

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-151

NOVEMBER TERM, 2007

Joseph Bruyette	}	APPEALED FROM:
	}	
v.	}	Washington Superior Court
	}	
Steven Gold, Commissioner of Department of Corrections	}	DOCKET NO. 429-8-04 Wncv

Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Plaintiff Joseph Bruyette appeals from a superior court order granting summary judgment in favor of the Commissioner of the Department of Corrections (DOC) and dismissing Bruyette's V.R.C.P. 75 complaint challenging a disciplinary adjudication. Bruyette contends that he was entitled to procedural due process protections under the Vermont Constitution. We affirm.

Bruyette is an inmate committed to the custody of DOC and is currently incarcerated in the state of Kentucky. In March 2004, Bruyette was involved in an altercation with a prison guard, charged with a disciplinary violation and placed in segregation pending a hearing. The prison convened a disciplinary hearing eight days later and provided Bruyette with the evidence to be presented, including the report of the investigating officer, who had interviewed two inmate witnesses. Bruyette testified at the hearing and also called the two inmate witnesses to testify. The disciplinary board found Bruyette guilty of the violation and sentenced him to eight days of segregation with credit for time served. The sentence had no effect on his earned credit or other collateral consequences. The ruling was affirmed by the prison warden.

Bruyette then filed a pro se complaint, pursuant to V.R.C.P. 75, alleging that the chair of the prison disciplinary board violated his due process rights by failing to permit the introduction of a videotape of the altercation; viewing the tape herself prior to the proceeding; denying him an opportunity to cross-examine the prison guard; relying on the investigating officer's report which misquoted the witnesses; and denying a continuance. DOC subsequently moved for summary judgment, asserting—among other claims—that Bruyette had failed to demonstrate the deprivation of a liberty interest sufficient to trigger procedural due process protection. DOC

relied on a series of United States Supreme Court decisions culminating with Sandin v. Conner, 515 U.S. 472, 484 (1995), where the high court held that a deprivation of liberty sufficient to entitle an inmate to the procedural due process protections of the United States Constitution must impose “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Applying this test, the Sandin court held that a punishment of thirty days solitary confinement was not a sufficient deprivation to warrant constitutional protection. Id. at 486-87. DOC also contested Bruyette’s claims that he was denied due process, noting that: Bruyette had failed to request the videotape before the hearing, and its absence was harmless inasmuch as the violation was based to a large extent upon Bruyette’s admissions that he had repeatedly refused the guard’s orders and resisted the guard’s efforts to handcuff him; there was no showing that the board chair’s viewing of the tape had affected her impartiality; Bruyette had not attempted to cross-examine the guard at the hearing; Bruyette had ample opportunity to address any alleged inaccuracies in the investigating officer’s report by questioning the two inmate witnesses at the hearing; and, finally, that Bruyette had failed to request a continuance at the hearing.

Bruyette, through appointed counsel, filed an opposition to the DOC’s motion and a cross-motion for summary judgment. In response to DOC’s claim that he had failed to demonstrate the requisite liberty interest, Bruyette argued that he was entitled to due process protection “regardless of the liberty interests” at stake because “an inmate has a protected interest in the procedures themselves,” citing two federal appeals court decisions considering federal due process rights. In March 2007, the trial court issued a written decision granting DOC’s motion and denying Bruyette’s cross-motion. Relying on Sandin, the court concluded that Bruyette had failed to demonstrate that eight days of segregation was a sufficient deprivation of liberty to trigger the right to due process protection. Accordingly, the court dismissed the complaint. This appeal followed.

On appeal, Bruyette has not renewed his claim that he was entitled to procedural due process protections regardless of the liberty interest at stake. Nor has he challenged the trial court’s ruling that he failed to demonstrate a sufficient deprivation of liberty interests under Sandin. Instead, Bruyette’s sole claim on appeal is that he was deprived of a liberty interest sufficient to trigger the due process protections of Chapter I, Article 10 of the Vermont Constitution, under the test articulated by this Court in Parker v. Gorczyk, 170 Vt. 263, 273 (1999) (declining to rely on the “catchword” tests articulated in Sandin and holding that the determination of whether due process protections are required turns on a “fact sensitive examination of the particular circumstances involved, including . . . the nature and significance of the interest at stake, the potential impact of any decision resulting in the deprivation of that interest, and the role that procedural protections might play” in the decision).

As noted, however, Bruyette did not ground his claim in the trial court on the Vermont Constitution; indeed, neither the complaint nor the cross-motion for summary judgment so much as cited Parker, the Vermont Constitution or Chapter I, Article 10 in particular. We have repeatedly held that issues not raised in the first instance in the trial court will not be considered on appeal, In re Miller, 170 Vt. 64, 69 (1999), and this rule applies to constitutional claims no less than other issues. See Mellin v. Flood Brook Union Sch. Dist., 173 Vt. 202, 218 (2001) (upholding trial court’s dismissal of claims alleging violation of due process under Vermont Constitution for “lack of specificity” at trial); State v. Stanislaw, 153 Vt. 517, 528 (1990) (“Even

when the defendant asserts a violation of constitutional rights, failure to promptly raise the issue before the trial court results in a waiver.”). Accordingly, the issue presented on appeal was not preserved for review, and we therefore decline to address it.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice