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DISTRICT IV

October 21, 2021

To:

Hon. Richard G. Niess
Circuit Court Judge
Electronic Notice

Steven C. Kilpatrick
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Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
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David Marshall 354701
Stanley Correctional Inst.
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Stanley, WI 54768

Brian Keenan
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2020AP1156

State of Wisconsin ex rel. David Marshall v. Kevin A. Carr
(L.C. # 2018CV1287)

Before Blanchard, P.J., Fitzpatrick, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

David Marshall, pro se, appeals a circuit court order that dismissed his petition for a writ of certiorari review of a decision by the Secretary of the Department of Corrections.¹ Marshall challenges the department's deduction of funds from his prison account at an increased rate of fifty percent. Based on our review of the briefs and the record, we conclude at conference that

¹ The caption of this appeal has been changed to reflect the name of the current Secretary.

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).² We affirm.

Marshall initiated this matter by filing an internal inmate complaint. The complaint was dismissed. Marshall sought an administrative appeal in the office of the Secretary, and that appeal was also dismissed. Marshall then filed his petition for certiorari review in the circuit court and, as noted, the circuit court dismissed the petition.

We affirm the circuit court for two reasons. Either of these reasons would alone be sufficient to affirm.

First, Marshall fails to make a developed argument on appeal. Although we make some allowances for pro se litigants, “[w]e cannot serve as both advocate and judge” by developing arguments for them. *See State ex rel. Harris v. Smith*, 220 Wis. 2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998); *see also M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (declining to consider an “unexplained and undeveloped” argument). Marshall’s brief-in-chief is two pages. It contains no citations to legal authority or to the record, and it lacks a coherent explanation of Marshall’s grounds for challenging the deduction of funds from his prison account. Marshall’s reply brief includes a handful of citations, but it too lacks developed argument. Further, “[i]t is a well-established rule that we do not consider arguments raised for the first time in a reply brief.” *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Second, for the reasons we explain in this paragraph, we conclude that Marshall has forfeited the argument he makes on appeal.³ Marshall states in his brief-in-chief that his challenge to the deduction of funds from his prison account presents a due process question and, in his reply brief, Marshall pointedly states that his challenge is based on his state and federal constitutional rights to due process. However, Marshall did not present his challenge as a due process claim in his internal inmate complaint or his administrative appeal. “It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency.” *Bunker v. LIRC*, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 650 N.W.2d 864. Additionally, Marshall did not present his challenge as a due process claim in his petition for a writ of certiorari or his initial circuit court brief. Rather, the record shows that Marshall referenced due process for the first time in his circuit court reply brief, and even then he did not present a developed due process argument. Accordingly, Marshall not only failed to raise due process before the agency but also failed to timely and sufficiently raise it in the circuit court. *See State v. Eugene W.*, 2002 WI App 54, ¶13, 251 Wis. 2d 259, 641 N.W.2d 467 (In order to avoid forfeiting an issue, “a party must raise [it] with sufficient prominence such that the trial court understands that it is called upon to make a ruling.”).⁴ For all of these reasons, we conclude that Marshall forfeited his due process argument.

Therefore,

³ As a general rule, we do not consider forfeited arguments, *see Bunker v. LIRC*, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 650 N.W.2d 864, and Marshall provides us with no compelling reason to depart from the general rule here.

⁴ Not surprisingly, given Marshall’s failure to clearly present a due process argument in the circuit court, the circuit court’s decision did not address due process.

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals