FILED
United States Court of Appeals
Tenth Circuit

September 15, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DELMART E.J.M. VREELAND, II,

Plaintiff - Appellant,

v.

PHIL WEISER, Colorado Attorney General; RYAN CRANE, Assistant Colorado Attorney General; DAVID ZUPAN, Colorado Department of Corrections Warden; PATRICK J. MULLIGAN, Attorney at Law; R. SCOTT REISCH, Attorney at Law; LYNN C. HARTFIELD, Attorney at Law,

Defendants - Appellees.

No. 20-1385
(D.C. No. 1:20-CV-02298-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT[*]

Before **McHUGH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Delmart Vreeland, II, appeals the dismissal, under 28 U.S.C. § 1915(e)(2)(B)(i), of his civil rights complaint against three Colorado officials and

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[*] After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

three of his former attorneys. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Vreeland is a Colorado prisoner serving a lengthy sentence for various sex and drug crimes. The Colorado Court of Appeals upheld his convictions and sentence on direct appeal. A federal district court denied his 28 U.S.C. § 2254 habeas petition, and this court affirmed that denial. *See Vreeland v. Zupan*, 906 F.3d 866, 883 (10th Cir. 2018). In this lawsuit, brought under 42 U.S.C. § 1983, Vreeland alleged three state defendants (Weiser, Crane, and Zupan) and three of his former attorneys (Mulligan, Reisch, and Hartfield) interfered with his constitutional right of access to the courts during the habeas proceedings by restricting his access to the state-court record.

Vreeland's complaint included five claims for relief. Claim one, against Weiser, Crane, Zupan, Mulligan, and Reisch alleged a violation of his right of access to the courts stemming from the state defendants' failure to timely make available the state court record to the federal habeas court and the attorney defendants' failure to review the record and share it with Vreeland once they had access to it. Claim two alleged breach of contract and professional malpractice against Mulligan and Reisch. Claim three alleged breach of contract, legal malpractice, and violation of Vreeland's right of access to the courts against Hartfield. Claim four was a state-law claim for fraud against Hartfield alleging improper billing practices. Claim five, against all defendants, alleged "[t]he conduct of each Defendant named in this complaint has

subjected Plaintiff to cruel and unusual treatment and punishment as well as emotional distress in violation of the State of Colorado and United States Constitution." R. at 27.

The magistrate judge screened the complaint and recommended dismissal because the claims were frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i). Regarding claim one, while the magistrate judge acknowledged the existence of a federal right of access to the courts, he recommended dismissal in part because the record in the federal habeas case indicated the state court record was, in fact, submitted on January 25, 2016. Further, Vreeland acknowledged attorneys Mulligan and Reisch had access to the state court records from the Colorado Court of Appeals in May of 2015. He therefore could not establish actual injury in the form of impairment of his ability to establish a nonfrivolous legal claim, so no valid cause of action for denial of access to the courts existed.

The magistrate judge recommended dismissal of the federal claims against the attorney defendants because they were not state actors as required for § 1983 liability to attach. The magistrate judge also recommended the district court decline to exercise pendant jurisdiction over the state-law claims. Finally, the magistrate recommended dismissal of claim five against all defendants because Vreeland's complaint did not implicate any of the core areas implicated by the Eighth Amendment.

The district court adopted the recommendation, dismissed all federal claims, and declined to exercise jurisdiction over the remaining state claims. This appeal follows.

DISCUSSION

Because Vreeland proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). "We generally review a district court's dismissal for frivolousness under § 1915 for abuse of discretion. However, where the frivolousness determination turns on an issue of law, we review the determination de novo." *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006) (internal citation and italics omitted). "[A] complaint . . . is frivolous where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A plausible allegation is not frivolous under § 1915. *See Shabazz v. Askins*, 980 F.2d 1333, 1335 (10th Cir. 1992). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Initially, we note Vreeland does not challenge the district court's decision not to exercise jurisdiction over his state-law claims, including those against attorneys Mulligan, Reisch, and Hartfield. *See Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 549 (10th Cir. 1997) ("If federal claims are dismissed before trial, leaving only issues of state law, the federal court should decline the exercise of

jurisdiction by dismissing the case without prejudice." (internal quotation marks omitted)). "Issues not raised in the opening brief are deemed abandoned or waived." *Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) (internal quotation marks omitted)). We therefore affirm those dismissals.

We also affirm the dismissal of Vreeland's federal-law claims against the attorney defendants because they were not acting under color of state law. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) ("[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." (internal quotation marks omitted)). Although Vreeland alleged in his complaint, and states on appeal, that his attorneys conspired with the state-actor defendants, this allegation was conclusory, so the district court appropriately considered it lacking an arguable basis in law and disregarded it. *See Neitzke*, 490 U.S. at 325.

And we affirm the dismissal of Vreeland's Eighth Amendment claim because the conclusory, one-sentence count in his complaint did not show the defendants' actions implicated his access to shelter, sanitation, food, personal safety, medical care, or adequate clothing. *See Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992), *as corrected* (Feb. 14, 1992) ("[T]he core areas of any Eighth Amendment claim are shelter, sanitation, food, personal safety, medical care, and adequate clothing." (internal quotation marks omitted)).

This leaves only Vreeland's first claim against the state defendants, which the district court, following the recommendation of the magistrate judge, dismissed in

part because even if the relevant records were not made available in the federal habeas case, they were available to Vreeland's attorneys from the Colorado Court of Appeals. Vreeland responds that "[a]lthough . . . [his] lawyers were, on 5/1/2015, granted access to the state records at issue, [his complaint] asserts that [his] lawyers violated [his] access to court rights when they intentionally failed to go pick them up once the order by the state court judge issued granting that access." Aplt. Opening Br. at 29. But these allegations do not suggest misconduct by the state defendants. They instead relate to Vreeland's state-law claims for legal malpractice, over which the district court, in its sound discretion, declined to exercise jurisdiction. *See Bauchman*, 132 F.3d at 549.

CONCLUSION

We affirm the judgment of the district court.

Entered for the Court

Nancy L. Moritz
Circuit Judge