

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 12, 2021

Christopher M. Wolpert
Clerk of Court

ANTONIO DEWAYNE HOOKS,

Plaintiff - Appellant,

v.

BRYAN YANDELL,

Defendant - Appellee,

and

JUSTIN GLASPY; FNU HILL, Former
Deputy Warden at NFCC Sayre,

Defendants.

No. 20-7061
(D.C. No. 6:18-CV-00399-RAW-SPS)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **HOLMES**, **MATHESON**, and **McHUGH**, Circuit Judges.

The district court dismissed a pro se action Antonio Dewayne Hooks, an Oklahoma state prisoner, brought pursuant to 42 U.S.C. § 1983. The court determined that Mr. Hooks failed to exhaust his administrative remedies prior to

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

filing suit. Mr. Hooks appeals, challenging the dismissal and other rulings.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

Mr. Hooks entered Oklahoma custody and was housed in medium security at the North Fork Correction Center (NFCC). There, he saw Anthony Durham, one of three men who had been convicted and sentenced in state court for assaulting Mr. Hooks. The two had a fight, which Mr. Hooks reported to NFCC Deputy Warden Hill. Mr. Hill placed Mr. Hooks in segregation and ordered that Mr. Durham be kept separate from him. Thereafter, Mr. Hooks was transferred to the Davis Correctional Facility (DCF), medium security. While at DCF, Mr. Hooks learned that another man who had been convicted of assaulting him, Dewayne Smith, also was housed at DCF in medium security. Mr. Hooks reported this to his case manager, Justin Glaspy, who transferred Mr. Hooks to maximum security. The DCF contract monitor, Bryan Yandell, approved that transfer.

Mr. Hooks filed a pro se § 1983 action against Mr. Hill, Mr. Glaspy, and Mr. Yandell, asserting two claims. In the first claim, Mr. Hooks alleged he suffered emotional distress because of (1) Mr. Hill's failure to order that all the men convicted in state court of assaulting him be kept separate from him ("separatees") and (2) Mr. Glaspy's transfer of Mr. Hooks to maximum security.¹ In his second claim, Mr. Hooks alleged that Mr. Glaspy and Mr. Yandell violated his due process rights

¹ Although the first claim does not refer to Mr. Yandell, we assume Mr. Hooks asserted it against him for his role in approving the transfer to maximum security.

by transferring him to DCF maximum security without a disciplinary reason; instead, Mr. Glaspy should have transferred him to medium security at another prison.

Mr. Hooks also alleged that Mr. Glaspy falsely stated in the transfer package that Mr. Hooks would continue to refuse housing until he was transferred to a medical prison (Mr. Hooks had sustained serious injuries in the assault by the three men). He sought monetary damages and a medical transfer to a medical prison.

The district court dismissed Mr. Hill and Mr. Glaspy due to Mr. Hooks's failure to locate and serve them. The court then ordered a *Martinez* report, *see Martinez v. Aaron*, 570 F.2d 317, 319 (10th Cir. 1978) (per curiam); it identified six grievances Mr. Hooks had filed concerning his housing, classification, or transfer. Mr. Yandell filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that Mr. Hooks failed to properly exhaust his administrative remedies and failed to state a claim for relief. Mr. Hooks responded to the motion to dismiss. He also moved for leave to amend his complaint to add defendants. The district court denied that motion without prejudice, explaining that amendment would be futile if it dismissed the case for failure to exhaust and that Mr. Hooks could file another motion to amend in the event the court denied the motion to dismiss.

Mr. Hooks also asked the court to compel production of all grievance appeals he filed from August to December 2018.² The court interpreted that request as a

² This time period appears to be based on Mr. Hooks's response to the motion to dismiss, where he identified two of the six grievances contained in the *Martinez* report as those relevant to his claim against the DCF defendants, Mr. Glaspy and Mr. Yandell. *See R.*, Vol. I at 247 (identifying relevant grievances as those on pages

supplement to Mr. Hooks's response to the motion to dismiss and ordered Mr. Yandell to respond by a date certain. When Mr. Yandell failed to do so, the court ordered him to show cause for his failure to comply with the court's order. Mr. Yandell then filed a response, which included an affidavit from Mark Knutson, the manager of the Administrative Review Authority (ARA) at the Oklahoma Department of Corrections (ODOC). Mr. Knutson testified that the ARA had received no appeal regarding any grievance from Mr. Hooks during the August-December 2018 period.³

The district court dismissed the action for failure to exhaust administrative remedies. The court reasoned that Mr. Hooks failed to exhaust because he filed no appeals to the ARA from any of the six grievances identified in the *Martinez* report. The court rejected his argument that he had in fact filed appeals to the ARA during the August-December 2018 period, because Mr. Knutson testified that Mr. Hooks had filed no appeals during that period and Mr. Hooks had submitted no documentation of his alleged appeals. The district court also denied three motions for a preliminary injunction Mr. Hooks had filed requesting transfer to a medical prison. This appeal followed.

18 and 33 of ECF No. 30-6, which may be found at R., Vol. I at 117, 132). These two grievances were returned unanswered during the August-December 2018 period because of various procedural defects.

³ Appeal to the ARA is the fourth and final step in ODOC's administrative grievance process. *See* R, Vol. I at 84-93 (ODOC grievance policy outlining four-step process).

II. Discussion

We first discuss Mr. Hooks's waiver of four issues he inadequately briefed.

We then turn to the remaining three issues, which are adequately briefed.

A. Issues inadequately briefed

Mr. Hooks lists seven arguments in his opening brief, but the first three and the seventh are insufficiently briefed to garner substantive review. Even though we construe pro se pleadings and papers liberally, our role is not to act as a pro se litigant's advocate. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). Appellants must "sufficiently raise all issues and arguments on which they desire appellate review in their opening brief." *Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007). Sufficient presentation means providing an "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." *Garrett*, 425 F.3d at 840-41 (quoting Fed. R. App. P. 28(a)(8)(a)). "When a pro se litigant fails to comply with that rule, we cannot fill the void by crafting arguments and performing the necessary legal research." *Id.* at 841 (internal quotation marks omitted). Instead, we treat such issues as waived. *Id.*

Mr. Hooks's first issue concerns the attempt to serve process on Deputy Warden Hill. The summons was returned unexecuted, stating that Mr. Hill no longer worked at NFCC and there was no forwarding information. The district court ordered Mr. Hooks to show cause why it should not dismiss Mr. Hill from the case for failure to serve process. Mr. Hooks responded only that he could not understand

why service failed because Mr. Hill still worked at NFCC. The district court then dismissed Mr. Hill.

On appeal, Mr. Hooks alleges that the United States Marshals Service in the Eastern District of Oklahoma, where he filed this case, did not try to serve Mr. Hill because the NFCC is in the Western District of Oklahoma. He also questions why it took four months for the Marshals Service to return the summons unexecuted. But he fails to explain why he thinks the district court erred in dismissing Mr. Hill based on the facts that were before the court, and he cites no legal authority. Accordingly, he has waived appellate review of this issue.

Mr. Hooks's second issue concerns service of process on Mr. Glaspy. Mr. Glaspy's summons was returned unexecuted, stating he was no longer employed at the address provided. Mr. Hooks argues the district court should have helped him locate Mr. Glaspy because he informed the court that Mr. Glaspy had left DCF to work at the Oklahoma Department of Human Services. But he fails to develop this argument and cites no legal authority regarding the obligation he alleges the district court had. He has therefore waived appellate review of his second issue.

As best we understand Mr. Hooks's third issue, he complains that the district court did not send him a copy of Mr. Yandell's motion for a stay to prepare the *Martinez* report (he claims he would have objected), delayed ruling on the stay motion for seven months, and should not have granted the motion. But because he does not develop this argument or present any legal authority, it is waived.

In his seventh issue, Mr. Hooks contends the district court should not have sua sponte given Mr. Yandell more time to file a response to Mr. Hooks’s motion to compel production of the ARA grievances allegedly omitted from the *Martinez* report.⁴ But he again fails to develop this argument or cite any relevant legal authorities. Accordingly, it is waived.

B. Issues adequately briefed

We next address the issues Mr. Hooks adequately briefed, beginning with his sixth issue—whether the district court erred in dismissing his case for failure to exhaust his administrative remedies in the manner prescribed by ODOC policy. *See* 42 U.S.C. § 1997e(a) (requiring exhaustion of “such administrative remedies as are available” before a prisoner may bring a § 1983 action concerning prison conditions); *Jones v. Bock*, 549 U.S. 199, 218 (2007) (“[T]o properly exhaust administrative remedies prisoners must complete the administrative review process in accordance with the applicable procedural rules—rules that are defined . . . by the prison grievance process itself.” (internal quotation marks and citation omitted)). Our review is de novo. *Thomas v. Parker*, 609 F.3d 1114, 1117 (10th Cir. 2010).

Mr. Hooks argues as follows: The *Martinez* report was incomplete because it omitted any documentation of his grievance record to support its conclusion that he never appealed to the ARA. Instead, the district court just accepted what was set

⁴ In this issue, Mr. Hooks also contends that grievance appeals should not be omitted from a *Martinez* report. We construe this contention as part of his sixth issue.

forth in the *Martinez* report and Mr. Knutson's affidavit stating that Mr. Hooks had filed no ARA appeals during August-December 2018. By relying on materials outside the record, the court effectively converted the motion to dismiss into one for summary judgment, but it did not give Mr. Hooks an opportunity to file materials in opposition.

For purposes of our analysis, we may assume the district court erred in failing to convert the motion to dismiss into one for summary judgment and permitting discovery. But we must disregard errors that do not affect a litigant's substantial rights. *See* 28 U.S.C. § 2111 (“On the hearing of any appeal . . . the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”). And Mr. Hooks fails to convince us that any error affected his substantial rights. He has not claimed he possesses any materials that would belie the *Martinez* report or Mr. Knutson's affidavit evidencing that Mr. Hooks filed no relevant ARA appeals. Nor has he identified any categories of materials that would do so. Furthermore, Mr. Hooks has made conflicting statements bearing on exhaustion. In his complaint, which was sworn under penalty of perjury, he did not mention any ARA appeals when describing the steps he took to exhaust his administrative remedies; he identified only “request to staff and grievance,” R., Vol. I at 14, which are the second and third steps in ODOC's four-step administrative grievance process. Then, in a later-filed affidavit, Mr. Hooks contradicted the complaint's assertion when he observed that the *Martinez* report failed to include any records of his “grievances that was appealed to

O.D.O.C.,” *id.*, Vol. II at 15, ¶ 3. Finally, in his appellate brief, Mr. Hooks suggests he was hindered in filing appeals because the grievance coordinator “doesn’t always provide [a] grievance appeal form when she find[s] issues with the grievance,” and because he “is max and can’t obtain appeal form without [the grievance coordinator].” Aplt. Opening Br. at 5. This theory, which Mr. Hooks did not advance in the district court, is plainly contrary to his contention that he in fact filed appeals of the relevant grievances.

In sum, we are not persuaded that discovery would have led to a different outcome. Mr. Hooks’s motion to compel the production of any relevant appeals was effectively the document request he necessarily would have had to make if the district court had converted the motion to dismiss into one for summary judgment and permitted Mr. Hooks to propound discovery. The answer to that request was that there was no record of any relevant appeals, and Mr. Hooks has given us no reason to think the result would have been any different if the district court had allowed him discovery. We therefore reject this argument.

In his fourth issue, Mr. Hooks contends the district court erred in not allowing him to amend his complaint to add defendants after submission of the *Martinez* report. Mr. Hooks relies on *Foman v. Davis*, 371 U.S. 178 (1962), apparently for its statement that although district courts have discretion whether to grant leave to amend, “outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.” *Id.* at 182. But *Foman* also listed

“futility of amendment” among the examples of valid reasons to deny leave to amend. *Id.* Here, the district court relied on futility, reasoning that amendment would be futile if the court dismissed the action for failure to exhaust administrative remedies. As it turned out, the court did just that, and Mr. Hooks makes no argument that amendment would have avoided that outcome. He therefore has not demonstrated that the district court abused its discretion in denying his motion for leave to amend.

Finally, in his fifth issue, Mr. Hooks argues the district court should have granted his motions for a preliminary injunction. We need not address the merits of this argument because the district court dismissed his action and entered a final judgment, which moots his appeal of the district court’s orders denying a preliminary injunction. *See Sac & Fox Nation v. Cuomo*, 193 F.3d 1162, 1168 (10th Cir. 1999) (affirming dismissal of complaint and dismissing appeal from denial of preliminary injunction as moot); *U.S. ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1512 (10th Cir. 1988) (explaining that a preliminary injunction is by its nature a temporary measure intended to furnish provisional protection while awaiting a final judgment on the merits and that entry of final judgment moots appeal of preliminary injunction); *Baker v. Bray*, 701 F.2d 119, 122 (10th Cir. 1983) (dismissing appeal of preliminary injunction ruling as moot where district court later dismissed the underlying claim).

III. Conclusion

We affirm the district court's judgment.

Entered for the Court

Jerome A. Holmes
Circuit Judge