

NO. 93221-2

SUPREME COURT OF THE STATE OF WASHINGTON

FRED STEPHENS,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Fred Stephens, a Washington State prisoner, had five pieces of incoming mail rejected by the prison mailroom in 2013 and 2014. All five mailings were sent to Stephens by commercial forwarding agents who were not the originators of the correspondence and, as such, were rejected under the Department's prohibition on third-party mail. Stephens filed a civil rights action raising claims under the First Amendment of the U.S. Constitution; under article I, section 5 of the Washington State Constitution; and under the Federal Communications Decency Act.

Division One of the Court of Appeals affirmed the trial court's dismissal of Stephens' First Amendment claim, concluding that the trial court properly considered and applied the factors in *Turner v. Safley*, 482 U.S. 78, 87-89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), when it found that the Department's restriction on incoming third-party mail furthered legitimate safety and security concerns. Division One affirmed the trial court's dismissal of Stephens' claim that article I, section 5 is more protective of an inmate's incoming mail rights than the First Amendment because his claim was not supported by meaningful legal argument or a *Gunwall*, analysis. And Division One declined to consider Stephens' claim under the Communications Decency Act because he offered no coherent explanation of how the Act supported his claim.

This Court should deny review because the Court of Appeals' decision is well-reasoned, does not conflict with decisions of this Court or other courts, and the issues are not significant.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Court should deny review because the decision below does not meet any of the RAP 13.4(b) criteria. However, if the Court were to accept review the following issue would be presented: Whether the Court of Appeals correctly affirmed dismissal of Stephens' case when he failed to create a genuine issue of material fact that the restriction of third-party mail furthers a legitimate penological interest?

III. REASONS WHY REVIEW SHOULD BE DENIED

The standard of review applied to a motion for discretionary review is set forth in RAP 13.4(b). In order to be entitled to discretionary review, Stephens must show that the decision by the Court of Appeals: 1) is in conflict with a decision of the Supreme Court; 2) is in conflict with another decision of the Court of Appeals; 3) involves a significant question of law under the Constitution of the State of Washington or of the United States; or 4) involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

A. The Court of Appeals' Application of the Summary Judgment Standard and *Turner v. Safley* Standard Does Not Conflict With Any Appellate Decision Nor Does It Involve Any Issue of Constitutional Significance or Public Interest

Rather than applying the RAP 13.4(b) standard to specific issues, Stephens merely attempts to reargue the court's application of the *Turner v. Safley* standard and the granting of summary judgment. Stephens has failed to show that he is entitled to discretionary review of this Court.

The trial court and the Court of Appeals both applied the proper summary judgment standard in holding that Stephens' evidence failed to raise a genuine issue of material fact that the rejection of incoming third-party mail was constitutional. In assigning error, Stephens attempts to reargue that evidence. Stephens specifically argues that there was no protocol for identifying the true sender of mail, that another inmate claims to have received third-party mail, and that other prisons permitted incoming third-party mail. But even if true, these facts do not undercut the Department's arguments and supporting evidence that prison officials in Washington have a legitimate penological interest in rejecting third-party mail. Rather, the factual issues that Stephens raises challenge the *efficacy* of restrictions on third-party mail, not the legitimacy or validity of these restrictions. There was no error in the Court's application of the summary judgment standard.

The Court's application of the *Turner* standard was also appropriate. In arguing that the court misapplied *Turner v. Safley*, Stephens conflates the mail rejections at issue in this case with a claimed right to internet speech. The Court of Appeals aptly noted that "the issue before us is the validity of the third-party incoming mail restriction, not the Department's internet access policy." Opinion at p. 8. Moreover, the Court explicitly addressed *Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148 (9th Cir. 2004), and concluded that "Stephens makes no showing that the sweeping ban on internet materials at issue in *Clement* bears any resemblance to the more narrow restrictions here...." Opinion at p. 8. When the issue is properly framed, Stephens' arguments regarding "internet mail" miss the point because this case is not about the right to internet access nor "internet speech." Moreover, the Court's careful analysis of each of the four *Turner* factors is consistent with federal case law and Stephens assigns no error to this analysis other than that it ignored case law on the issue of internet speech. Again, because Stephens inappropriately frames the issue in this case, this argument is of no consequence and he has failed to show any conflict with other appellate decisions or particular public importance.

B. The Court of Appeals' Rejection of Stephens' Unsupported Arguments Regarding Article I, Section 5 Is Consistent With Case Law

In assigning error to the Court of Appeals' ruling on his article I, section 5 argument, Stephens simply argues again that it provides greater protection than the federal constitution. The Court of Appeals declined to reach the merits of Stephens' article I, section 5 claim because he did not meaningfully address the *State v. Gunwall*, 106 Wn.2d 54, 64, 720 P.2d 808 (1986), factors regarding an inmate's right to receive incoming mail. Opinion at pp. 10-12. The Court's refusal is consistent with decisions requiring an issue-specific *Gunwall* inquiry to demonstrate that the particular subject matter is afforded greater protection under the state constitution than the federal constitution. *See, e.g., State v. Reece*, 110 Wn.2d 766, 777-78, 757 P.2d 947 (1988); *State v. McKinney*, 148 Wn.2d 20, 48-49, 60 P.3d 46 (2002).

As he did below, Stephens again argues only generally that article I, section 5 should be understood as providing greater protection of free speech than the First Amendment. *See* Petition for Review at p. 6. He provides no analysis applicable to an inmate's right to receive incoming mail. This is insufficient and the Court of Appeals properly rejected Stephens' article I, section 5 claims. *See State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988) (burden is on the party seeking to expand

state constitutional protection to demonstrate “adequate and independent state grounds”); *State v. K H-H*, 188 Wn. App. 413, 423-24, 353 P.3d 661 (2015) (affirmed on other grounds).

Stephens has failed to show that article I, section 5 was intended to provide greater protection than the First Amendment to incoming prison mail. Indeed, existing case law on the issue implicitly adopts the federal free speech standard. Both Washington courts and the legislature have recognized the limited speech rights afforded to prisoners. *See* RCW 72.09.530; *DeLong v. Parmelee*, 157 Wn. App. 119, 144-145, 236 P.3d 936 (2010), (inmates do not retain all the rights a free citizen would have, including freedom of speech), *remanded*, 157 Wn. App. 119 (2010). While state courts have addressed speech rights under the First Amendment, Stephens has shown no reason why the same analysis should not apply under article I, section 5. *See also In re Parmelee*, 115 Wn. App. 273, 281, 63 P.3d 800 (2003) (“A prisoner retains those First Amendment rights that are consistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”); *id* at 288 (a prisoner’s First Amendment rights are “subject to limitation” while incarcerated “because institutional goals and policies take top priority.”); *Livingston v. Cedeno*, 164 Wn.2d 46, 55-56, 186 P.3d 1055 (2008) (“As a condition of confinement, an inmate’s first amendment right to send and receive mail

lawfully may be restricted by prison regulations reasonably related to legitimate penological interests.” (citing *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989)). Stephens’ unsupported conclusory arguments regarding the sweeping protections of article I, section 5 do not demonstrate any basis for providing broader protection for incoming prison mail than is provided by the First Amendment. Accordingly, the Court did not err in failing to consider these arguments.

IV. CONCLUSION

The Court of Appeals’ decision in this case is carefully reasoned and correctly applied the proper legal standards. None of the criteria for accepting review under RAP 13.4(b) are satisfied. Therefore, the Department asks this Court to deny review.

RESPECTFULLY SUBMITTED this 11th day of July, 2016.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the ANSWER TO PETITION FOR DISCRETIONARY REVIEW with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 11th day of July, 2016, at Olympia, WA.

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