United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 11, 2023*
Decided July 12, 2023

Before

DIANE S. SYKES, *Chief Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

Nos. 22-1571 & 22-2481

ANJENAI BOLDEN,
Plaintiff-Appellant,

v.

MICHAEL N. MEZO and JEFFREY L. STALLINS,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Illinois.

No. 18-cv-2197-DWD

David W. Dugan,
Judge.

O R D E R

Anjenai Bolden, an Illinois prisoner, told two prison guards that his cellmate threatened to attack him. The cellmate never followed through, but Bolden sued the guards for failing to protect him from the *risk* of an attack. The district court entered summary judgment for the defendants for two reasons: It found that Bolden did not exhaust his available administrative remedies and Bolden had not alleged an actual injury. The second rationale is straightforward and correct; we thus affirm on that basis.

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

In mid-February of 2018, Bolden was assigned to live with and help a blind and wheelchair-bound inmate. Bolden's cellmate did not want Bolden's help, became hostile, and threatened to attack Bolden. Bolden told two prison guards about the threats. He alleges that they laughed at him, prompting him to file, on February 17, an emergency grievance about their response. After that grievance went unanswered, Bolden wrote to prison administrators, including a written appeal in May.

The cellmate made more threats and accusations but never attacked Bolden. Five days after he filed his emergency grievance, the cellmate threatened to kill Bolden if Bolden tried to help him. Bolden reported this threat to other officers, and they talked to the cellmate to defuse tensions. The cellmate then accused Bolden of rape. Afterward, officers removed Bolden from the joint cell and launched an investigation. While the investigation was underway, the cellmate stole and damaged Bolden's belongings. After the investigation concluded, officials permanently moved Bolden to a different cell. Bolden then filed an unsuccessful grievance complaining that the cellmate had falsely accused him of rape and stolen his personal items.

Invoking 42 U.S.C. § 1983, Bolden sued the two guards who left him with the cellmate after he initially reported the cellmate's threats. He contended that, by failing to protect him from the risk of harm from a hostile cellmate, they violated his Eighth Amendment rights. The district judge allowed this claim to proceed, but dismissed others at screening, 28 U.S.C. § 1915A, and Bolden does not contest that dismissal. The defendants then moved for summary judgment, arguing that Bolden had failed to exhaust administrative remedies because he had not filed a grievance on February 17. The judge held a *Pavey* hearing to resolve the dispute. *See Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008). After a hearing, the judge entered summary judgment for the defendants, giving two reasons. First, he ruled that "there is not sufficient evidence in this case to show that Plaintiff ever filed a February 17 grievance." Second, the judge explained that Bolden failed to state a claim because he did not allege injury from the defendants' inaction. *See Lord v. Beahm*, 952 F.3d 902, 905 (7th Cir. 2020). Bolden then unsuccessfully moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e).

On appeal, Bolden argues only that the judge erred in concluding that he had failed to exhaust. We review a judge's legal rulings in a *Pavey* hearing de novo. *Wallace v. Baldwin*, 55 F.4th 535, 541 (7th Cir. 2022). Here, the judge may have misallocated the burden of proof to Bolden when he ruled that "there is not sufficient evidence in this case to show that Plaintiff ever filed a February 17 grievance." It is a defendant's burden

to prove that a prisoner did not file a grievance, *see Pyles v. Nwaobasi*, 829 F.3d 860, 869 (7th Cir. 2016), not the prisoner's burden to prove that he did.

But summary judgment for the defendants was proper nonetheless. Bolden does not address in his opening brief the judge's ruling that, even if Bolden had exhausted the failure-to-protect claim, he alleged no compensable injury and thus failed to state a claim for relief. We may affirm on this ground because Bolden waived any challenge to this alternative ruling. *See Maher v. City of Chicago*, 547 F.3d 817, 821 (7th Cir. 2008).

In any case, the ruling that Bolden lacks an alleged injury is correct. An injury is necessary for a constitutional tort under § 1983. *Lord,* 952 F.3d at 905. But Bolden never alleged that the cellmate physically harmed him. Moreover, he does not attribute to the defendants his cellmate's destruction of his property. (Nor could he; he alleges that the loss occurred because *other* officials removed Bolden from their shared cell.) Finally, a mere "failure to prevent exposure to risk of harm," without more, is not an injury. *Babcock v. White*, 102 F.3d 267, 272 (7th Cir. 1996). True, a prisoner who lacks a physical injury might recover punitive or nominal damages if a defendant psychologically injured him. *See Thomas v. Illinois*, 697 F.3d 612, 614 (7th Cir. 2012). Bolden, however, never alleged in his complaint that the defendants' failure to remove him from his cell inflicted psychological damage. We are mindful that he testified that he "felt stress" living with the cellmate, but "[n]ot every psychological discomfort a prisoner endures amounts to a constitutional violation." *Calhoun v. DeTella*, 319 F.3d 936, 939 (7th Cir. 2003). And Bolden did not allege or testify that this vague "stress" resulted from the defendants' failure to address the cellmate's threats.

Finally, for completeness, we address an argument contained in Bolden's notice of appeal but not his opening brief. Bolden contends that he should have been granted leave to file an amended complaint that adequately alleged injury. But in his postjudgment motion, Bolden never asked the judge for leave to file an amended complaint to allege an injury from the events in February 2018. According to his postjudgment motion, the allegations he wished to add to his complaint concerned an unrelated claim about the loss of legal materials in late 2021—not anything relevant to the events in February 2018. And on appeal, Bolden does not describe what facts about 2018 he would have included in an amended complaint. Because Bolden never asked to amend his complaint to allege an injury about the relevant events, nor does he explain on appeal how he would have done so, we will not disturb the judgment. *See Haywood v. Massage Envy Franchising, LLC*, 887 F.3d 329, 335 (7th Cir. 2018).

We thus AFFIRM the judgment of the district court.