MEMORANDUM DECISION

APPELLANT PRO SE

Michael D. Hickingbottom
Carlisle, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Aaron T. Craft
Deputy Attorney General

Frances Barrow
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Michael D. Hickingbottom,
Appellant-Defendant,

v.

Charles Dugan, et al.,
Appellee-Plaintiff.

May 20, 2022

Court of Appeals Case No. 21A-CT-2085

Appeal from the Sullivan Circuit Court

The Honorable Robert E. Hunley, Judge

Trial Court Cause No. 77C01-1904-CT-204

Altice, Judge.

Case Summary

[1] Michael D. Hickingbottom, an inmate at the Wabash Correctional Facility, filed a pro se complaint against six Indiana Department of Correction employees (collectively, the DOC), alleging various violations of federal and state law. After the trial court denied his third request for an extension of time to respond to the DOC's motion for summary judgment and granted the summary judgment motion, Hickingbottom filed a motion to correct error, which the trial court denied. He appeals, pro se, asserting that the trial court abused its discretion in not granting him an extension of time.

[2] We affirm.

Facts & Procedural History

[3] Hickingbottom filed his complaint against the DOC on April 3, 2019. The complaint alleged that he had been in administrative restrictive status housing[1] for six months and that he was not given required periodic meaningful review to determine whether the reasons for his placement in segregation still existed, which he asserted violated the Fourteenth and Eighth Amendments to the United States Constitution and Articles 11 and 13 of the Indiana Constitution. The DOC filed a motion for summary judgment on February 11, 2021.

---

[1] Administrative restrictive status housing is a form of solitary confinement. "An offender is placed in administrative restrictive status housing where prison staff determines that the offender would pose a significant threat to the safety and/or security of other offenders and/or staff if housed with the general prison population." *Appellees' Appendix* at 22.

[4] On March 8, 2021, Hickingbottom filed a "Motion to Deny Defendants Motion for Summary Judgment Until Plaintiff Is Done With Deposing the Defendant Witnesses." *Appellees' Appendix* at 37. And on March 15, he filed a "Motion for Extension of Time to Reply to Defendants' Motion for Summary Judgment," asking for an additional ninety days and stating that he "can have his Response . . . filed on or before June 10, 2021." *Id.* at 40-41. On March 18, the trial court granted Hickingbottom an extension of time "through and including June 10, 2021 to respond to the Defendants' Motion." *Id.* at 42.

[5] On June 10, Hickingbottom filed "Plaintiff's Second Request for An Extension of Time to Reply," explaining that he needed additional time due to pending discovery requests and motions, and he requested an additional forty-five to ninety days. *Id*. at 75. On June 18, the trial court granted Hickingbottom's request for additional time, giving him thirty days from the date of the order – that is, by July 18 – to file his response (the June 18 Order).

[6] On June 23, Hickingbottom filed "Plaintiff's Motion to Respond to Defendants Motion for Summary Judgement Until After Plaintiff Take [sic] The Deposition of the Defendants," in which he explained various issues he was encountering with hiring a court reporter. *Id*. at 84.

[7] On July 21, Hickingbottom filed Plaintiff's Final Motion for a 10 Day Extension to Reply to Defendants Motion for Summary Judgment (Third Request), explaining that the prison toilet had overflowed and his exhibits and other legal documents that were in a box on the floor were soaked with urine

and fecal material, and he asked the court to "to extend his deadline to 7/28/21." *Appellant's Appendix* at 25.

[8] On July 27, the trial court issued an order denying Hickingbottom's Third Request. That same day, the trial court summarily granted the DOC's motion for summary judgment. Thereafter, on July 29, Hickingbottom filed a "Reply to Defendant's Motion for Summary Judgment and [] Cross-Mo[tion] for Summary Judgement on All Eighth and Fourteenth Amendment Claims." *Appellees' Appendix* at 99.

[9] On August 4, Hickingbottom filed a motion to correct error. His motion asserted that the court's July 27 order denying his request for a ten-day extension of time was in error. Hickingbottom's motion claimed, incorrectly, that on March 18, 2021, the court gave him until "7/20/21 to depose the witnesses and respond to defendant's summary judgement motion" [2] and that, based on various trial rules, he timely filed his Third Request before the July 20 deadline.[3] *Id*. at 29.

[10] On August 16, Hickingbottom filed a second motion to correct error to which he attached forms reflecting that he had submitted grievances to DOC personnel in June 2021 about the overflowing toilets and destroyed documents,

---

[2] The court's March 18, 2021 order gave Hickingbottom until June 10, 2021 to file a response; the June 18 Order gave Hickingbottom thirty days, or until July 18, to file a response.

[3] Hickingbottom's Third Request was file stamped July 21, 2021; his certificate of service avers that he served it upon the Indiana Deputy Attorney General by U.S. Mail on July 14, 2021.

as well as requests to case managers in July 2021 to allow him to repurchase classification hearing forms and review forms that were necessary for his response to the DOC's summary judgment motion.

[11] On August 19, 2021, the court issued an order regarding Hickingbottom's Reply and Cross-Motion:

> This Court granted [Hickingbottom] an Extension of time in which to Respond to [the DOC's] Motion for Summary Judgment on June 18, 2021 *that allowed him 30 days in which to respond, making the deadline July 18, 2021. The Court notes that [Hickingbottom] did not respond in a timely matter* and the [DOC]'s Motion for Summary Judgment was granted on July 27, 2021 making [Hickingbottom]'s . . . Reply . . . and [Cross-Motion] moot.

Id. at 23 (emphases added). On September 22, 2021, the trial court denied Hickingbottom's August 16 motion to correct error.

[12] Hickingbottom now appeals.[4]

---

[4] Hickingbottom's notice of appeal, which is file-stamped September 20, 2021 and avers that it was mailed September 13, 2021, states that he "is appealling [sic] the order of 8/19/21 granting Summary Judgment in favor of Defendants." *Appellees' Appendix* at 176. We note that the trial court's order that granted summary judgment to the DOC is dated July 27, 2021, not August 19, 2021. Further, on appeal, Hickingbottom does not present any argument on the merits of the summary judgment motion, and thus he has waived any challenge to the grant of summary judgment in favor of the DOC. Ind. Appellate Rule 46(A)(8) (requiring appellant to set forth his contentions on the issues supported by cogent reasoning); *Martin v. Brown*, 129 N.E.3d 283 (Ind. Ct. App. 2019). Indeed, he states that his appeal "deals only with" the denial of his Third Request seeking a ten-day extension of time. *Appellant's Brief* at 4.

Discussion & Decision

[13] Initially, we observe that Hickingbottom is proceeding pro se. "It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. This means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so." *Basic v. Amouri*, 58 N.E.3d 980, 983-84 (Ind. Ct. App. 2016) (internal citation omitted).

[14] Hickingbottom appeals after a denial of a motion correct error. A trial court's ruling on a motion to correct error is generally reviewed for an abuse of discretion.[5] *Poiry v. City of New Haven*, 113 N.E.3d 1236, 1239 (Ind. Ct. App. 2018) (where plaintiff filed motion to correct error after grant of summary judgment to defendant). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Id*.

[15] Hickingbottom's motion to correct error alleged that the trial court should have granted his Third Request, which sought an additional ten days to file a response to the DOC's motion for summary judgment. A trial court has the discretion to grant or deny a request for extension of time, and its decision will

[5] Where the issues raised in the motion are questions of law, the standard is de novo. *Poiry*, 113 N.E.3d at 1239 (applying de novo standard where motion to correct error raised questions concerning trial court's interpretation of a statute). Here, Hickingbottom's motion to correct error that challenged the denial of a requested continuance does not present a question of law.

not be overturned absent clear abuse of that discretion. *Scott v. Corcoran*, 135 N.E.3d 931, 939 (Ind. Ct. App. 2019).

[16] As is relevant to this appeal, Hickingbottom filed his second request for extension of time on June 10, 2021. The court issued the June 18 Order granting Hickingbottom an additional thirty days, until July 18, to respond. Hickingbottom's Third Request was filed on July 21, which was three days after the deadline set by the court.

[17] Hickingbottom claims that the trial court's determination that his Third Request was untimely was contrary to Ind. Trial Rule 56(I), which states: "Alteration of Time. For cause found, the Court may alter any time limit set forth in this rule upon motion made within the applicable time limit."

[18] Our courts have considered the various provisions of T.R. 56 and have established the following "bright-line rule":

> [W]here a nonmoving party fails to respond within thirty days by either (1) filing affidavits showing issues of material fact, (2) filing his own affidavit under Rule 56(F) indicating why the facts necessary to justify his opposition are unavailable, or (3) requesting an extension of time in which to file his response under 56(I), the trial court lacks discretion to permit the party to thereafter file a response. In other words, a trial court may exercise discretion and alter time limits under 56(I) only if the nonmoving party has responded or sought an extension of time within thirty days from the date the moving party filed for summary judgment.

Desai v. Croy, 805 N.E.2d 844, 850 (Ind. Ct. App. 2004), *trans. denied*; *see also HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98 (Ind. 2008) (quoting and applying *Desai*); *Handy v. P.C. Building Materials, Inc.*, 22 N.E.3d 603, 606-07 (Ind. Ct. App. 2014) (same), *trans. denied*.

[19] Our court has further explained:

> The rationale behind the rule requiring a nonmoving party to respond to a motion for summary judgment—by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F)—within thirty days does not vanish because the trial court has happened to grant one extension of time. That is, the nonmoving party should not be rewarded and relieved from the restriction of responding within the time limit set by the court because he or she has had the good fortune of one enlargement of time. *Therefore, any response, including a subsequent motion for enlargement of time, must be made within the additional period granted by the trial court*. The rationale of *HomEq* and the cases leading up to it are not restricted to the initial thirty-day period following the filing of a motion for summary judgment.

Miller v. Yedlowski, 916 N.E.2d 246, 251-52 (Ind. Ct. App. 2009), *trans. denied* (emphasis added). Here, Hickingbottom did not file his Third Request by July 18 – that is, not "within the additional period granted by the court" – and, therefore, the trial court did not have discretion under T.R. 56(I) to alter any time limit to respond. Hickingbottom's T.R. 56(I) argument thus fails.

[20] Hickingbottom also argues that, pursuant to Ind. Trial Rule 6(E), his Third Request was timely filed. T.R. 6(E) provides: "[w]henever a party has the right

or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by United States mail, three days shall be added to the prescribed period." Hickingbottom's argument seems to be that, because the court mailed the June 18, 2021 order to him, "Trial Rule 6(E) gave or added an extra 3 days to the 7/18/21 dead-line," and therefore, his Third Request – file stamped on July 21 – was timely. *Appellant's Brief* at 12.

[21] In *McDillon v. N. Indiana Pub. Serv. Co.*, 841 N.E.2d 1148 (Ind. 2006), our Supreme Court considered the application of T.R. 6(E) "and its automatic three-day extension of time when court orders are mailed." *Id*. at 1150. The Court held that

> the application of Trial Rule 6(E) applies only when a party has a right or is required to do some act within a prescribed period *after the service of a notice or other paper*. It does not apply to extend periods that are triggered by the mere entry of the order[.]

Id. at 1152; *see also Annon II, Inc. v. Rill*, 597 N.E.2d 320, 324 (Ind. Ct. App. 1992) ("[T]he three day extension of provision T.R. 6(E) only applies when a party has a right or is required to do some act within a prescribed period 'after the service of a notice' upon the party."), *trans. dismissed*. Here, the June 18 Order did not state that Hickingbottom had thirty days "after service of" the order. Rather, it said that Hickingbottom had "30 days from the date herein" to file his response. *Appellees' Appendix* at 83. The order was dated and signed on June 18, 2021, and thus Hickingbottom had thirty days from that date, or until

July 18, to file his response. *See also Harkins v. Westmeyer*, 116 N.E.3d 461, 471 (Ind. Ct. App. 2018) (holding that additional three days provided by T.R. 6(E) did not apply where court order gave defendant forty-five days "from the date of this order" to respond).

[22] To the extent that Hickingbottom suggests that it was timely under the prison mailbox rule because his signed certificate of service on the Third Request indicates that he mailed it on July 14, we disagree.

> The prison mailbox rule provides that a pro se incarcerated litigant who delivers a document to prison officials for mailing on or before its due date accomplishes a timely filing; and the document is deemed "filed" on the date of submission to prison officials. A pro se prisoner must provide reasonable, legitimate, and verifiable documentation supporting a claim that a document was timely submitted to prison officials for mailing. Where a prisoner's proof is lacking, however, the opposite result obtains.

Id. at 469 (cleaned up and quoting *Dowell v. State*, 922 N.E.2d 605, 607-08 (Ind. 2010)).

[23] In *Dowell*, the Court recognized that a sworn affidavit from a prison official stating that the prisoner had submitted the record for mailing on the due date for filing but that the official had not mailed it until the next day was "reasonable, legitimate, and verifiable documentation." 922 N.E.2d 608; *see also Harkins*, 116 N.E.3d 469-70 (recognizing a "letterhead statement" from a prison library supervisor captioned "Misplaced Legal Mail" and stating that offender's attempted mailing failed by no fault of his was sufficient to provide

the necessary documentation of the offender's delivering mail to prison authorities). Here, Hickingbottom has presented no documentation and thus has failed to meet his burden to show that he timely delivered his Third Request to prison authorities.

[24] Lastly, Hickingbottom argues that the denial of his Third Request was contrary to T.R. 6(B), which provides, in relevant part, that "[w]hen an act is required . . . to be done at or within a specific time by these rules, the court may at any time for cause shown: (1) order the period enlarged, with or without motion or notice, if request therefor is made before the expiration of the period originally prescribed or extended by a previous order; or (2) upon motion made after the expiration of the specific period, permit the act to be done where the failure to act was the result of excusable neglect[.]" In *DeLage Landen Fin. Servs., Inc. v. Cmty. Mental Health Ctr., Inc.,* 965 N.E.2d 693, 698 (Ind. Ct. App. 2012), *trans. denied*, a plaintiff filed for summary judgment and the defendant filed a motion for enlargement of time to file a response, relying on T.R. 6(B)(2). The trial court initially denied the motion for enlargement of time but later granted relief from that order and allowed the non-movant/defendant to file a response. The court denied the plaintiff/movant's motion to strike the response, ultimately denying the plaintiff's motion for summary judgment.

[25] On appeal, we reversed, finding that, despite the general enlargement of time provisions of T.R. 6(B), the trial court had no discretion to alter the time limits provided in T.R. 56 for summary judgment filings, and thus it abused its discretion when it accepted and considered the late-filed response to summary

judgment. In its analysis, the *DeLage* court applied the principle that when two rules cover the same subject matter and one does so generally and the other does so specifically, the more specific rule prevails. Upon examining the provisions of T.R. 6(B) and T.R. 56(I), the court determined that T.R. 56 "has its own enlargement of time provision, which applies only to [T.R.] 56 and [it] is therefore the more specific of the two rules[,]" such that T.R. 6(B) "does not apply to summary judgment materials." 965 N.E.2d at 698. Thus, Hickingbottom's claim that, pursuant to T.R. 6(B), the trial court should have granted his Third Request fails.

[26] For all these reasons, the trial court did not abuse its discretion when it denied Hickingbottom's Third Request for an extension of time to respond to the DOC's motion for summary judgment.

[27] Judgment affirmed.

Vaidik, J. and Crone, J., concur.