Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Dec 30 2011, 9:01 am
CLERK
of the supreme court, court of appeals and tax court

APPELLANT PRO SE:

CARLOS GARCIA
Pendleton, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

STEPHANIE L. ROTHENBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CARLOS GARCIA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-1108-MI-434
	)	
INDIANA DEPARTMENT OF CORRECTION and DONNA CARNAGEE,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Rudolph R. Pyle, III, Judge
Cause No. 48C01-1104-MI-203

December 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Carlos Garcia, pro se, appeals the trial court's decision to grant summary judgment in favor of the Indiana Department of Correction and Donna Carnagee (collectively IDOC). He contends that the trial court erred in granting summary judgment, preventing him from receiving educational credit time for earning his high school diploma, because Continental Academy in Florida is substantially equivalent to Indiana schools. We hold that there is a material issue of fact as to whether Continental Academy in Florida is substantially equivalent to Indiana schools. We therefore reverse and remand with instructions for the trial court to conduct an evidentiary hearing on the substantial equivalence of this program.

Facts and Procedural History

On November 26, 2002, Garcia pled guilty to four counts of Class B felony dealing in cocaine or narcotic drug. The trial court sentenced Garcia to four concurrent ten-year sentences. Appellant's App. p. 5. On April 19, 2005, Garcia completed the requirements to obtain his high school diploma through correspondence from Continental Academy in Coral Gables, Florida. *Id.* Continental Academy is a private secondary school that is accredited by The National Association for the Legal Support of Alternative Schools. *Id.* at 15. The United States Marine Corps accepts diplomas from Continental Academy, and the courses available are similar to those of a public high school, including such areas of study as English, Math, Science, History, Economics, Health, and Art. *Id.* at 16.

Garcia submitted his diploma from Continental Academy to IDOC for educational credit time in April 2005, but he was denied. *Id.* at 5. On April 22, 2008, while still incarcerated for the above crimes, Garcia was convicted of Class B felony possession of cocaine or narcotic drug and received an additional ten-year sentence. His projected release date for that sentence is September 30, 2012. Appellee's Br. p. 2.

Garcia filed a pro se petition for writ of habeas corpus in April 2011, arguing that if he had received his educational credit time in 2005, he would be entitled to immediate release. Appellant's App. p. 5-19. IDOC filed a motion for summary judgment, *id.* at 29-33, and Garcia filed a motion in opposition to IDOC's motion for summary judgment. *Id.* at 20-23. The trial court summarily granted summary judgment in favor of IDOC without a hearing or any findings of facts or conclusions of law. *Id.* at 4.

Garcia now appeals.

Discussion and Decision

Garcia contends that the trial court erred in granting summary judgment in favor of IDOC. He argues that he should be granted educational credit time because he earned his high school diploma while incarcerated from a correspondence school that is substantially equivalent to Indiana schools, as was required under the law at the time Garcia earned his diploma.

When reviewing the entry or denial of summary judgment, our standard of review is the same as that of the trial court: summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904

N.E.2d 1267, 1269 (Ind. 2009). All facts established by the designated evidence, and all reasonable inferences from them, are to be construed in favor of the nonmoving party. *Naugle v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1062 (Ind. 2007).

Under Indiana law that was in effect at the time that Garcia earned his diploma from Continental Academy, education credit time could be earned if an inmate "(1) is in credit Class I; (2) has demonstrated a pattern consistent with rehabilitation; and (3) successfully completes requirements to obtain one (1) of the following: . . . (B) a high school diploma, if the person has not previously obtained a general educational development (GED) diploma." Ind. Code Ann. § 35-50-6-3.3(a) (West 2010). The diploma could be earned at an out-of-state high school as long as it "'in the judgment of the superintendent provides a course of instruction at the secondary level and maintains standards of instruction substantially similar to those of public high schools located in the state.'" *McGee v. State*, 790 N.E.2d 1067, 1070 (Ind. Ct. App. 2003) (citing Ind. Code Ann. § 20-12-21-3(3) (West 2006)), *trans. denied*.[1]

The purpose of educational credit time statutes is to encourage inmates to better themselves through education while incarcerated. The goal of Indiana's penal system is rehabilitation: "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice." Ind. Const. art. 1, § 18. By encouraging inmates to further their education, they are working to better themselves while incarcerated. The legislative intent underlying the credit time statute is to "enhance rehabilitation through education . .

[1] Pursuant to P.L. 2-2007, Section 390, Indiana Code section 20-12-21-3 was repealed, but it was the applicable law at the time that Garcia received his diploma. We also note that the requirements for receiving educational credit time for earning a high school diploma from an out-of-state school have changed as of May 2011. Ind. Code § 35-50-6-3.3(n). In this case, however, we decline to comment on the current statute.

. . Discouraging a person from pursuing further education flies in the face of the legislature's intent." *Moshenek v. Anderson*, 718 N.E.2d 811, 813-14 (Ind. Ct. App. 1999).

In this case, Garcia contends that the trial court erred and improperly granted summary judgment for IDOC. He argues Continental Academy is substantially equivalent to an Indiana school, making him eligible for educational credit time for earning his high school diploma. Appellant's Br. p. 8. IDOC, however, contends that the trial court did not err because Continental Academy is not accredited by the Florida Department of Education and does not require a proctored final exam. Appellee's Br. p. 6.

Garcia argues that Continental Academy is an accredited school, which is not the case with all of the Indiana schools from which IDOC will accept diplomas for educational credit time. *Id.* at 9. IDOC, however, argues that Continental Academy is not accredited by the Florida Department of Education, indicating that it does not meet the standards for Indiana schools. Appellee's Br. p. 6. We find IDOC's argument to be without merit, as the State of Florida neither accredits private schools nor officially recognizes agencies that do accredit. Florida Department of Education, *Private School Accreditation*, http://www.floridaschoolchoice.org/Information/Private_Schools/accreditation.asp (last visited Dec. 6, 2011). Continental Academy, however, is accredited by a national organization, The National Association for the Legal Support of Alternative Schools (NALSAS). Appellant's App. p. 15, 17. But NALSAS is mainly a consumer-protection organization, its accreditation indicating

> 1) that a member of [The National Coalition of Alternative Community Schools] not involved with the control, operation, or proceeds of the applicant program has reviewed and confirmed documentation of their compliance with all state and local laws; and 2) that the conditions and advertising claims made regarding their location and operation have been verified . . . .

National Association for the Legal Support of Alternative Schools, http://nalsas.org (last visited Dec. 8, 2011).

After reviewing Garcia's transcript, it is apparent that Continental Academy offers standard high-school-level courses. *See* Appellant's App. p. 16. Garcia completed a total of twenty-four credit hours with a cumulative GPA of 3.8. Some of the courses he enrolled in included English, Math through Geometry, Science, World History, American History, American Government, Economics, Health, and Art. *Id.* This course load is almost identical to the required curriculum for Indiana schools as outlined in Indiana Code section 20-30-5-7. Further, the United States Marine Corps accepts high school diplomas from Continental Academy, which it recognizes as an "accredited 'private' school." Appellant's App. p. 18.

Based on the information provided, there is a genuine issue of material fact as to whether Continental Academy meets Indiana standards. Therefore, the granting of summary judgment to IDOC on this basis was done in error.

The other argument of the parties is centered around the lack of a proctor for Garcia's final test. Garcia argues that this is akin to the IDOC denying him credit time because he cheated on his final test. Appellant's Br. p. 7. Without showing that he cheated, he argues, the IDOC cannot use this as a basis to deny him educational credit time. IDOC, on the other hand, contends that the lack of a proctor makes the final exam

sufficiently dissimilar to the ISTEP+ exam that a diploma from Continental Academy cannot qualify for educational credit time. Appellant's App. p. 31-32.

The Indiana Code does not provide that a graduation qualifying exam be proctored. *See* Ind. Code § 20-32-4-1. However, the ISTEP+ guidelines do specify that there is to be supervision during the test, saying that only professional educators who hold a valid educator or administrator license can administer the exam, while anyone without such a license can at most be a proctor. Indiana Department of Education, *ISTEP+ Program Manual*, www.doe.in.gov/assessment/docs/2011_2012_istep_ program_manual_11-30-11_final _kc2.pdf (last visited Dec. 8, 2011). This discrepancy alone is not sufficient to have granted summary judgment to IDOC.[2]

As a result, we reverse the trial court's grant of summary judgment and remand with instructions for the trial court to conduct a hearing on the substantial equivalence of Continental Academy to Indiana schools. The trial court should consider such factors as the books Garcia used in his studies, the courses Garcia completed,[3] the safeguards that were in place to ensure that Garcia could not cheat on his un-proctored final exam, and any other facts deemed relevant to the analysis.

Reversed and remanded with instructions.

ROBB, C.J., and NAJAM, J., concur.

---

[2] We note that IDOC's argument that Garcia has failed to state a claim upon which relief could be granted is without merit. IDOC did not raise this argument before the trial court, so it has been waived; "[a] party cannot change its theory and on appeal argue an issue that was not properly presented to the trial court." *Carmichael v. Siegel*, 754 N.E.2d 619, 634 (Ind. Ct. App. 2001).

[3] We disagree with the footnote of *Samuels v. State*, 849 N.E.2d 689, 692 n.2 (Ind. Ct. App. 2006), *trans. denied*, indicating that educational credit should not be granted to Samuels because Continental Academy failed to instruct Samuels in the area of Indiana history. It is doubtful that any out-of-state institution would provide a course in Indiana history and an insufficient basis to deny educational credit to an inmate who has otherwise completed the requirements of the statute.