



Bailey v. Gonzales ex rel President

2004 | Cited 0 times | Court of Appeals of Arizona | January 30, 2004

MEMORANDUM DECISION

Not for Publication Rule 28, Rules of Civil Appellate Procedure

¶1 In this administrative appeal, appellant Donald D. Bailey challenges the Board of Accountancy's decision to suspend his accounting certification and place him on probation for three years based on a federal civil judgment against him. Because we conclude the administrative law judge (ALJ) did not abuse her discretion by denying Bailey a continuance to retain a lawyer and because Bailey waived the issue of the sufficiency of the federal civil judgment by failing to raise it at the administrative hearing, we affirm.

¶2 We view the facts in the light most favorable to upholding the Board's decision. See *Empire W. Cos. v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 95, 97, 893 P.2d 746, 748 (App. 1995). Bailey is a certified public accountant. In *Bailey v. United States*, No. CV 95-267-TUC-RMB (D. Ariz. Apr. 10, 1996), the United States obtained a civil judgment in the amount of \$1,000 against Bailey. The judgment did not state its basis and did not contain express factual findings. The Board of Accountancy subsequently filed a complaint against Bailey pursuant to A.R.S. § 32-741(A)(7), which allows the Board to take disciplinary action against a certified public accountant based on a "[f]inal judgment in a civil action if the court makes findings of accounting violations, dishonesty, fraud, misrepresentation or breach of fiduciary duty." After a hearing before an ALJ, the ALJ found that the judgment satisfied § 32-741(A)(7) and recommended, inter alia, that Bailey's certificate be suspended for six months. The Board rejected the ALJ's sanction recommendation and, instead, imposed a suspension of one year, with three additional years of probation. On appeal, the superior court affirmed the Board's decision that Bailey's certificate was subject to penalties under § 32-741(A)(7), but remanded the case to the Board for written findings on the increase in the penalty. Bailey now appeals that ruling to this court.

RIGHT TO AN ATTORNEY

¶3 Bailey first argues that the ALJ denied his due process right to an attorney by refusing to grant him a continuance of the hearing so he could retain an attorney. He contends that any waiver of a constitutional right must be "knowing, voluntary and intelligent" and that his actions prior to the hearing did not meet this standard. We review questions of statutory interpretation and constitutional claims de novo. *Webb v. State*, 202 Ariz. 555, ¶7, 48 P.3d 505, ¶7 (App. 2002).

¶4 As the Board acknowledges, because Bailey's livelihood was threatened, Bailey had the right to



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procedural due process. See *id.* at ¶8. "Procedural due process requires notice and an opportunity to be heard in a meaningful manner and at a meaningful time." *Id.* at ¶9. In the civil context, however, procedural due process does not include the right to an attorney. See *State ex rel. Woods v. Hameroff*, 180 Ariz. 380, 383 n.3, 884 P.2d 266, 269 n.3 (App. 1994) (no due process right to attorney in civil fraud case); cf. *In re Leon G.*, 204 Ariz. 15, n.1, 59 P.3d 779, n.1 (2002) (no Sixth Amendment right to counsel in civil cases); *Encinas v. Mangum*, 203 Ariz. 357, ¶10, 54 P.3d 826, ¶10 (App. 2002) (civil procedural due process does not include court-appointed attorney); *Highway Prods. Co. v. Occupational Safety & Health Review Bd.*, 133 Ariz. 54, 57, 648 P.2d 1060, 1063 (App. 1982) (rights afforded criminal defendants not applicable to proceedings before administrative agency).

¶5 Bailey cites *Daniel Y. v. Arizona Department of Economic Security*, ___ Ariz. ___, 77 P.3d 55 (App. 2003), in support of his argument that the Due Process Clause includes the right to an attorney. But *Daniel Y.* involved a severance hearing; as the Board notes, parents have a statutory right to court-appointed counsel in such cases, and this right has been equated with due process in this context. See A.R.S. § 8-221(B); *Denise H. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 257, ¶4, 972 P.2d 241, ¶4 (App. 1998). *Daniel Y.*, therefore, is not helpful to Bailey.

¶6 When questioned at oral argument, Bailey was unable to identify any other civil context in which the right to counsel has been engrafted on to the Due Process Clause. He noted that in *Arizona State Board of Regents ex rel. Arizona State University v. Arizona State Personnel Board*, which discussed the application of the Administrative Procedures Act to the university, the supreme court stated it was not reaching the argument presented there that the "constitution itself requires full participation by a lawyer at the hearing." 195 Ariz. 173, ¶13, 985 P.2d 1032, ¶13 (1999). But the supreme court's refusal to reach an issue is insufficient to overcome the other precedent cited above, which holds that due process in the civil context does not include the right to an attorney. And, although the ALJ did not allow Bailey to subpoena all of the witnesses and documents he requested, Bailey has not shown he was unable to protect his due process rights at the hearing. Thus, Bailey has not shown that in the context of this case, due process required that he have an attorney during his administrative hearing.¹ Accordingly, we reject Bailey's claim that any waiver of this right had to meet the "knowing, intelligent and voluntary" standard applied to waivers of constitutional rights. See *State v. Nelson*, 157 Ariz. 187, 188, 755 P.2d 1175, 1176 (App. 1988) (waiver of statutory rights must be voluntary, but need not be knowing and intelligent).

¶7 Nonetheless, Bailey did have a statutory right to have an attorney present, or to appear without an attorney, during the administrative proceeding under A.R.S. § 41-1092.07(B). This section provides that "[t]he parties to a contested case or appealable agency action have the right to be represented by counsel or to proceed without counsel, to submit evidence and to cross-examine witnesses." § 41-1092.07(B). This right includes the right to have counsel effectively participate in the proceedings. See *Ariz. State Bd. of Regents*, 195 Ariz. 173, ¶13, 985 P.2d 1032, ¶13.

¶8 Bailey argues that he did not waive this right to an attorney and that the ALJ therefore erred by



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refusing to continue the hearing so he could retain one. In reviewing an administrative agency's decision, the superior court examines whether the administrative action was illegal, arbitrary, or capricious and whether it involved an abuse of discretion. A.R.S. §§ 12-901 through 12-914; *Ethridge v. Ariz. State Bd. of Nursing*, 165 Ariz. 97, 100, 796 P.2d 899, 902 (App. 1989). In our review of a superior court's ruling upholding an administrative decision, we independently examine the record to determine whether the evidence supports the ruling. *Carley v. Ariz. Bd. of Regents*, 153 Ariz. 461, 463, 737 P.2d 1099, 1101 (App. 1987). Applying a non-constitutional standard for waiver of the right to an attorney, see *Nelson*, we cannot say that the ALJ abused her discretion in denying Bailey's motion to continue the hearing.

¶9 Section 41-1092.05(C) allows an ALJ to continue the hearing for "good cause." When considering whether to continue a hearing for good cause, the ALJ should consider such factors as:

1. The time remaining between the filing of the motion and the hearing date;
2. The position of other parties;
3. The reasons for expediting the hearing or for the unavailability of the party, representative, or counsel on the date of the scheduled hearing;
4. Whether testimony of an unavailable witness can be taken telephonically or by deposition; and
5. The status of settlement negotiations. Ariz. Admin. Code R2-19-110.

¶10 In addition, A.R.S. § 41-1004 states that a party may waive any right provided for by chapter six, which includes the right to be represented by counsel under § 41-1092.07(B). "Waiver need not be expressed but may be inferred from conduct and is therefore a question of fact to be determined by the trial court." *Concannon v. Yewell*, 16 Ariz. App. 320, 321, 493 P.2d 122, 123 (1972).

¶11 On November 6, 2001, the Board filed the administrative complaint against Bailey, setting a hearing for January 28, 2002. The Board served the complaint on him by mail on November 21. Acting as his own attorney, Bailey filed a stay request in superior court in an attempt to stop the administrative proceeding. On January 4, again without counsel, Bailey requested a continuance of the administrative proceeding to subpoena documents in the federal civil case against him. The Board opposed the motion and the ALJ denied the continuance on January 9. Still acting as his own attorney, Bailey answered the complaint on January 13 and responded to the Board's reply on January 23, requesting subpoenas for witnesses concerning the federal case. When the ALJ denied Bailey's request to subpoena witnesses, Bailey, for the first time, attempted to hire counsel on the evening of January 23. His counsel of choice declined to represent him unless the hearing was continued for thirty days. Bailey filed a request for another continuance on January 25, and the ALJ denied his motion that same day. The hearing took place as scheduled on January 28.



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¶12 Despite the complaint's notice of his right to representation, Bailey chose to represent himself in the initial portions of the administrative proceeding and in the attempt to stay the proceedings filed in superior court. Bailey did not file a motion to continue based on his inability to obtain an attorney until five days before the hearing; the other party opposed the continuance. The reason counsel was unavailable was solely related to Bailey's decision to represent himself, in accordance with his right under § 41-1092.07(B). And the record does not show that Bailey attempted to contact any other attorney after the ALJ denied his motion to continue the hearing.

¶13 The record reflects that Bailey was provided adequate opportunity to obtain the assistance of an attorney. Rather than using this opportunity to retain counsel, Bailey instead chose to represent himself until a few days before the scheduled hearing. Accordingly, we do not believe the ALJ deprived Bailey of his right to counsel; Bailey simply chose not to exercise this right until it was too late. Because Bailey waived his statutory right to counsel under § 41-1092.07(B), the ALJ did not abuse her discretion by denying Bailey a continuance of the hearing.

¶14 Finally, Bailey cites *Martin v. Industrial Commission*, 120 Ariz. 616, 587 P.2d 1193 (App. 1978), and *Avila v. Arizona Department of Economic Security*, 160 Ariz. 246, 772 P.2d 600 (App. 1989), for the proposition that an ALJ commits reversible error by failing to grant a continuance so a claimant may retain counsel. However, Bailey's reliance on these cases is misplaced. In *Martin*, the court observed that the claimant had been confused about her right to and need for counsel. *Martin*, 120 Ariz. at 618, 587 P.2d at 1195. In *Avila*, the ALJ knowingly set the hearing on a day when the claimant's retained counsel was not available. *Avila*, 106 Ariz. at 249, 772 P.2d at 603. In contrast, Bailey's hearing was set almost two months before Bailey attempted to retain counsel. And Bailey has not established that he was confused about his right to have an attorney present. By his own admission, Bailey was represented by counsel in other judicial proceedings and should have been aware of the dangers and consequences of self-representation.

CIVIL JUDGMENT AND STATUTORY REQUIREMENTS

¶15 Bailey further argues that the ALJ erred in finding that the federal civil judgment satisfied the statutory requirements of § 32-741(A)(7). Section 32-741(A)(7) allows the Board to take disciplinary action against a certificate holder based on a "[f]inal judgment in a civil action if the court makes findings of accounting violations, dishonesty, fraud, misrepresentation or breach of fiduciary duty." Bailey contends that neither the judgment nor the administrative record contains any evidence supporting a conclusion that the civil judgment was based on accounting violations, dishonesty, fraud, or misrepresentation. Thus, he contends, the findings required by § 32-741(A)(7) are unsupported by substantial evidence and the Board's case against him must be dismissed.

¶16 But Bailey did not raise this issue before the ALJ. Bailey only argued to the ALJ that the civil judgment was not final; Bailey failed to address the issue of whether the judgment was predicated on a finding of "accounting violations, dishonesty, fraud or misrepresentation." § 32-741(A)(7). Although



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Bailey raised this issue in his appeal to the superior court, the issues on review to the superior court remain the same as those presented to the ALJ. See *Shaffer v. Ariz. State Liquor Bd.*, 197 Ariz. 405, ¶¶17, 19, 4 P.3d 460, ¶¶17, 19 (App. 2000). As a result, failure to raise an issue before an administrative tribunal precludes judicial review of that issue on appeal unless the issue is jurisdictional in nature. *Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, ¶8, 985 P.2d 633, ¶8 (App. 1999). Any other rule would defeat one of the purposes of the exhaustion of administrative remedies requirement -- allowing the administrative agency to correct its own errors. See *Stephens v. Indus. Comm'n*, 114 Ariz. 92, 94, 559 P.2d 212, 214 (App. 1977); see also *Moulton v. Napolitano*, 205 Ariz. 506, ¶9, 73 P.3d 637, ¶9 (App. 2003) (purpose of doctrine is to allow administrative agency to perform functions within its special competence -- to make a factual record, to apply its expertise, and to correct its own errors to moot judicial controversies).

¶17 A challenge to the sufficiency of the evidence is not jurisdictional. Accordingly, because Bailey did not dispute before the ALJ that the federal civil judgment satisfied the requirements of § 32-741(A)(7), he was precluded from raising that argument on judicial review. Any other outcome would result in substantial damage to long-established principles of administrative law. See *Shaffer*, 197 Ariz. 405, ¶14, 4 P.3d 460, ¶14.

¶18 At oral argument, Bailey noted that the Board did not contend, either before the superior court or in its appellate briefs, that he had waived the argument that the civil judgment satisfied the statute. Bailey asserts therefore that the Board has waived the waiver issue² and that this court is precluded from raising the issue of waiver sua sponte. But the requirement that all issues be raised before an administrative agency arises from the requirement for exhaustion of administrative remedies. See *Stephens*. The requirement for exhaustion of administrative remedies has been described as jurisdictional, although it does not affect the subject-matter jurisdiction of the court. *Moulton*, 205 Ariz. 506, ¶9, n.2, 73 P.3d 637, ¶9, n.2 (doctrine of exhaustion does not implicate subject-matter jurisdiction, but rather, is procedural prerequisite to judicial review of agency decision). And in *Southwest Soil Remediation, Inc. v. City of Tucson*, this court held that, even if a party had waived the affirmative defense of failure to exhaust administrative remedies, "[a] court can decide sua sponte the question of whether or not to exercise jurisdiction." 201 Ariz. 438, ¶32, 36 P.3d 1208, ¶32 (App. 2001), quoting *Avila v. Chamberlain*, 119 Ariz. 369, 372, 580 P.2d 1223, 1226 (App. 1978). Because we are deciding not to exercise our jurisdiction, we may raise the issue of exhaustion sua sponte. See *Southwest Soil Remediation*.

¶19 Bailey further cites *Childress Buick Co. v. O'Connell*, 198 Ariz. 454, ¶29, 11 P.3d 413, ¶29 (App. 2000), and *Kalil Bottling Co. v. Burroughs Corp.*, 127 Ariz. 278, 281, 619 P.2d 1055, 1058 (App. 1980), for the proposition that this court will not address issues not raised in the trial court. But both *Childress Buick* and *Kalil* involved substantive law issues, not a refusal by the court to exercise jurisdiction for failure to exhaust administrative remedies. *Childress Buick*, 198 Ariz. 454, ¶¶28-29, 11 P.3d 413, ¶¶28-29 (whether insurance company had acted reasonably in paying car's apparent owner for damages to vehicle); *Kalil*, 127 Ariz. at 280, 619 P.2d at 1057 (whether parties' conduct constituted



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mutual rescission of disputed contract); see also *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 406 n.9, 904 P.2d 861, 868 n.9 (1995) (waiver doctrine is jurisprudential rather than substantive). And the court in *Childress Buick* refused to use the new argument to overturn the trial court's ruling, see *Childress Buick*, 198 Ariz. 454, ¶33, 11 P.3d 413, ¶33 (Berch, J. dissenting), whereas we are affirming the trial court's ruling. These cases, therefore, do not prohibit us from applying the non-waiver rule.

CONCLUSION

¶20 Because we find that the ALJ did not abuse her discretion by denying Bailey a continuance of the hearing to obtain an attorney and because Bailey waived the issue of the sufficiency of the federal civil judgment, we affirm the judgment of the superior court.

JOSEPH W. HOWARD, Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Presiding Judge

M. JAN FLUREZ, Judge

1. We do not conclude that due process never would require an attorney be allowed to participate in an administrative proceeding.

2. The Board did note in its answering brief in superior court that the only issue Bailey had raised before the ALJ was whether the district court's decision was final. The Board also notes that Bailey did not raise the issue of finality in his opening brief before the superior court and that the issue was therefore waived. The Board also stated that Bailey had only raised the issue of finality before the ALJ and that a new hearing will not change the resolution of that issue.

