UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2079

September Term, 2015

LARIN GRIFFIN

v.

FRANK BISHOP, WARDEN

Krauser, C.J.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: September 27, 2016

On September 29, 2015, Larin Griffin, appellant, filed a petition for a writ of *habeas corpus* in the Circuit Court for Allegany County.[1] Appellant alleged that the Division of Corrections ("the Division"), an agency within the Maryland State Department of Public Safety and Correctional Services ("DPSCS") – represented by Warden Frank Bishop in this matter – appellee, had unlawfully deprived appellant of 918 good conduct or diminution credits through prison disciplinary measures. The circuit court denied appellant's petition, whereupon he noted this appeal and raised two questions for our review, which we have combined and rephrased as follows:[2]

Did the circuit court err in denying the petition for a writ of *habeas corpus*?

For the reasons that follow, we answer this question in the negative and affirm.

[1] "A writ of *habeas corpus* – meaning 'that you have the body' in Latin – is 'employed [to cause the detainer] to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal." *Simms v. Shearin*, 221 Md. App. 460, 468 (2015) (quoting BLACK'S LAW DICTIONARY (9th ed. 2009)). Maryland Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"), § 3-702(a) provides that a "person committed, detained, confined, or restrained from his lawful liberty within the State for any alleged offense or under any color or pretense or any person in his behalf, may petition for the writ of *habeas corpus* to the end that the cause of the commitment, detainer, confinement, or restraint may be inquired into."

[2] Appellant's questions presented, verbatim from his brief, read:

> 1. Was the lower court in error in denying Appellant's Petition for *Habeas Corpus* which would entitle Appellant to immediate release?
>
> 2. Is *Massey v. State-DPSCS*, retroactive and/or apply to the Appellant's removal of his 918 good conduct credits?

BACKGROUND

Appellant was incarcerated, serving four sentences as follows. On May 15, 2003, the Circuit Court for Baltimore City imposed a life sentence, with all but 15 years suspended, for attempted first-degree murder and a concurrent fifteen-year term of imprisonment for use of a handgun in a crime of violence. On January 23, 2006, the Circuit Court for Washington County imposed a sentence of six months for carrying a concealed weapon, to run consecutive to the Baltimore City sentence appellant was then serving. Lastly, on March 10, 2009, the Circuit Court for Allegany County imposed a sentence of one year and one day for second-degree assault, to run consecutive to any sentence appellant was then serving. The latter two sentences were imposed as a result of crimes that appellant committed while incarcerated.

In Maryland, inmates may earn diminution credits to reduce the length of their confinement. *See* Maryland Code (1999, 2008 Repl. Vol.), Correctional Services ("C.S."), § 3-702. Diminution credits may be obtained for good conduct, completing certain work tasks, educational courses, or special projects. *See* C.S. §§ 3-704 to 3-707.[3] As of September 22, 2015, appellant had accumulated 923 good conduct diminution credits, but 918 had been revoked as a result of prisoner disciplinary proceedings.

After the revocation of those credits, appellant filed a petition for a writ of *habeas corpus*, alleging that the prisoner disciplinary proceedings used to revoke his diminution credits were unlawful under *Massey v. Secretary, Department of Public Safety &*

[3] We note that the General Assembly has amended these statutes, effective October 1, 2017.

Correctional Services, 389 Md. 496 (2005). The circuit court denied appellant's petition, prompting this appeal.

STANDARD OF REVIEW

We review the denial of a petition for a writ of *habeas corpus* pursuant to Md. Rule 8-131(c).[4] *Wilson v. Simms*, 157 Md. App. 82, 91 (2004). The clearly erroneous standard of review applicable to findings of fact, however, "'does not apply to a trial court's determinations of legal questions or conclusions of law based on findings of fact.'" *Webb v. Nowak*, 433 Md. 666, 676 (2013) (quoting *Heat & Power Corp. v. Air Prods. & Chems., Inc.*, 320 Md. 584, 591 (1990)). Rather, we review issues of law *de novo*. *See e.g., Dumbarton Improvement Ass'n, Inc. v. Druid Ridge Cemetery Co.*, 434 Md. 37, 55 (2013).[5]

[4] Md. Rule 8-131(c) provides:

> "When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of witnesses."

[5] To the extent that petitions for writs of *habeas corpus* involve the determinations of an administrative agency, the arbitrary and capricious standard of review may be applicable. *See Stouffer v. Holbrook*, 417 Md. 165, 178 n.7 (2010). In this case, however, appellant's arguments concern questions of law, which we will review *de novo*.

DISCUSSION

Preliminarily, the Division argues that we should affirm the circuit court because appellant failed to exhaust his administrative remedies prior to filing the petition.[6] Indeed, pursuant to CJP § 5-1003(a)(1), "[a] prisoner may not maintain a civil action until the prisoner has fully exhausted all administrative remedies for resolving the complaint or grievance." *See also Evans v. State*, 396 Md. 256, 330 (2006). Appellant argues that there is an exception to this requirement where a prisoner has a "colorable" claim to immediate release.[7] The Division acknowledges the exception, but contends that appellant failed to present a colorable claim.

This Court has observed that when a prisoner "alleges entitlement to immediate release and makes a colorable claim that he has served his sentence, less credits, the inmate is not required to pursue administrative remedies." *Wilson*, 157 Md. App. at 92

[6] Although the circuit court did not rely on this ground in denying appellant's petition, "an appellee is 'ordinarily entitled to assert any ground shown by the record for upholding the trial court's decision even though the ground was not relied on by the trial court . . . .'" *Unger v. State*, 427 Md. 383, 403 (2012) (emphasis and internal quotation marks omitted) (quoting *Grant v. State*, 299 Md. 47, 53 n.3 (1984)).

[7] We note that appellant has cited an unreported case in support of this point. Pursuant to Md. Rule 1-104(a), "[a]n unreported opinion of [the appellate courts] is neither precedent within the rule of *stare decisis* nor persuasive authority." Furthermore, appellant failed to attach a copy of the unreported opinion to his brief, in compliance with Md. Rule 1-104(b). *Pro se* litigants are required to observe the rules of procedure, just as represented parties. *See Finucan v. Md. State Bd. Of Physician Quality Assurance*, 151 Md. App. 399, 423 n.11 (2003) (citing cases), *aff'd*, 380 Md. 577 (2004). It is, however, "the 'preferred alternative . . . to reach a decision on the merits of the case.'" *McAllister v. McAllister*, 218 Md. App. 386, 399 (2014) (quoting *Joseph v. Bozzuto Mgmt. Co.*, 173 Md. App. 305, 348 (2007)). As appellant is not wrong about this point of law, and appellee acknowledged that this exception exists, we will exercise our discretion and rule on the merits.

(citing *Md. House of Corr. v. Fields*, 348 Md. 245, 261 (1997)). In *Wilson*, we addressed the merits of the inmate's claim, despite his having failed to exhaust his administrative remedies and our recognition that "it appears likely that [the inmate] is not entitled to immediate release, *even if we assume he is correct in his contentions* . . . ." *Id.* (emphasis added). Assuming *arguendo* that appellant would be entitled to immediate release if his revoked diminution credits were returned to him, we will address the merits of appellant's case.

Appellant contends that the Court of Appeals determined in *Massey* that the prisoner disciplinary regulations the Division had been using were unlawful. He maintains that *Massey* should be retroactively applied to him to nullify the proceedings in which he lost 918 diminution credits. Furthermore, he alleges that the Division did not adopt lawful regulations until 2011, citing an internal DPSCS October 2011 memorandum addressing revisions to COMAR 12.02.27 (the regulations concerning prisoner disciplinary proceedings).

The Division argues that *Massey* is not retroactively applicable to nullify the tens of thousands of prisoner disciplinary proceedings that occurred prior to that case, which includes appellant's. Moreover, the Division notes that of the 918 revoked diminution credits appellant challenges, only 120 were lost prior to *Massey*, meaning that even if that case were retroactively applied to him, he would still have properly lost 798 diminution credits. The Division maintains that it properly adopted regulations promptly in the aftermath of *Massey* on March 9, 2006, rendering appellant's later disciplinary

proceedings lawful. Ultimately, the Division contends that appellant is lawfully confined, and the circuit court properly denied his *habeas corpus* petition.

In *Massey*, the Court of Appeals determined that the directives the Division had been using for prisoner disciplinary proceedings were regulations that must be adopted pursuant to the Maryland Administrative Procedure Act ("APA"), codified in Maryland Code (1984, 2014 Repl. Vol.), State Government Article ("S.G."), § 10-101, *et seq.* *Massey*, 389 Md. at 524. As the Division had not enacted the directives pursuant to the APA, the Court reversed the decision upholding Massey's prisoner disciplinary proceedings and remanded. *Id.* at 525-26.

The Court took the unusual step, however, pursuant to its authority under Md. Rule 8-606(b), of delaying the issuance of the mandate in that case for 120 days "in order to give the Secretary [of DPSCS] time to comply with the APA requirements." *Id.* at 525. The Court observed that the deficiency the Division needed to correct was "essentially a procedural one[.]" *Id.* The delay would allow the Division to adopt proper regulations: "Massey may or may not be entitled to relief on his basic claim, but he is entitled to have his claim resolved in accordance with validly adopted procedures." *Id.* (emphasis omitted). The Court also recognized that the delay served "important practical considerations," since nullifying the directives effective immediately was "not an option," because it would have brought prisoner disciplinary proceedings "to a halt[.]" which was "not an option." *Id.* Regulations addressing prisoner disciplinary proceedings, compliant with the APA, were properly adopted on March 9, 2006. *See* COMAR 12.02.27.00, *et seq.*

Accordingly, we perceive no error in the prisoner disciplinary proceedings after *Massey* that led to the revocation of 798 diminution credits for appellant. These were conducted according to valid, APA-compliant procedures. *See* COMAR 12.02.27.00, *et seq*.

As to whether *Massey* should be applied retroactively to appellant's other disciplinary proceeding, we note that the United States Supreme Court, in a case addressing regulations governing federal prisoners, observed that "great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison officials placed, in good faith, on prior law not requiring such procedures." *Wolff v. McDonnell*, 418 U.S. 539, 574 (1974). The Division also cites decisions from Vermont and New Jersey in which courts in those states declined to apply decisions invalidating current prisoner disciplinary regulations retroactively. *See Dep't of Corr. v. McNeil*, 506 A.2d 1291, 1294 (N.J. Super. Ct. App. Div. 1986) ("[T]he public interest requires that the disciplinary standards remain in force pending their adoption as rules under the APA. Overall invalidation of the standards would void literally tens of thousands of disciplinary proceedings . . . . Thus it is obvious that general retroactive invalidation of the disciplinary standards would trigger the early inappropriate release of large numbers of inmates. Beyond doubt, regardless of any failings of the Department we should, if possible, avoid such a mischievous result." (Footnote omitted)); *LaFaso v. Patrissi*, 633 A.2d 695, 702-03 (Vt. 1993) (considering "administrative burden" of ordering retroactive application of invalidation of prisoner disciplinary proceedings to weigh against such relief).

This Court has observed that the "general rule of retroactivity *vel non* can be stated simply – if the subject case merely applies settled precedents to new facts, the case is given retroactive effect, for the case is viewed as not changing the law in any material way." *Warrick v. State*, 108 Md. App. 108, 113 (1996) (citing *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988)). "On the other hand, if the subject case creates a new rule that is a 'clear break' with the past, retrospective application is inappropriate." *Id.* (citing *Griffith v. Kentucky*, 479 U.S. 314, 324 (1987)). The Court of Appeals has stated that a "clear break" occurs "where 'a court overrules a prior interpretation of a constitutional or statutory provision, and renders a new interpretation of the provision.'" *Attorney Grievance Comm'n v. Saridakis*, 402 Md. 413, 427 (2007) (quoting *Am. Trucking Ass'ns, Inc. v. Goldstein*, 312 Md. 583, 591 (1988)). *See also Warrick*, 108 Md. App. at 113 (including situations in which a court "overrule[s] a longstanding practice" within definition of "clear break") (citing *Griffith*, 479 U.S. at 325).

We are persuaded that retroactive application of *Massey* would be inappropriate. Considering the high administrative burden a retroactive application of *Massey* would place on the Division, we find the reasoning of our sister state courts in Vermont and New Jersey to be sound. Moreover, the Court of Appeals concluded that the problem with the prisoner disciplinary proceedings in *Massey* was a procedural one, and the Court remanded the case to permit implementation of proper procedures prior to a re-examination of Massey's complaint. 389 Md. at 525. To the extent that appellant alleges he suffers harm from the use of pre-*Massey* prisoner disciplinary procedures, that harm pales in comparison to the burdens of applying *Massey* retroactively. Finally, we note

that "a change in the law . . . affects all new and pending cases to which it applies[,]" unless the statute or opinion states otherwise. *Gee v. Mass Transit Admin.*, 75 Md. App. 253, 260 (1988) (citing *Janda v. GM*, 237 Md. 161, 169 (1964)). As appellant's case was not pending when *Massey* was decided, it does not apply to his case.

As such, we conclude that the circuit court committed no error in denying appellant's petition.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.