therefore arbitrary, not rational, capricious, a freakish notion, what due process is to prevent. Black's Law Dictionary, Fourth Edition, defining due process of law ("... law shall not be unreasonable, arbitrary, or capricious, and that means selected shall have real and substantial relation to object.")--shall not be remote--Turner v. Safley, id.

II. THE CRITERIA AND ARGUMENTS CAN BE SIMPLIFIED.

Page 23 of the Warden's brief says that the concept and case of Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985) is no longer good law, citing Virgili v. Gilbert, 272 F.3d 391, 395 (6th Cir. 2001) in the sense that prison rules and their mandatory language or negative implication language giving rise to rights or protected liberty or property interests for inmates, is no longer the rule under "Sandin v. Conner".

This "Sandin v. Conner" reasoning, and the Warden's claim to it, actually work in Larson's favor, actually work to simplify the issue for prisoner claims. It removes the obfuscation which covers the illegality of the Warden's

conduct.

Sandin v. Conner, 515 U.S. 472, 483, 115 S.Ct. 2293, 2300 (1995), says that instead of courts trying to find rights for inmates in prison rules, that we should go back to the constitution, back to the basics, back to inalienable rights, back to due process of law. "The time has come to return to the due process principles we believe were correctly established and applied in "Wolf" and "Meachum".
Id.

Going back to the basics will simplify the arguments for prisoner claims. Id., page 483 note 5, 2300 note 5 ("Our decision today only abandons an approach that in practice is difficult to administer and which produces anomalous results.").

The touchstone of due process is protection of the prisoner against arbitrary action by the Warden. Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976 (1974). Under due process, rights can not be arbitrarily abrogated. Id., page 557, 2975.

Arbitrariness is the entire definition or is possibly the entire meaning of due process of law. For example: Notice and opportunity to be heard and to defend are due process rules. It would be arbitrariness to not allow for notice, etc. Failure to state a claim upon which relief can be granted is simply a rule that one can not be made liable unless all the elements for the tort or crime are shown. It would be arbitrary to say one is liable even

though no tort or crime occurred, or one did not commit the offense, that is, if all the elements of the offense were not shown to exist. All the rules of due process are another way of protecting one from arbitrariness.

Sandin v. Conner, id., at page 483, 2299, says that the return to the constitution, as opposed to prison rules, is needed because prison rules are not necessarily designed to give rights to inmates, but are designed to give direction to the Warden's staff; and also that prison rules should be written to allow staff to exercise the discretion the Warden would or should exercise if he were the one confronting the prisoner.

In other words, prison rules should not be a basis for prisoner rights. The common law, inalienable rights, and the Constitution should be.

And prison rules are for the direction of the staff, and are not to be a basis for authority for the staff, as the staff is to exercise their discretion in obedience to the power or jurisdiction of the Warden, as opposed to obedience to a rule which confers "standardless discretion on correctional personnel", Id., page 482, 2299, arbitrary rules, all-encompassing rules.

In Spruytte v. Department of Corrections, 459 N.W.2d 52 (Mich.App. 1990), the prisoner said he had a right to a computer because the prison rule said he had a right.

Now, under the Warden's claim of Sandin v. Conner, id., the prisoner could and should have said he could not be deprived of his property without due process of law,

and that his right to the computer is inalienable. The warden would have to allow the computer unless his having it violated or threatened the security, etc., of the prison. The warden would not be able to deny the property simply because of a rule. Arbitrariness, cloaked in a rule, is now not to be allowed on the warden's part.

Under due process of law, or under the terms of that rule in Spruytte, id., the claim and ruling would be the same. It is just that under due process of law, reference to the rule would not be needed and could or should not be relied upon. That is, even if no rule had been in existence, "Spruytte" would have had a claim, the warden would not be able to forbid the acquisition and possession of the computer.

Larson's claim did just this. Larson did not refer to or rely upon a prison rule. See ¶4-6 of Larson's certiorari application, Larson's App.P.3-4; and pages 3-5 of Larson's motion, R.A.#7. He relied upon the common law and due process of law, Article I, §12, N.D. Constitution. The statute, N.D.C.C. 12-47-12 simply refers to due process of law. Even if §12-47-12 did not exist, the Warden's jurisdiction would still be restricted to the Constitution, to due process of law as he is an officer or member of the Executive Branch of government.

At the top of page 23 of his brief, the Warden makes a point of noting that Larson did not rely upon any prison rule, albeit for his own purpose. By using a negative,

without also showing that Larson had a duty to rely upon a prison rule, the Warden wants the reader to conclude that Larson should have relied upon a prison rule as the source of his right to alter property and to receive a gift, and, since no prison rule, no right, the reader being led to think that the Warden is the source of rights; and to complete his circle of reasoning, because of Sandin v. Conner, id., if Larson had relied upon a rule, he still would have no rights.

But the Warden is not realizing that his circular reasoning forces the reader to 'go outside the box', outside the circle, to find the source of one's rights.

He ignores that Sandin v. Conner, id., does just this, directing one to the common law, due process of law, directs one to go back to the basics, back to one's inalienable source of rights as opposed to seeking the Warden for a beneficence, privilege, magnanimity, generosity or charity.

Larson's natural rights are inalienable, exist at the common law. He lost no right simply because the Warden acquired custody of him. Note that none of the statutes in N.D.C.C. 12-47 say that a prisoner loses rights. Rather, the statutes only give the Warden power or jurisdiction. Larson even retains his right to liberty--it is just that the Warden has power to restrain Larson's right.

Larson did cite Spruytte, id, but in the context of referring to due process of law, not in the context of reliance on any prison rule. See page 14-15 of Larson's

brief. The rule or concept of Spruytte, id., is accurate law, it is just that the focus now is to the constitution, and to inalienable rights, not to the Warden as the source of rights.

On page 23, the Warden concludes that his rules do not impose on Larson the type of "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" which would give rise to due process of law protection, quoting Sandin v. Conner, id., page 484, 2300.

Here, the Warden again misconstrues "Sandin v. Conner". This phrase does not do away with due process of law. The "ordinary incidents of prison life" does not mean the Warden has a license to violate due process of law, that is, the Warden does not dictate what it will be, rather, the rule of law governs, not the Warden. Prisoners retain protection from arbitrary state action even within expected conditions of confinement, as well as other rights under the First and Eighth Amendments and equal protection under the Fourteenth Amendment, and state judicial review, such as is this Certiorari case, etc. Sandin v. Conner, id., page 487 note 11, 2302 note 11.

"Sandin" was based on a claim that he should not have been disciplined because the evidence was not sufficient to show his liability. Sandin v. Conner, id., page 476-477, 2296 (The prisoner claimed there was not substantial evidence to prove guilt in a disciplinary hearing, relying

upon the prison rule which said substantial evidence should be the criteria to find guilt.). If the prisoner had relied upon due process of law, not the prison rule, his argument would have been the same, that there was insufficient evidence or that the prison did not bear its burden of proof--these being due process principles to protect one from arbitrary action to say he was guilty when they did not prove it, or that they did not state a cause of action, etc. The prisoner's disciplinary conviction was overturned by the prison on appeal nine months later. *Id.*, page 476, 2296. He then sued, but 'lost' because he relied upon the prison rule for his due process right, as opposed to relying on the constitution. But the U.S. Supreme Court kept the law in their rule in footnote number 11, as discussed in the above preceding paragraph.

Now, with "Sandin v. Conner", the issue will simply be:

Larson's possession of the magazines given to him, and the cutting of the picture of the flag out of the newspaper and displaying it, did not harm, violate or threaten the Warden's penological interest. Therefore, the Warden exceeded his jurisdiction in threatening to take the flag, and in taking the magazines. (On page 14, the Warden says Larson had to remove the flag. Larson was threatened. But his flag is still flying.)

"Really, nothing else need be said or argued."--See page 21 of Larson's appeal brief, and page 1 of Larson's

motion for judgment on the pleadings, R.A.#7.

Without the Warden's argument and "Sandin v. Conner", the argument will be all the pages written by the Warden, and all the pages written by Larson. In bringing this to our attention, the Warden has helped to simplify and shorten the issue, to get back to the basics, making it easier for the reader to see he committed an intentional, gross and malicious abuse of discretion.

III. CERTIORARI DOES NOT ENCOMPASS SUBJECT MATTER JURISDICTION.

The Warden still claims that certiorari encompasses subject matter jurisdiction. Here, the Warden is arguing in bad faith, knowing it does not, abusing or misusing process. Page 14 of Larson's reply, R.A.#12; and see pages 9-14 of R.A.#12, and pages 2-3 of R.A.#7, and pages 1-2 of R.A.#10 or pages 15-16 of the Warden's Appendix.

CONCLUSION

Wherefore, Larson reaffirms his prayer for relief and asks this Court to declare the conduct of the District Court 'coram non iudice' and the conduct of the Warden 'ultra vires', that the Warden's rules and conduct exceed his jurisdiction; and Larson further prays this Court to simplify the issues or rules 'of argument' as the Warden brought to our attention.

Dated this 10th day of February, 2006.



Reuben Larson
P.O. Box 5521
Bismarck, N.D. 58506-5521