

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38221

MICHAEL EDWARD HARKE,)	2011 Unpublished Opinion No. 477
)	
Plaintiff-Appellant,)	Filed: May 18, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO, COMMISSION OF)	THIS IS AN UNPUBLISHED
PAROLE AND PARDONS,)	OPINION AND SHALL NOT
)	BE CITED AS AUTHORITY
Defendant-Respondent.)	
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Order dismissing action for inactivity, affirmed.

Michael Edward Harke, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark A. Kubinski, Deputy Attorney General, Boise, for respondent, did not participate on appeal.

MELANSON, Judge

Michael Edward Harke appeals from an order of the district court dismissing his case for inactivity pursuant to I.R.C.P. 40(c). We affirm.

On December 8, 2009, Harke, who was an inmate in the custody of the Idaho Department of Correction, filed a pro se motion to proceed in forma pauperis. The district court granted a partial fee waiver. On February 24, 2010, a document entitled "Civil Action" was filed in which Harke asserted a claim against the State of Idaho, Commission of Parole and Pardons, based upon an allegedly inaccurate presentence investigation report. At about the same time, Harke filed a motion and affidavit requesting appointment of counsel which was denied by the district court. On May 3, 2010, Harke filed a document entitled "Motion Civil Action Notice of Entry of Default Judgment" along with an affidavit. On August 9, 2010, Harke filed two additional affidavits in support of his motion for default judgment. Some of the foregoing documents filed by Harke have certificates of mailing but refer only to mailing the documents to the clerk of the

district court of Ada County. None of Harke's affidavits assert that the Commission was served with a summons and complaint. In one affidavit, he claims that he "contacted" the Commission and "risk management" about the claim. No return of service of the summons and complaint is found in the record.

On August 25, 2010, the district court issued a notice of intent to dismiss for failure to prosecute pursuant to I.R.C.P. 40(c), allowing Harke fourteen days to show cause why the case should be retained and what action Harke would take to resolve the case promptly. Harke filed a timely response, referring to his "Notice of Entry of Default Judgment" and his previously filed affidavits, but did not address service of process. On October 8, 2010, the district court entered an order of dismissal. Harke filed a timely notice of appeal along with several other documents, including a copy of a summons apparently issued in his case but no return of service. Harke's brief on appeal refers to his notice of default and asserts that the district court abused its discretion in dismissing his case. The only indicia in the record that any document of any kind has been served upon or mailed to the Commission in this case is the certificate of service attached to the clerk's record on appeal which is addressed to counsel.

Dismissal of inactive cases under I.R.C.P. 40(c) is treated as a discretionary decision which will be upheld unless it is found that the district court abused its discretion. *Agrodyne, Inc. v. Beard*, 114 Idaho 342, 345, 757 P.2d 205, 208 (Ct. App. 1988). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

It is apparent Harke did not understand that he was required to serve the summons and complaint or that he did so and failed to file a return of service. It is evident from his brief on appeal that he still does not comprehend why his case was dismissed. Idaho Rule of Civil Procedure 4(d)(5) governs service on state agencies. Rule 4(g) deals with the requirements for the return of service. Based upon the record, Harke complied with neither of these rules. Pro se litigants are held to the same standards as those litigants represented by counsel. *Golay v. Loomis*, 118 Idaho 387, 392, 797 P.2d 95, 100 (1990). Pro se litigants are not excused from

abiding by procedural rules simply because they are appearing pro se and may not be aware of the applicable rules. *See id.*

The district court did not abuse its discretion in dismissing Harke's action due to inactivity pursuant to I.R.C.P. 40(c). Therefore, we affirm.

Chief Judge GRATTON and Judge GUTIERREZ, **CONCUR.**