FILED
United States Court of Appeals
Tenth Circuit

September 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JESSIE TUNSON-HARRINGTON,

Plaintiff - Appellant,

v.

ADAMS COUNTY SHERIFF; ADAMS COUNTY JAIL; DEPUTY EWING; UNKNOWN SHERIFFS, acting in the color of law,

Defendants - Appellees.

No. 23-1103
(D.C. No. 1:21-CV-01443-LTB)
(D. Colo.)

JESSIE TUNSON-HARRINGTON,

Plaintiff - Appellant,

v.

EWING, Adams County Sheriff's Deputy; SHYRIGH, Adams County Sheriff's Deputy; JOHN DOE, Unknown Deputy, Aurora Police Department,

Defendants - Appellees.

No. 23-1105
(D.C. No. 1:19-CV-03705-RBJ-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

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* 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 This order and judgment is not binding precedent, except under the doctrines of law of the (*footnote continued*)

Before **PHILLIPS**, **BALDOCK**, and **ROSSMAN**, Circuit Judges.

In these appeals,[1] Jessie Tunson-Harrington, proceeding pro se, appeals two orders from separate dockets in the District of Colorado. Both orders denied Tunson-Harrington's motions to reopen. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

Both appeals arise from similar facts. In one appeal, *Tunson-Harrington v. Ewing*, Tunson-Harrington alleges that in April 2018, police officers with the Aurora Police Department arrested him for violating a protective order. He asserts that on April 20, 2018, while a pretrial detainee at the Adams County Jail, he was assaulted by Deputies Ewing and Shyrigh.[2] Soundless video footage in the record shows that as Tunson-Harrington left the jail's showers, two guards rushed to restrain him; one guard tased him. Several guards then escorted a handcuffed Tunson-Harrington to a quiet room. Tunson-Harrington alleges that this incident left him with a concussion and exacerbated his broken arm.

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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.

[1] We decide these appeals together given their related natures.

[2] Deputy Shyrigh's last name was originally misspelled by Tunson-Harrington as "Shyreigh."

In the other appeal, *Tunson-Harrington v. Adams County Sheriff*, Tunson-Harrington alleges a separate, similar incident with Deputy Ewing and other guards at the Adams County Jail. He alleges that on March 6, 2019, Deputy Ewing began punching him as he was leaving the jail's showers. He claims that the guards then tased him in the groin and kicked him while he was on the ground. Based on that, Tunson-Harrington alleges that he suffered head trauma and mental anguish.

In December 2019, Tunson-Harrington filed his first complaint, based on his April 2018 detention. He alleged (among other claims) a false-arrest claim against the Aurora Police Department and an excessive-force claim against Adams County Jail and Deputies Ewing and Shyrigh. After two amended complaints, the district court permitted these claims to proceed. But Tunson-Harrington struggled to prosecute his case after that. The record reflects that he didn't receive court orders due to his frequent address changes. Nor did he retain a pro bono attorney or contact the magistrate judge to set a scheduling conference.[3] As a result, in July 2021, the district court dismissed Tunson-Harrington's case without prejudice for failure to prosecute. More than a year later, Tunson-Harrington moved to reopen, which the district court denied because he hadn't shown cause to reopen or a willingness to prosecute his case.

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[3] The district court granted Tunson-Harrington's motion to appoint pro bono counsel but "the Court was unable to find a volunteer lawyer who would be willing to represent the plaintiff on a pro bono basis."

In May 2021, on a separate docket, Tunson-Harrington filed a second complaint, this time based on the alleged 2019 assault. He asserted (among others) an excessive-force claim against Adams County Jail and Deputy Ewing. The district court ordered Tunson-Harrington to correct deficiencies in the complaint, including alleging why his case wasn't duplicative of his earlier action. It gave him 30 days to cure and warned him that it would dismiss his case if he neglected to do so. Again, the record shows that Tunson-Harrington didn't receive court orders due to his changes in address. In July 2021, the district court dismissed the case without prejudice for failing to correct deficiencies, adding that Tunson-Harrington hadn't filed change-of-address notices under the district's local civil rules. Tunson-Harrington moved to reopen more than a year later. And the district court denied that motion, finding no grounds under Federal Rule of Civil Procedure 60 to relieve him from the court's judgment.

Tunson-Harrington appeals these twin denials of his motions to reopen. We construe both motions as requests to reopen under Rule 60(b)(6), which allows courts to relieve a party from judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6).[4] We review the denial of a Rule 60(b) motion to reopen for abuse of discretion. *Johnson v. Spencer*, 950 F.3d 680,

[4] Indeed, Tunson-Harrington cannot seek relief on grounds of "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1) because he filed his motions to reopen "more than a year after the entry of the judgment." Fed. R. Civ. P. 60(c)(1).

701 (10th Cir. 2020) (quoting *Kile v. United States*, 915 F.3d 682, 688 (10th Cir. 2019)). And because Tunson-Harrington proceeds pro se, we construe his pleadings liberally without serving as his advocate. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citations omitted).

Tunson-Harrington hasn't shown that the district courts abused their discretion. "The denial of a 60(b)(6) motion will be reversed only if we find a complete absence of a reasonable basis and are certain that the decision is wrong." *Davis v. Kan. Dep't of Corr.*, 507 F.3d 1246, 1248 (10th Cir. 2007) (quoting *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1293 (10th Cir. 2005)). Here, the district courts gave reasonable bases to not reopen Tunson-Harrington's cases. The district court gave several reasons explaining the futility in reopening *Tunson-Harrington v. Ewing*:

- Tunson-Harrington moved to reopen in an unserved letter.
- He didn't try to prosecute his case, including by setting a scheduling conference or a trial date.
- He did not respond to several orders to show cause, even though the court mailed them to the addresses on file.
- He was unlikely to prevail on the merits, including by being unable to overcome a qualified-immunity defense.
- He couldn't retain a volunteer, pro bono counsel.

The district court likewise articulated reasonable bases for refusing to reopen *Tunson-Harrington v. Adams County Sheriff*, including deficient allegations and Tunson-Harrington's neglecting to file change-of-address

notices under District of Colorado Local Civil Rule 5.1(c).[5] *See Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 n.3 (10th Cir. 2002) ("[P]ro se status does not relieve [a plaintiff] of the obligation to comply with procedural rules." (citation omitted)); *Theede v. U.S. Dep't of Lab.*, 172 F.3d 1262, 1267 (10th Cir. 1999) ("[T]he District of Colorado Local Rules place the burden on the parties to formally direct the attention of the court to any change of address. . . . The fact that [a plaintiff] is acting pro se does not eliminate this burden." (citations omitted)).

We are sympathetic to the difficulties incarcerated pro se parties face in litigating cases.[6] But pro se litigants must prosecute their cases and follow the court's rules. *Petty v. Manpower, Inc.*, 591 F.2d 615, 617 (10th Cir. 1979) (per curiam) ("It is well recognized that a trial court may, within its sound discretion, subject to review only for abuse, dismiss an action Sua sponte for want of prosecution." (collecting cases)). Tunson-Harrington hasn't met his

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[5] This rule directs unrepresented prisoners to file a change-of-address notice within five days after the change. D. Colo. Civ. R. 5.1(c).

[6] We note that the record contains some evidence that Tunson-Harrington may suffer from diagnosed mental-health illnesses. Under the Federal Rules, district courts must appoint a guardian "to protect . . . [an] incompetent person who is unrepresented in an action." Fed. R. Civ. P. 17(c)(2); *see also Mondelli v. Berkeley Heights Nursing & Rehab. Ctr.*, 1 F.4th 145, 149 (3d Cir. 2021) ("A district court must invoke Rule 17 sua sponte and consider whether to appoint a representative for an incompetent person when there is 'verifiable evidence of incompetence.'" (citation omitted)). Though we think Tunson-Harrington hasn't presented sufficient evidence to trigger a district court's mandatory Rule 17 duty, we remind district courts to be vigilant to mental-health evidence in cases brought by pro se litigants.

heavy burden to show the district courts abused their discretion in denying his Rule 60(b)(6) motions to reopen.

We affirm. We also deny Tunson-Harrington's motions to proceed *in forma pauperis* and all other pending motions.

Entered for the Court

Gregory A. Phillips
Circuit Judge