FILED
United States Court of Appeals
Tenth Circuit

November 20, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KEITH CLAYTON BROOKS, JR.,

Plaintiff - Appellant,

v.

RICK RAEMISCH, individually and in his official capacity as CDOC Executive Director; KRIS KLINE, individually and in his official capacity as Private Prison Warden; LOIS ROSA, individually and in his official capacity as Private Prison Associate Warden; ROBERT ALEN, individually and in his official capacity as Private Prison Monitoring Unit Associate Director; DELGADO, individually and in his official capacity as Private Prison Lieutenant; BRIAN LENGERICH, individually and in his official capacity as CDOC Warden; PPMU, whose true name and indentity is unknown, individually and in their official capacity; PRIVATE PRISON WARDEN DESIGNEE, whose true name is unknown, individually and in their official capacity; CORRECTIONS CORPORATION OF AMERICA,

Defendants - Appellees.

No. 17-1248
(D.C. No. 1:17-CV-01125-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **KELLY**, **MURPHY**, and **MATHESON**, Circuit Judges.

Keith Clayton Brooks, Jr., a Colorado state prisoner appearing pro se,[1] appeals the district court's dismissal of his 42 U.S.C. § 1983 amended complaint concerning his confinement at the Buena Vista Correctional Facility ("BVCF") and the Kit Carson Correctional Center ("KCCC") in Colorado. The district court concluded that all of Mr. Brooks's claims were legally frivolous. Exercising jurisdiction under 28 U.S.C. § 1291, we agree with the district court and dismiss this appeal as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i).

I. **BACKGROUND**

On June 14, 2017, Mr. Brooks filed an amended complaint *in forma pauperis* ("*ifp*") in the United States District Court for the District of Colorado. In his complaint, Mr. Brooks claimed that various officials at BVCF, KCCC, and Corrections Corporation of America violated his constitutional rights. His claims stem from two prison disciplinary convictions he received while imprisoned at KCCC. The first, for "solicitation of staff," arose from his sexual relationship with a prison contract worker and resulted in a sanction of 30 days in punitive segregation, loss of 90 days good time credit, and loss of 40 days earned time credit. The second was for "failure to work" and resulted in a sanction of loss of privileges for 40 days and 20 days of lost earned time credit.

[1] Because Mr. Brooks proceeds pro se, we construe his fillings liberally, *see Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010), but we do not craft arguments or otherwise advocate for him, *see Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

When Mr. Brooks challenged both disciplinary convictions in Colorado State court under Colorado Rule of Civil Procedure ("C.R.C.P.") 106.5, prison officials responded by expunging the disciplinary convictions before the state court took any action, and the case was dismissed. The Colorado Department of Corrections ("CDOC") reimbursed Mr. Brooks $255.86 for his expenses to file the challenge to his failure-to-work conviction, but it denied reimbursement for the expenses he incurred to challenge the solicitation conviction.

In his amended complaint, Mr. Brooks asserted First Amendment retaliation claims alleging that officials expunged his disciplinary convictions in retaliation for his constitutionally protected activity of filing the state court actions. He alleged the defendants used the expungements to prevent him from recouping all of his court costs.

Also in his amended complaint, Mr. Brooks alleged due process violations based on deprivation of (1) his property, when he was denied recovery of his court costs and (2) his liberty, when he was placed in segregation and lost earned and good time credit following his disciplinary convictions.

The district court dismissed Mr. Brooks's claims as legally frivolous under 28 U.S.C. § 1915(e)(2)(B)(i) and denied his motion to proceed *ifp* on appeal. He filed a timely notice of appeal and renewed his application to proceed *ifp*. [2]

[2] Mr. Brooks also alleged that the failure-to-work disciplinary proceeding was brought in retaliation to his assertion of his rights as a victim of sexual misconduct. He has not addressed this claim in this appeal, so he has waived any challenge to dismissal of this claim. *See Dodds v. Richardson*, 614 F.3d 1185, 1205 (10th Cir.

II. **DISCUSSION**

A. ***Legal Background***

Under 28 U.S.C. § 1915(e)(2)(B), a court must dismiss an *ifp* proceeding "if the court determines that . . . the action or appeal—(i) is frivolous or malicious; or (ii) fails to state a claim on which relief may be granted." A complaint is frivolous if "it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). In other words, "dismissal is only appropriate for a claim based on an indisputably meritless legal theory and the frivolousness determination cannot serve as a factfinding process for the resolution of disputed facts." *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006) (quotations omitted).

B. ***Standard of Review***

We review the district court's dismissal of the amended complaint under § 1915(e)(2)(B)(i) for frivolousness under an abuse of discretion standard, but if the frivolousness determination turns on an issue of law we review the determination de novo. *See id.* at 1259; *Harold v. Univ. of Colo. Hosp*, 680 F. App'x 666, 671 n.1 (10th Cir. 2017) (unpublished). We find Mr. Brooks's claim to be frivolous under either standard.

2010). We understand he is still arguing that the expungement of his failure-to-work conviction was retaliation for his bringing the state action, even though he has recovered the costs relating to that court challenge.

Mr. Brooks further brought an equal protection claim based on the BVCF's mailroom stopping him from corresponding with a victims' rights organization, but he has not appealed the dismissal of that claim.

C. ***Analysis***

1. **Retaliation Claims**

We agree with the district court that Mr. Brooks's retaliation claims are frivolous. To state a claim for retaliation, Mr. Brooks must allege (1) he engaged in "constitutionally protected activity," (2) Defendants responded in a manner "that would chill a person of ordinary firmness from continuing to engage in that activity," and (3) the Defendants' action was "substantially motivated" by his constitutionally protected activity. *Gee v. Pacheco*, 627 F.3d 1178, 1189 (10th Cir. 2010) (quotations omitted). We review the second element using an objective standard. *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007).

The CDOC's reimbursement of Mr. Brooks for the cost of filing his complaint about his failure-to-work conviction eliminated any basis for his retaliation claim, which is premised on his failure to receive payment of his court costs. As to CDOC's failure to reimburse his costs on the solicitation claim, Mr. Brooks has failed to allege that he suffered an injury that would deter a "person of ordinary firmness" from bringing such a claim. As the district court noted, the "allegedly adverse action, expungement of a disciplinary conviction, is not an adverse action," and "[t]he fact that he was required to pay court costs and fees in order to achieve that success does not demonstrate the favorable result . . . is the sort of injury that would chill a person of ordinary firmness from continuing to exercise his rights." ROA at 127. The

district court correctly dismissed the First Amendment retaliation claims as legally frivolous.

2. **Due Process Claims**

We also agree that Mr. Brooks's due process claims are frivolous. Due process protections apply only when a person is deprived of a liberty or property interest. *See Cordova v. City of Albuquerque*, 816 F.3d 645, 656 (10th Cir. 2016). "A protected interest in liberty or property may have its source in either federal or state law." *Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012) (citing *Ky. Dep't. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). But Mr. Brooks failed to assert any plausible property or liberty interest.

a. *Property*

A prevailing plaintiff in a C.R.C.P. 106.5 action may recover his costs of suit under C.R.S. § 13-16-111. *See Branch v. Colo. Dept. of Corrections*, 89 P.3d 496, 497 (Colo. Ct. App. 2003) (awarding costs in a C.R.C.P. 106(a)(4) action); *see also* C.R.C.P. 106.5 (applying Rule 106(a)(4) procedures when not otherwise modified by Rule 106.5). But this applies only to plaintiffs who "obtain[] judgment or an award of execution," C.R.S. § 13-16-111, not when plaintiffs' claims are dismissed, as happened in this case. Mr. Brooks had no property interest in his filing costs.

b. *Liberty*

"[I]ncarcerated persons retain only a 'narrow range of protected liberty interests.'" *Rezaq v. Nalley*, 677 F.3d 1001, 1011 (10th Cir. 2012) (quoting *Abbott v. McCotter*, 13 F.3d 1439 (10th Cir. 1994)). Although the Constitution does not "give

rise to a liberty interest in avoiding transfer to more adverse conditions of confinement," a state may create such an interest. *Wilkinson v. Austin*, 545 U.S. 221-22 (2005). "A protected liberty interest only arises from a transfer to harsher conditions of confinement when an inmate faces an 'atypical and significant hardship . . . in relation to the ordinary incidents of prison life.'" *Rezaq*, 677 F.3d at 1011 (quoting *Wilkinson*, 545 U.S. at 223).

In *Sandin v. Conner*, 515 U.S. 472 (1995), for example, the Supreme Court said that "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the [prison] sentence imposed by a court of law," *id.* at 485. The Court held that 30 days of disciplinary segregation was not an "atypical, significant deprivation in which a State might conceivably create a liberty interest."[3] *Id.* at 486. The disciplinary segregation to which the plaintiff had been subjected was similar to conditions imposed upon inmates in other situations, such as administrative segregation and protective custody. *Id.*

In applying *Sandin* and its progeny, we have considered several factors to evaluate whether segregated confinement is an "atypical and significant hardship." For example, we have considered whether "the segregation relates to and furthers a legitimate penological interest," "the conditions of the placement are extreme," "the placement increases the duration of confinement," and the length of the punishment

[3] The misconduct charge that was the basis of the segregation in *Sandin* was eventually expunged. *Id.* at 476.

is indeterminate. *Estate of DiMarco v. Wyo. Dept. of Corrections*, 473 F.3d 1334, 1342 (10th Cir. 2007).

None of these factors show that Mr. Brooks's segregation was atypical. His discipline was for a limited time (30 days) and did not increase the duration of his imprisonment. In short, his amended complaint does not allege any facts that would plausibly indicate his punishment was atypical in relation to the ordinary incidents of prison life.

Loss of earned or good time credit also does not implicate a liberty interest under Colorado law when an inmate is entitled only to discretionary parole. *See Meyers v. Price*, 842 P.2d 229, 231-32 (Colo. 1992) (en banc); C.R.S. § 17-22.5-302. The district court correctly found that Mr. Brooks was entitled only to discretionary parole. ROA at 129.

III. **CONCLUSION**

The district court's dismissal of Mr. Brooks's amended complaint as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i) constituted a second "strike" against Mr. Brooks under § 1915(g). *See* 28 U.S.C. § 1915(g). We agree with the district court's rulings, dismiss this appeal as frivolous, and impose a third "strike" under § 1915(g). *See id.* (a "strike" is imposed when a prisoner's action *or appeal* is dismissed for

frivolousness). Finally, we deny Mr. Brooks's renewed application to proceed *ifp* and remind him that he remains obligated to pay the full filing fee.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge