FILED
United States Court of Appeals
Tenth Circuit

November 4, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CONG THAN,

Plaintiff - Appellant,

v.

CODY MCKIBBIN, Lt.; JODY BROWN, Captain; KEN TOPLISS, Lt.; MATTHEW VALDEZ, Captain; CAROL TRUJILLO, Major; MIKE ROMERO, Warden,

Defendants - Appellees.

No. 21-1193
(D.C. No. 1:20-CV-00766-WJM-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **PHILLIPS**, Circuit Judges.**

Cong Than is a Colorado prisoner who was disciplined for possessing electronic contraband, including a DVD player. As punishment, Mr. Than received two weeks of administrative segregation. Mr. Than then sued six Colorado Department of Correction Officers, alleging that they violated his Fourteenth

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

** 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.

Amendment procedural-due-process rights during associated investigations and disciplinary hearings. The district court dismissed his claims under Federal Rule of Civil Procedure 12(b)(6), ruling that Mr. Than had failed to allege that the Officers violated a liberty or property interest, as required for a procedural-due-process claim. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND[1]

Mr. Than, who is serving life in prison in a Colorado facility, sued six Colorado Department of Corrections Officers—Lieutenant Cody McKibbin, Captain Jodi Brown, Lieutenant Ken Topliss, Captain Matthew Valdez, Major Carol Trujillo, and Warden Mike Romero—for Fourteenth Amendment violations. The district court issued a sua sponte order under 28 U.S.C. § 1915A. That order outlined applicable substantive law, identified deficiencies in Mr. Than's Complaint, and directed him to amend his Complaint within thirty days. Mr. Than filed his Amended Complaint.

In the Complaint, Mr. Than alleges that he wrote a letter in Vietnamese to his brother. His facility sent the letter to the FBI for translation. After allegedly mistranslating his letter, the Officers investigated him for possession of and intent to acquire electronic contraband. In Mr. Than's cell, Officers located and seized a DVD

[1] Mr. Than's Complaint is somewhat convoluted, especially temporally. But, as a pro se litigant, we must liberally construe Mr. Than's pleadings, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), without acting as his advocate, *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

player, laundry ties, and nail clippers. The Officers also strip-searched Mr. Than but first ordered his cellmate to leave.

The prison then initiated a disciplinary hearing against Mr. Than. In both his Complaint and appellate briefs, Mr. Than argues that this hearing did not comply with procedural due process because the prison failed to provide him with a translator, there was insufficient evidence to punish him, and the Officers withheld exculpatory evidence from Mr. Than. As punishment for possessing contraband, Mr. Than was placed in administrative segregation for fifteen days.

On September 11, 2020, the Officers moved to dismiss Mr. Than's Complaint under Federal Rule of Civil Procedure 12(b)(6). Treating Mr. Than's allegations as a procedural-due-process claim under the Fourteenth Amendment, the Magistrate Judge recommended the dismissal of Mr. Than's Amended Complaint for failure to allege violation of a liberty or property interest. The district court adopted the Magistrate's recommendation and dismissed Mr. Than's Complaint with prejudice. Mr. Than timely appealed this order.

DISCUSSION

We review de novo the dismissal of a complaint under Rule 12(b)(6). *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). On review, we assume all facts properly pleaded are true and make all reasonable inferences in favor of the plaintiff. *See id.* If a fact is not in the plaintiff's complaint, however, neither the district court nor this court will consider it. *Jojola v. Chavez*, 55 F.3d 488, 494 (10th Cir. 1995).

The Fourteenth Amendment establishes that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To state a Fourteenth Amendment procedural-due-process claim, a plaintiff must allege the deprivation of a constitutionally cognizable liberty interest. *See Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012). "Discipline by prison officials in response to a wide range of misconduct" seldom constitutes deprivation of a liberty interest, because it "falls within the expected perimeters of the sentence imposed by a court of law." *Sandin v. Connor*, 515 U.S. 472, 485 (1995). A prison's disciplinary punishment constitutes violation of a liberty interest only when that punishment is atypical and extraordinarily harsh. *Cosco v. Uphoff*, 195 F.3d 1221, 1224 (10th Cir. 1999).

Here, the district court properly dismissed Mr. Than's Complaint because he failed to allege that the Officers deprived him of a liberty or property interest. Mr. Than contends that being placed in administrative segregation violated his liberty interest. But that alone does not suffice. *See Sandin*, 515 U.S. at 485; *Talley v. Hesse*, 91 F.3d 1411, 1413 (10th Cir. 1996) ("*Sandin* makes clear that placement in administrative segregation such as occurred here does not give rise to a liberty interest."). Still, Mr. Than's claim may survive if he alleges that his punishment was particularly atypical and harsh. *See Cosco*, 195 F.3d at 1224 (citing *Sandin*, 515 U.S. at 486). But he has not done so.

Because Mr. Than is serving life in prison, no punishment can increase the length of his sentence. This fact weighs heavily against finding that his punishment was harsh or atypical. *See Sandin*, 515 U.S. at 487 (finding no liberty interest in part because the petitioner was "serving an indeterminate term of 30 years to life"); *Hesse*, 91 F.3d at 1413. Second, the amount of time he was in administrative segregation—fifteen days—was not atypical or harsh. *See Sandin*, 515 U.S. at 486 (holding that a man's placement in disciplinary confinement for thirty days did not constitute deprivation of a liberty interest); *Clayton v. Ward*, 232 F. App'x 827, 831–32 (10th Cir. 2007) (holding that twenty-six days in administrative segregation did not constitute harsh conditions). Thus, Mr. Than has failed to allege he suffered any exceptional circumstances demonstrating a violation of a liberty interest.[2] *See Grissom v. Werholtz*, 524 F. App'x 467, 474–75 (10th Cir. 2013) (holding that a defendant serving a life sentence who was placed in administrative segregation for possession of contraband did not suffer violation of a liberty interest).

Mr. Than also argues that he was deprived of a property interest because prison officials confiscated his property. But even reading the Complaint liberally, the court cannot reasonably infer that any Officers took Mr. Than's property. *See,*

[2] Mr. Than asserts other "liberty interests" he believes were violated, such as access to the prison's incentive unit and the ability to apply for clemency from the Governor. But, as Mr. Than mostly acknowledges in his brief, the "damages" he asserts are privileges not liberty interests. Opening Br. at 5–6. And he has not plausibly explained why their withdrawal would constitute atypical and significant hardship for one serving a life sentence. Thus, these arguments fail. *See Rodriguez v. Gen. Couns. for Fed. Bureau of Prisons*, 315 F. App'x 79, 80 (10th Cir. 2009).

e.g., ROA at 47 ("Mr. Than was found guilty of possession of an electronic device without any evidence what-so ever. No device was found on his personal possession or in an area under his control."); ROA at 52 ("[T]here was no evidence, documentary or otherwise, that tied Mr. Than to the items [that were confiscated]."). Without establishing that he owned the confiscated property, Mr. Than cannot assert Officers violated any property interest.

Finally, Mr. Than argues that the Officers violated the Fourteenth Amendment by ignoring certain procedures for prison disciplinary hearings established by state law and prison administrative rules. But state law can create a liberty interest only when it "establish[es] *substantive* predicates to govern official decisionmaking *and mandate[s] an outcome* when relevant criteria have been met." *Elwell v. Byers*, 699 F.3d 1208, 1214 (10th Cir. 2012) (emphasis added). Here, Mr. Than identifies laws that regulate procedure, but none that give him a substantive right. Thus, the "guarantees of the state" that Mr. Than relies on "are plainly procedural rather than substantive." *Id.* at 1214–15; *see also PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1200 (10th Cir. 2010). And without a substantive interest created under state law, Mr. Than lacks "any constitutionally cognizable liberty interest." *Wagner*, 603 F.3d at 1201.[3] The district court thus properly granted the Officers' Rule 12(b)(6) motion to dismiss.

[3] Mr. Than raises an additional Fourteenth Amendment claim beyond those presented to the district court. "Generally, this court does not consider arguments raised for the first time on appeal." *Strauss v. Angie's List, Inc.*, 951 F.3d 1263, 1266 n.3 (10th Cir. 2020). "Because [Mr. Than] has not" explained why "we should

CONCLUSION

For these reasons, we affirm the district court's order dismissing all of Mr. Than's claims with prejudice.

Entered for the Court

Gregory A. Phillips
Circuit Judge

exercise discretion to address these arguments, we conclude they are not properly before us." *Id.*