IN THE COURT OF APPEALS OF IOWA

No. 0-888 / 10-0733
Filed January 20, 2011

JASON W. FRANSENE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

A postconviction relief applicant appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Jason W. Fransene, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, H. Loraine Wallace, Assistant Attorney General, and Janet M. Lyness, County Attorney, for appellee State.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

VAITHESWARAN, J.

Jason Fransene appeals the denial of his postconviction relief application.

I. Background Facts and Proceedings

Fransene, an inmate committed to the custody of the Iowa Department of Corrections, was granted work release and placed at a residential facility. While there, Fransene violated a number of the facility's rules. His work release was terminated, and he was transferred to the Iowa Medical and Classification Center and later to the Anamosa State Penitentiary.

Fransene appealed the transfer decision to a higher authority within the Department of Corrections. The department denied the appeal.

Fransene eventually filed the present postconviction relief application challenging the decision to revoke his work release and return him to prison. He moved for partial summary disposition, asserting he was transferred without notice and without being informed of his right to appeal. Prior to the hearing on Fransene's motion, the State filed a resistance and its own motion for summary disposition. The State argued "that termination of an applicant's work release agreement does not state a cause of action for post-conviction relief because the statutory authority for the work release program . . . does not create a constitutionally protected liberty interest."

Following a hearing, the district court denied Fransene's motion for partial summary disposition and granted the State's motion. Fransene appealed.

II. Analysis

Both parties agree this appeal is properly reviewable as a postconviction relief action. *See Maghee v. State*, 773 N.W.2d 228, 242 (Iowa 2009) (holding

transfer of an inmate from work release to a secure institution is reviewable in a postconviction proceeding). Summary disposition is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa Code § 822.6 (2007).

Fransene contends the district court erred in (A) denying his motion to strike the State's resistance to his motion for summary disposition as untimely and inadequately supported; (B) finding he had no due process liberty interest in remaining in the work release program; (C) finding he had no due process property interest in remaining in the work release program; (D) failing to address his claim that the transfer decision was based on materially false statements; and (E) failing to address his claim that the department abused its discretion in deciding to transfer him from work release to prison. He requests that we order the department to return him to the work release program.[1]

A. Motion to Strike Resistance

Fransene moved to strike the State's untimely resistance to his partial motion for summary judgment. The district court denied the motion to strike, reasoning that Fransene suffered no prejudice, as he was allowed to reply to the State's resistance and participate in a hearing that did not take place until after the filing of these documents.

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[1] Fransene requests similar relief in a "Motion for a Temporary Injunctive Order" he filed with this court on December 23, 2010. The motion largely repeats the arguments presented in his brief. For relief, Fransene asks this court to issue

> a Temporary Injunctive Order which should order the Appellee to reinstate the Appellant's Iowa Board of Parole Work Release Agreement/Status and to release him to that status immediately, pending final disposition of this matter by the Iowa Court of Appeals.

We deny the motion for the same reasons we deny Fransene's claims on appeal.

Fransene does not explain why he believes this ruling is incorrect. Because the record supports the district court's findings concerning the timing of the filings and Fransene's ability to participate in the hearing, we conclude the court did not abuse its discretion in denying Fransene's motion. *See Kulish v. Ellsworth*, 566 N.W.2d 885, 889 (Iowa 1997) (setting forth scope of review).

B. Due Process Clause—Liberty Interest

In granting the State's motion for summary disposition, the district court concluded Fransene had no protected liberty interest in remaining in the work release program. Fransene takes issue with this aspect of the court's ruling.

"Protected liberty interests under the Fourteenth Amendment may arise from the Due Process Clause itself or from State laws." *Callender v. Sioux City Residential Treatment Facility*, 88 F.3d 666, 668 (8th Cir. 1996). "A liberty interest inherent in the Due Process Clause arises when a person has substantial, albeit conditional, freedom such as when he is on probation or parole." *Id.* A liberty interest created by the laws or regulations of a state arises if the deprivation "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995); *see also Callender*, 88 F.3d at 669; *Drennan v. Ault*, 567 N.W.2d 411, 414 (Iowa 1997).

Fransene's claim of a liberty interest derived from the Due Process Clause fails because, although he was allowed to leave the facility for work, he was required to "use the most direct route or method of transportation" to and from work and to notify the facility's staff of any changes in his work schedule. He was also required to return to the facility at night, refrain from using alcohol, and limit

his use of cell phones. Similar restrictions on an inmate have been deemed insufficient to create an inherent liberty interest. *See Asquith v. Dep't of Corr.*, 186 F.3d 407, 411 (3d Cir. 1999) (noting the "Supreme Court has consistently held that while a prisoner remains in institutional confinement, the Due Process Clause does not protect his interest in remaining in a particular facility").[2]

Fransene's claim of a state-created liberty interest in remaining in the work release program also fails because he cannot show his return to prison "imposed atypical and significant hardship on him in relation to the ordinary incidents of prison life." *See Callender*, 88 F.3d at 669 (finding inmate had no state-created liberty interest in remaining in work release program because "[w]ithin two or three months, Mr. Callender was returned to the same institution that he had left upon being granted work release"); *Drennan*, 567 N.W.2d at 414 ("[A] transfer to a higher degree of confinement or a reclassification to a more supervised form of prison environment . . . does not appear to be an atypical and significant hardship on an inmate in relation to the ordinary incidents of prison life."). While Fransene asserts that he has a state-created liberty interest based on the State's failure to follow its rules pertaining to the revocation of his work release agreement, that type of argument was specifically rejected in *Sandin*. In that case, the Supreme Court deviated from its prior focus on "the language of a

[2] Fransene's reliance on *Edwards v. Lockhart*, 908 F.2d 299, 302–03 (8th Cir. 1990), which he cites in his motion for injunctive relief, is misplaced as the prisoner in that case was released from confinement to live in her own home while participating in a work release program. Here, as mentioned, Fransene was required to live in a facility operated and supervised by a judicial district department of correctional services under a contract with the department. *See* Iowa Code §§ 904.904; 905.1(2); *see also id.* § 901B.1 (stating on the "corrections continuum" that begins with "noncommunity-based sanctions" and ends with incarceration, work release facilities are on the "quasi-incarceration" level).

particular regulation" rather than "the nature of the deprivation" on the ground that its prior focus "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." *Sandin*, 515 U.S. at 481, 115 S. Ct. at 2299, 132 L. Ed. 2d at 428.

We conclude Fransene had no due process liberty interest in remaining in the work release program.

C. Due Process Clause—Property Interest

Fransene next claims his work release agreement with the department created a protected property interest under the Due Process Clause. Fransene did not preserve error on this claim. Although he raised the issue in a post-hearing motion preceding the court's ruling and the court acknowledged the motion in its ruling, the court did not address the issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Accordingly, we decline to consider this issue.

D. Remaining Claims

Fransene finally asserts that the district court should have addressed his remaining arguments. These arguments are grounded in the Due Process Clause. As we affirm the district court's conclusion that Fransene had no liberty interest in remaining on work release, these arguments necessarily fail.

We affirm the denial of Fransene's postconviction relief application.

AFFIRMED.