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DANIEL T. MEIS, APPELLANT, V. ROBERT HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

808 N.W.2d 897

Filed January 31, 2012. No. A-11-386.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo. It accepts all the factual allegations in the complaint as true and draws all reasonable inferences for the nonmoving party.
2. **Constitutional Law: Property.** To establish a takings claim under either the U.S. or Nebraska Constitution, it is axiomatic that the claimant must have been deprived of some property right.
3. **Constitutional Law: Prisoners.** While prisoners do not shed all constitutional rights at the prison gate, lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights.
4. **Prisoners: Property.** A state has a compelling interest in maintaining security and order in its prisons and, to the extent that it furthers this interest in reasonable and nonarbitrary ways, property claims by inmates must give way.
5. ____: ____. A prisoner does not enjoy the unqualified right to possess property while in prison.
6. ____: ____. An inmate is not deprived of ownership of property when forced to send property out of prison so long as he or she retains the ability to exercise some degree of choice as to its destination.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
8. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.
9. **Mandamus.** A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.
10. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
11. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed in part, and in part vacated and dismissed.

Daniel T. Meis, pro se.

Jon Bruning, Attorney General, and Linda L. Willard for appellee.

INBODY, Chief Judge, and CASSEL and PIRTLE, Judges.

CASSEL, Judge.

INTRODUCTION

Daniel T. Meis, an inmate at the Nebraska State Penitentiary, appeals from the order of the district court dismissing his complaint against Robert Houston, the director of the Nebraska Department of Correctional Services (the Department), in which Meis challenged a new limitation on the amount of property that an inmate can possess. Because Meis does not enjoy a right to the possession of property while in prison, the district court did not err in failing to grant declaratory judgment or in finding that there was no taking. We similarly find no error in the court's decision not to grant mandamus. However, to the extent the district court considered the decision of the Department of Correctional Services Appeals Board (Appeals Board), which appeal was not timely filed, we vacate the district court's order for lack of jurisdiction. Accordingly, we affirm in part, and in part vacate and dismiss.

BACKGROUND

The facts of this case are not in dispute.

On September 24 and November 1, 2009, the Department revised administrative regulation No. 204.01(III)(A)(13) and operational memorandum No. 204.001.110(V)(D)(9), respectively, to limit the amount of personal property that can be possessed by an inmate to 4 cubic feet. Neither the revisions nor the original rules were promulgated pursuant to the Administrative Procedure Act. Under the revised rules, an inmate is given the choice to dispose of any excess property by shipping it to a location designated by the inmate or by having it picked up by an approved visitor. For inmates at the state penitentiary, excess property that is not removed within 30 days will be destroyed or donated to charity. Inmates in Meis' housing unit at the state penitentiary were notified on June 9, 2010, that this new property limitation would take effect on July 12.

On July 13, 2010, a case manager at the state penitentiary approached Meis and ordered him to place his personal property into a plastic tub to determine if it was less than 4 cubic feet. Meis refused. The case manager filed a misconduct report. The disciplinary committee found Meis guilty of disobeying an order and sentenced him to "7 days [of] bunk restriction." This misconduct was later dismissed and expunged from his record.

On July 14, 2010, the case manager again approached Meis and ordered him to place his personal property into a plastic tub. Meis again refused. The case manager filed a second misconduct report, in response to which the disciplinary committee again held a hearing, found Meis guilty of disobeying an order, and sentenced him to 7 days of segregation. Meis appealed this disciplinary committee decision to the Appeals Board, which upheld his punishment for disobeying an order.

While Meis was serving his time in segregation, his property was sent to storage. Upon release, Meis retrieved his property and found several items to be missing. He was presented with a "Notice of Excess Property" informing him that these items were either not allowed or in excess of the new property limit. This form, dated July 26, 2010, also notified Meis that he had 30 days to remove the property from the state penitentiary before it would be "destroyed or donated to charity." Meis refused to sign the "Notice of Excess Property" to acknowledge its receipt. On July 26, Meis also received a "Property Release Form" giving him the opportunity to designate an individual to whom the excess or contraband property could be released. Meis refused to designate an individual to receive his property. When Meis filed a grievance in early September requesting that his property be returned, he was informed that it had been held for 30 days and then destroyed when he failed to exercise his option to have the property sent out of the facility.

Meis subsequently filed a complaint with the district court for Lancaster County, Nebraska, asking for a declaratory judgment declaring the property limitation to be invalid, for a writ of mandamus ordering the Department to promulgate the property limitation under the Administrative Procedure Act, for a reversal of the Appeals Board decision, and for damages. In

response, Houston filed a motion to dismiss, arguing that the complaint failed to state a cause of action upon which relief could be granted. After a hearing at which briefs were submitted, the district court found that the property limitation was not required to be promulgated pursuant to the Administrative Procedure Act, because it fell within the internal management exception of Neb. Rev. Stat. § 84-901(2) (Reissue 2008), and that the limitation did not constitute an illegal taking. It ruled that Meis' complaint did not state a cause of action for declaratory relief, mandamus, or damages and that his complaint did not support a reversal of the decision of the Appeals Board. Consequently, the district court sustained the motion to dismiss.

Meis timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Meis alleges, restated and reordered, that the trial court erred (1) in ruling that there was no taking that required just compensation, (2) in finding that Meis was not entitled to declaratory judgment under Neb. Rev. Stat. § 84-911 (Reissue 2008), (3) in finding that Meis had no right to mandamus, and (4) in sustaining the decision of the Appeals Board. Meis also alleges that Neb. Rev. Stat. § 83-4,111 (Reissue 2008) and 68 Neb. Admin. Code, ch. 7, § 008 (2008), are unconstitutional.

STANDARD OF REVIEW

[1] An appellate court reviews a district court's order granting a motion to dismiss de novo. It accepts all the factual allegations in the complaint as true and draws all reasonable inferences for the nonmoving party. *Roos v. KFS BD, Inc.*, 280 Neb. 930, 799 N.W.2d 43 (2010).

ANALYSIS

Whether Property Limitation Is Taking.

Meis alleges that the district court erred in ruling that the property limitation did not affect a taking under the U.S. or Nebraska Constitution. The Fifth Amendment to the U.S. Constitution provides that private property will not be taken

for public use without just compensation. Neb. Const. art. I, § 21, is slightly broader in its protection and states that "[t]he property of no person shall be taken or damaged for public use without just compensation therefor." The district court ruled that the property limitation did not result in a taking under either provision. We agree.

We note at the outset that Meis' argument does not turn upon—indeed, does not even mention—the fact that his excess property was ultimately destroyed pursuant to the property limitation rule. He argues instead that merely denying him the use of his excess property was a taking. As such, we do not address whether the property limitation rule affects a taking to the extent that it results in the destruction of property, but limit our analysis to the provisions of the property limitation rule that require inmates to send excess property out of the prison.

[2] To establish a takings claim under either the U.S. or Nebraska Constitution, it is axiomatic that the claimant must have been deprived of some property right. *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009). Meis argues that he was deprived of the ownership, possession, and use of his property. However, because Meis does not have a protected property interest in the possession or use of property while in prison and because he was not deprived of ownership of the excess property, his claim under the Takings Clause is without merit.

[3] "While prisoners do not shed all constitutional rights at the prison gate, '"'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights.'"'" *Martin v. Curry*, 13 Neb. App. 171, 176, 690 N.W.2d 186, 192 (2004) (quoting *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)).

[4] One of the rights limited upon incarceration is the right to property. The U.S. Supreme Court has held that a prisoner's right against the deprivation of property without due process of law is "not absolute." *Bell v. Wolfish*, 441 U.S. 520, 554, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Rather, this property right is "subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution." *Id.* Indeed,

a state has a compelling interest in maintaining security and order in its prisons and, to the extent that it furthers this interest in reasonable and nonarbitrary ways, property claims by inmates must give way. *Sullivan v. Ford*, 609 F.2d 197 (5th Cir. 1980).

[5] In limiting prisoners' property rights, the 10th Circuit has drawn a distinction between the right to own property and the right to possess property while in prison—a prisoner's right to *own* property is protected; the right to *possess* property while in prison is not. See, *Searcy v. Simmons*, 299 F.3d 1220 (10th Cir. 2002); *Hatten v. White*, 275 F.3d 1208 (10th Cir. 2002). Even though these cases arose in the due process context, we believe that the same distinction between ownership and possession applies in the context of takings. If penological interests justify the limitation of due process property rights, those same penological interests will justify a limitation of the property rights guaranteed by the Takings Clause. Therefore, we now adopt this distinction and hold that a prisoner does not enjoy the unqualified right to possess property while in prison.

If a prisoner is not guaranteed the right to possess property while in prison, it follows that he will not enjoy the right to use property either, which right necessarily depends upon the ability to possess property. The cases to which Meis cites for the proposition that denying use of property is a taking both pertain to regulatory takings and involve real property, and we consequently find them to be inapplicable in the context of the taking of a prisoner's personal property. Additionally, we have found no cases that recognize a prisoner's right to the use of personal property. As such, we are not persuaded by Meis' argument that he has a right to the use of his property while in prison.

[6] Having established that a prisoner's right to the possession and use of property while in prison is limited, we turn to the property right that inmates do retain—the right to own property. In determining whether the property limitation interferes with the right of ownership, we again find the 10th Circuit's due process property rights jurisprudence to be instructive and applicable. In *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991),

the 10th Circuit held that requiring an inmate to send property out of prison to a place he could designate did not "deprive" the inmate of the property because he retained control over it. Similarly, in *Hatten v. White, supra*, the 10th Circuit held that an inmate was not deprived of his property because he was allowed to send it to a place of his choosing. From these cases, we conclude that an inmate is not deprived of ownership of property when forced to send property out of prison so long as he or she retains the ability to exercise some degree of choice as to its destination. We note that this approach has also been adopted by the Supreme Court of Appeals of West Virginia and the U.S. District Court for the District of Minnesota. See, *Pyron v. Ludeman*, Nos. 10-3759, 10-4236, 2011 WL 3293523 (D. Minn. June 6, 2011); *State ex rel. Anstey v. Davis*, 203 W. Va. 538, 509 S.E.2d 579 (1998).

As was the case in *Williams v. Meese, supra*, and *Hatten v. White, supra*, Meis was given choices under the property limitation rule. He was given the option of sending his property to a designated address or having someone pick it up. Because it gave him these options, the property limitation rule did not deprive Meis of ownership of the excess property, but merely its possession and use, to which we have already determined he has no right.

Because Meis' right to possess and use property was limited upon his incarceration and because the property limitation does not affect property ownership, he has not established that the property limitation deprived him of a protected property interest. Therefore, his takings claim must fail.

Declaratory Judgment.

Under § 84-911, the validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court for Lancaster County if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. We need not reach the validity of the property limitation, however, because Meis is not entitled to declaratory judgment by virtue of the fact that the property limitation does

not interfere with or impair any legally recognized rights or privileges of Meis.

Meis argues that the property limitation affects his right to possess, use, and own property, but we are not convinced by his arguments. First, as we held above, Meis does not have a legal right to the possession of property while in prison. Because he has already forfeited his right to the possession of property as an inmate, the property limitation cannot be said to interfere with or impair that right. Second, if Meis has forfeited his right to possess property, he has also given up his right to use property while in prison, a right which cannot be exercised without possession. Finally, we have already determined that the property limitation does not interfere with Meis' right to own property.

[7] Because the property limitation does not interfere with or impair Meis' rights to the possession, use, or ownership of property, he is not entitled to declaratory judgment under § 84-911. We need not address whether the property limitation falls within the internal management exception of § 84-901(2). An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Jackson v. Brotherhood's Relief & Comp. Fund*, 273 Neb. 1013, 734 N.W.2d 739 (2007).

[8] Upon our de novo review of this assignment of error, we reach the same conclusion as the district court, but for a different reason. Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009). Therefore, we affirm.

Right to Mandamus.

[9] Meis next alleges that the district court erred in finding that he had no right to mandamus. A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.

Schropp Indus. v. Washington Cty. Atty.'s Ofc., 281 Neb. 152, 794 N.W.2d 685 (2011).

Meis contends that § 83-4,111 gives him a right "to a determination of which rights he lost and retained as a result of his felony conviction but also to the promulgation of that determination (upon his commitment)." Brief for appellant at 16. Section 83-4,111(1) demands that the Department "adopt and promulgate rules and regulations to establish criteria for justifiably and reasonably determining which rights and privileges an inmate forfeits upon commitment and which rights and privileges an inmate retains." We do not read this language as establishing a right in inmates to a determination of which rights they retain upon commitment.

Meis further argues that § 83-4,111 creates a duty on the part of Houston to promulgate "rules and regulations regarding inmate rights." Brief for appellant at 16. We agree with Meis to the extent that § 83-4,111 requires the Department to promulgate rules and regulations that establish criteria for determining which rights and privileges an inmate forfeits upon commitment. However, the Department has already promulgated the rules required by this statute—68 Neb. Admin. Code, chs. 1 through 9 (2008). Therefore, the Department's duty under § 83-4,111 has been fulfilled.

Because Meis has no clear right under § 83-4,111 and because the Department has already fulfilled its duty to promulgate rules pursuant to § 83-4,111, he has no right to mandamus. The district court properly ruled that Meis' complaint did not state a cause of action for mandamus.

Decision of Appeals Board.

Meis also alleges that the district court erred in sustaining the decision of the Appeals Board upholding his punishment for disobeying a direct order. However, the district court did not actually sustain the Appeals Board decision. It simply declared that Meis' complaint did not "support reversal of the decision of the [Appeals] Board." We therefore take Meis' assignment of error as challenging this decision of the district court.

[10] Because Meis' petition to review the Appeals Board decision was not timely filed, the district court had no

jurisdiction to review the Appeals Board decision. Pursuant to Neb. Rev. Stat. § 84-917(2)(a)(i) (Cum. Supp. 2010), Meis could institute proceedings for review of the Appeals Board decision "by filing a petition in the district court . . . within [30] days after the service of the final decision by the agency." The Appeals Board decision was sent to Meis on September 3, 2010, but his complaint was not filed with the district court until October 26, more than 30 days after the decision was sent to him. Therefore, because Meis' petition for review was not timely filed, the district court lacked jurisdiction to review the Appeals Board decision. Consequently, we also lack jurisdiction to review this assignment of error. If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008). We vacate the district court's order to the extent it considered the decision of the Appeals Board.

Constitutional Challenge to § 83-4,111 and 68 Neb. Admin. Code, ch. 7, § 008.

[11] Finally, Meis alleges that § 83-4,111 and 68 Neb. Admin. Code, ch. 7, § 008, are unconstitutional delegations of the State Legislature's authority. We refuse to address this assignment of error on appeal, however, because Meis did not raise this issue before the district court. Neither did the district court rule upon the constitutionality of § 83-4,111 and 68 Neb. Admin. Code, ch. 7, § 008. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011). Because the district court did not rule on these matters, Meis cannot assert them for the first time in this appeal.

CONCLUSION

Because Meis had no right to possession of property while in prison and because the property limitation preserved his right to ownership by giving him the choice of where to send his excess property, we affirm the decisions of the district court that there was no taking and that Meis was not entitled to declaratory judgment. Because Meis has no clear right under

§ 83-4,111, we also affirm the district court's decision that he was not entitled to mandamus. However, because Meis' request for review was not timely filed with the district court under the Administrative Procedure Act, we lack jurisdiction to review the Appeals Board decision and vacate the district court's order to the extent it reviewed this decision. Finally, because Meis did not raise the issue of constitutionality before the district court, we do not consider his challenge to § 83-4,111 and 68 Neb. Admin. Code, ch. 7, § 008.

AFFIRMED IN PART, AND IN PART VACATED AND DISMISSED.