

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

September 29, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

LUIS LEAL,

Plaintiff - Appellant,

v.

SERGEANT A. DIAZ, Correctional
Officer for the Colorado Department of
Corrections, in his individual and official
capacity; ROBERT SMOTHERMAN,
Correctional Officer for the Colorado
Department of Corrections, in his
individual and official capacity;
UNKNOWN SUPERVISOR, Correctional
Officer for the Colorado Department of
Corrections, in his individual and official
capacity,

Defendants - Appellees.

No. 20-1140
(D.C. No. 1:17-CV-00946-PAB-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ, KELLY, and McHUGH**, Circuit Judges.*

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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.

The United States District Court for the District of Colorado dismissed Mr. Luis Leal’s complaint for failure to prosecute. Mr. Leal appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

In April 2017 Mr. Leal filed suit alleging that officers at the Arkansas Valley Correctional Facility violated several of his federal statutory and constitutional rights by harassing him because of his disability and refusing him entry into the prison on account of his disability. His complaint describes one alleged event: Mr. Leal arrived at the prison to meet with inmate Dean Carbajal. Although Mr. Leal is a paraplegic and unable to stand, a prison guard ordered him to “stand up like everyone else” and then denied Mr. Leal entry when he could not stand. R. Vol. I at 66.

At the initial scheduling conference in January 2018, it became clear to the magistrate judge that Mr. Leal “did not speak English whatsoever.” Supp. R. Vol. II at 23. The hearing was therefore vacated. The judge issued an order observing that even though Mr. Leal spoke no English, “all of [his] filings and other communications with the court have been in the English language,” including his handwritten filings. *Id.* The judge further observed that “the last document purportedly filed by Mr. Leal was mailed to the court by Mr. Dean Carbajal, a frequent litigator currently incarcerated [at a Colorado correctional facility], who has filed at least 19 federal civil prisoner cases in this court alone since 2007.” *Id.* at 23–24. The judge warned Mr. Leal that he “cannot be represented in this matter by any non-attorney” and ordered that if Mr. Leal continued to proceed pro se, he must “come to court equipped to fully participate in proceedings” and that “to the extent

[he] is required to appear for court hearings, he must provide, at his expense, a court certified translator.” *Id.* at 24–25. Mr. Leal then moved for the appointment of pro bono counsel. The judge responded by ordering the court clerk to seek an attorney for Mr. Leal from the court’s civil pro bono panel; but no attorney took his case.

Mr. Leal continued submitting handwritten filings in English. A second magistrate judge determined that it was “quite clear” that Mr. Carbajal, not Mr. Leal, was drafting “most, if not all, of [Mr. Leal’s] filings.” R. Vol. I at 234. The judge noted that the handwritten filings from Mr. Leal matched Mr. Carbajal’s handwriting from Mr. Carbajal’s previous litigation and that “several of the motions were sent in envelopes *from* the Colorado Department of Corrections.” *Id.* at 234 n.1. The judge reiterated that Mr. Leal “may either represent himself, or hire a lawyer to represent him, but he may not use a non-attorney to craft his filing and advance the prosecution of his claims.” *Id.* at 234. The judge “warned [Mr. Leal] that future filings drafted and submitted by Mr. Carbajal are subject to being stricken without further notice.” *Id.* Mr. Leal objected to this order, arguing that Mr. Carbajal had a First Amendment right to participate in the litigation. But the district court overruled the objection because no authority cited by Mr. Leal permitted him to be represented by Mr. Carbajal.

In August 2019, over two years after the filing of the initial complaint, the second magistrate judge recommended dismissing Mr. Leal’s complaint for failure to prosecute. The recommendation said that “[s]ince this case’s inception, it has been obvious that [Mr.] Carbajal is drafting and filing papers in this matter under the guise

that [Mr.] Leal is drafting and filing his own papers *pro se*.” *Id.* at 622. And it concluded that dismissal was appropriate because Mr. Leal repeatedly and “flagrantly disregarded” the court’s orders to prosecute his case himself or hire counsel. *Id.* at 624.

In response to the magistrate judge’s recommendation, the district court ordered “the magistrate judge to hold a hearing and make recommended factual findings concerning [Mr. Leal’s] and Mr. Carbajal’s respective roles in this lawsuit.” Supp. R. Vol. I at 15. The magistrate judge set an evidentiary hearing for October 30, 2019, stating, that “[Mr. Leal] shall be prepared to testify and offer evidence on the matter and is responsible for providing his own translator so that he can meaningfully participate in the hearing.” *Id.* at 16. On the day of the hearing Mr. Leal filed a motion to continue the hearing to provide him with additional time to secure an interpreter. Although Mr. Leal filed the motion at the clerk’s office about a half hour before the hearing, the motion was not docketed until after the hearing and Mr. Leal did not mention it, so the judge was unaware of it. Mr. Leal attended the hearing without the required interpreter.

During the hearing the judge permitted a judicial intern to interpret for Mr. Leal. With the assistance of the intern Mr. Leal acknowledged that he had been required to bring an interpreter to the hearing and that he had previously represented to the court that he occasionally used family and friends to translate for him. The judge said that the hearing would need to be rescheduled and that Mr. Leal would need to bring his own translator. The judge made clear that Mr. Leal’s translator

could be “[a]ny person that can understand English well and translate well.” R. Vol. II at 9.

At the second evidentiary hearing Mr. Leal again failed to bring an interpreter. Instead, he was accompanied by “a friend who did not speak Spanish and could not translate.” R. Vol. I at 643. Also, as at the first hearing, Mr. Leal filed a motion in English a few minutes beforehand. This time, the motion sought leave to subpoena Mr. Carbajal. The motion stated that Mr. Carbajal would testify that he had not acted as Mr. Leal’s attorney and that Mr. Carbajal would testify that Mr. Leal requires assistance to prosecute his complaint because he is “unable to write, type, or read the law.” *Id.* at 637. Mr. Leal did not mention this motion during the hearing. Rather, “[i]n the un-translated dialogue between the Court and Plaintiff (Plaintiff either spoke in broken English or his friend assisted by speaking to Plaintiff and on his behalf, all in English), he stated that none of his Spanish-speaking friends or family were available to attend the hearing with him, and he requested that the hearing be continued to a later date” and that counsel be appointed for him. *Id.* at 643–44. The magistrate judge said that in the absence of a translator he “was prohibited from conducting an evidentiary hearing,” and he took the case under advisement. *Id.* at 644.

The magistrate judge then prepared a supplemental dismissal recommendation. It noted that Mr. Leal’s failure to bring a translator to either hearing violated the court’s orders. And it observed that Mr. Leal’s violations “forced defense counsel to appear twice for hearings that could not proceed, and has caused this Court to waste

time and judicial resources in preparing for those hearings, and has ultimately stymied the Court’s ability to obtain evidence on critical, potentially dispositive subjects.” *Id.* at 646. The supplemental recommendation also determined that it was “clear” that Mr. Carbajal, not Mr. Leal, was drafting the pleadings, performing the legal research, developing the legal arguments, and making the decisions related to the case. *Id.* at 645.

In reviewing the magistrate judge’s recommendation, the district court considered five factors used to analyze whether to dismiss a case with prejudice: “(1) the degree of actual prejudice to the defendant, (2) the amount of interference with the judicial process, (3) the culpability of the litigant, (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance, and (5) the efficacy of lesser sanctions.” *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993). On the first factor, the district court found that “the significant length of time . . . nearly three years . . . to move the case forward, along with [Mr. Leal’s] repeated noncompliance, has prejudiced defendants.” R. Vol. I at 657. On the second factor, the court found that Mr. Leal’s repeated noncompliance with court orders interfered with the judicial process and “weigh[ed] in favor of dismissal.” *Id.* at 658. As for the third factor, the district court determined that Mr. Leal was aware that he was responsible for securing an interpreter and could provide anyone who spoke both English and Spanish, and that his failure to do so—despite never expressing any problem with finding friends or family to translate his documents and being able to provide filings written in English— established his

culpability. On the fourth factor, the district court noted that Mr. Leal was “warned on several occasions that failure to comply with court orders could result in a dismissal of the case.” *Id.* at 659. And as for the fifth factor, the district court observed that Mr. Leal’s conduct “caused the litigation to come to a complete halt,” and it concluded that his continual disregard for court orders provided “no reason to believe that a lesser sanction would result in compliance.” *Id.* Accordingly, the district court dismissed Mr. Leal’s case with prejudice.

We review a dismissal for failure to prosecute for an abuse of discretion. *See Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1143 (10th Cir. 2007). “An abuse of discretion occurs when a district court makes a clear error of judgment or exceeds the bounds of permissible choice in the circumstances.” *Id.* (internal quotation marks and brackets omitted).

On appeal Mr. Leal continues to argue that he should have been appointed counsel, stating that his failure to prosecute the case can be attributed to his lack of counsel and that this “denial of counsel effectively denied [him] access to the Court; thereby, violating his First Amendment right” to access the courts, *Aplt. Br.* at 12. But the district court provided Mr. Leal with the opportunity to obtain counsel by granting his motion for pro bono counsel—the issue for Mr. Leal was that no attorney took his case. Further, there is generally no constitutional right to appointed counsel in civil cases; thus, Mr. Leal’s lack of appointed counsel did not violate his constitutional rights. *See Bethea v. Crouse*, 417 F.2d 504, 505 (10th Cir. 1969).

Otherwise, on appeal Mr. Leal addresses only the third dismissal factor—“the culpability of the litigant.” *Jones*, 996 F.2d at 264. He argues that he “made a good faith effort to obtain an interpreter, but no interpreters were available.” Aplt. Br. at 11. The record belies this argument. At the time of the dismissal Mr. Leal’s claims had been pending for over two years—yet he never secured a translator for his hearings, despite multiple warnings from the district court. And when it came time for the evidentiary hearings on the dismissal recommendation, the court rescheduled the first hearing to allow Mr. Leal additional time and permitted Mr. Leal to bring anyone who could translate, rather than requiring him to bring a court-certified translator. But Mr. Leal never secured a translator to come with him to court, even though he filed all his pleadings, motions, and other written communications to the court in English. All this supports our conclusion that the district court did not clearly err in finding that Mr. Leal was culpable for his failure to follow court orders.

We **AFFIRM** the district court’s order dismissing this case with prejudice and **GRANT** Mr. Leal’s motion to proceed *in forma pauperis*.

Entered for the Court

Harris L Hartz
Circuit Judge