FILED
United States Court of Appeals
Tenth Circuit

September 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WESLEY THOMPSON,

Plaintiff - Appellant,

v.

MEL COULTER,

Defendant - Appellee.

No. 23-4005
(D.C. No. 2:12-CV-00680-CW)
(D. Utah)

ORDER AND JUDGMENT*

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

Plaintiff Wesley Thompson, a Utah prisoner proceeding pro se, appeals the district court's denial of his motion under Fed. R. Civ. P. 60(b) requesting relief from judgment in a lawsuit against prison personnel.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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] Mr. Thompson's brief on appeal challenges two orders denying motions under Rule 60(b), one entered on June 18, 2021, and one entered on December 29, 2022. But his notice of appeal filed on January 18, 2023, was timely only with respect to the second order. *See* Fed. R. App. P. 4(a)(l)(A) (notice of appeal must be filed within 30 days after order appealed from).

I. BACKGROUND

In 2011 Mr. Thompson was an inmate at the Central Utah Correctional Facility (CUCF). In June of that year, CUCF personnel downgraded Mr. Thompson's inmate classification from "C2K"—which required that he be housed in a maximum-security unit—to "C3K" and moved him to less-restrictive transitional housing where he was assigned a cellmate. Mr. Thompson did not challenge his classification change, housing transfer, or new cellmate through available CUCF classification-review and inmate-grievance procedures. He did request an extension of time to challenge his behavioral classification—Kappa, or the "K" in "C2K" and "C3K"—but that request was denied because his behavioral classification level had not changed; it was the shift in security classification from "level 2" to "level 3" that led personnel to change his housing assignment. Mr. Thompson did not file a grievance challenging the denial of his request for an extension.

On the night of August 5, 2011, the new cellmate sexually assaulted Mr. Thompson. He reported the assault to CUCF personnel but did not file a formal grievance within the then-required seven-day time limit.

In July 2012 Mr. Thompson filed a lawsuit under 42 U.S.C. § 1983 in the United States District Court for the District of Utah against Defendant Mel Coulter, a CUCF Captain and Classification Officer, and several unnamed CUCF personnel. Mr. Thompson alleged that Defendants violated his Eighth and Fourteenth Amendment rights by improperly changing his classification level, denying him an extension of time to challenge that decision, and placing him in a cell with a

dangerous inmate. Captain Coulter moved for summary judgment based solely on Mr. Thompson's failure to exhaust available administrative remedies—CUCF classification-challenge and inmate-grievance procedures—before filing his complaint, as is required under the Prison Litigation Reform Act (PLRA). *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

In March 2016 the district court granted Captain Coulter's motion and we affirmed. We concluded that Mr. Thompson's Fourteenth Amendment due-process claim failed as a matter of law because inmates have no liberty interest in prison officials' discretionary classification decisions and his Eighth Amendment claim failed because he did not timely exhaust CUCF's available administrative remedies. *See Thompson v. Coulter*, 680 F. App'x 707, 709–12 (10th Cir. 2017). We also concluded that Mr. Thompson could not rely on a regulation promulgated under the Prison Rape Elimination Act (PREA) requiring that covered state agencies "not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse," 28 C.F.R. § 115.52(b)(1), because Utah had not yet adopted the PREA. *See Thompson*, 680 F. App'x at 711–12.

In November 2019 the Utah Department of Corrections revised its inmate-grievance policies to exempt reports of sexual assault from the grievance system, and thus from any time restrictions on reporting assault. This policy change prompted Mr. Thompson to attempt to reopen his case. On March 31, 2022, he filed a "Motion

Challenging the Constitutionality of the Prison Litigation Reform Act's § 1997e(a)'s Exhaustion Requirement," arguing that the exhaustion requirement violated his First Amendment right to court access and his Fourteenth Amendment right to equal protection. On December 29, 2022, the district court denied Mr. Thompson's motion, which it construed as a motion under Fed. R. Civ. P. 60(b). The court denied the motion because the arguments in the motion "all could have been offered before the action was dismissed six years ago" and therefore "lend nothing new" to his case. *Thompson v. Coulter*, No. 12-cv-680, 2022 WL 17987047, at *2 (D. Utah Dec. 29, 2022).[2] Mr. Thompson timely appeals.

II. DISCUSSION

Because Mr. Thompson is proceeding pro se, we construe his pleadings liberally, but he still must follow the rules. *See United States v. Green*, 886 F.3d 1300, 1307 (10th Cir. 2018). "We review the district court's denial of a Rule 60(b) motion for abuse of discretion." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000). Relief under Rule 60(b) is "extraordinary and may only be granted in exceptional circumstances." *Id.* (internal quotation marks omitted).

Under the PLRA, "[a]ny prisoner who seeks to bring a claim involving general circumstances or particular episodes of prison life must first exhaust the administrative remedies available to him in prison." *May v. Segovia*, 929 F.3d 1223,

[2] The district court relied on the death of Captain Coulter as a second reason to deny Mr. Thompson's motion. But we need not reach Mr. Thompson's arguments on this point because his claims fail on other grounds and substitution of parties would therefore be futile.

1226–27 (10th Cir. 2019) (citation and internal quotation marks omitted). Mr. Thompson argues that this provision is unconstitutional as applied because it has interfered with his First Amendment right of access to the courts.[3]

We agree with the district court that Mr. Thompson could have raised this argument before the entry of judgment. "[A] Rule 60(b) motion is not an appropriate vehicle to advance new arguments . . . that were available but not raised at the time of the original argument." *Lebahn v. Owens*, 813 F.3d 1300, 1306 (10th Cir. 2016). The sole argument advanced in Captain Coulter's September 2013 motion for summary judgment was Mr. Thompson's failure to exhaust his available administrative remedies. Mr. Thompson was therefore on notice that it would be appropriate to make any and all arguments related to the inapplicability of the exhaustion requirement.

And even if Mr. Thompson's constitutional challenge could *not* have been brought at the summary-judgment stage, he offers no proper justification for the six years that elapsed between judgment on March 14, 2016, and the filing of his Rule 60(b) motion on March 31, 2022. A Rule 60(b) motion "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). Six years is not "a reasonable time" under the circumstances. The district court did not abuse its discretion in reaching its conclusion.

[3] Mr. Thompson's brief filed in this court does not raise the Fourteenth Amendment equal-protection argument made in his Rule 60(b) motion.

Mr. Thompson on appeal also argues (1) that his failure to exhaust administrative remedies has been cured by the new Utah Department of Corrections policy exempting sexual-assault reporting from its standard inmate-grievance procedures and (2) that his attempts at the time of his assault to timely comply with the inmate-grievance procedures then in place were stymied by circumstance and by CUCF personnel. The first contention is not properly before us because it was raised inadequately, if at all, in his Rule 60(b) motion filed on March 31, 2022. And assuming it had been preserved in district court, it would still fail. Even if he could now pursue an administrative claim for sexual assault, he clearly failed to comply with the requirement of § 1997e(a) that he exhaust administrative remedies before he filed suit in 2012, and his March 2022 Rule 60(b) motion was unreasonably tardy insofar as he relied on the prison's new administrative procedures; indeed, he could have raised the issue more than a year earlier, as shown by the fact that he invoked those new procedures in his November 2020 motion to reopen (which was denied by the district court and not appealed in time). As for his "stymied" claim, it is far too late to seek relief under Rule 60(b) on that ground, since it could have been raised many years ago.

We **AFFIRM** the order of the district court. Mr. Thompson's motion to proceed *in forma pauperis* is **GRANTED**.

Entered for the Court

Harris L Hartz
Circuit Judge