

UNITED STATES COURT OF APPEALS October 9, 2013

TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

SOLOMON BOWENS,

Plaintiff - Appellant,

v.

STERLING CORRECTIONAL
FACILITY; THE WARDEN, in his
individual capacity, Sterling
Correctional [Facility],

Defendant - Appellee.

No. 13-1160
(D.C. No. 1:13-CV-00081-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

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

Plaintiff-Appellant Solomon Bowens, a Colorado state inmate proceeding pro se, appeals from the dismissal without prejudice of his civil rights complaint, 42 U.S.C. § 1983. Mr. Bowens sought damages for inadequate medical care of multiple sclerosis. Pursuant to Rule 41(b), Fed. R. Civ. P., the district court

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

dismissed the complaint based upon Mr. Bowens' failure to comply with a court order. R. 23-24. The magistrate judge had ordered Mr. Bowens to file an amended complaint that was legible, sued the proper parties, complied with pleading requirements, and alleged the personal participation of each named Defendant. R. 17-22.

Mr. Bowens' notice of appeal was received on April 19, 2013, two days after the 30-day deadline. See Fed. R. App. Proc. 4(a)(1). However, Mr. Bowens submitted a sworn affidavit stating that his notice of appeal was filed in the correctional facility's mail system on April 15, 2013; a statement supported by a copy of the envelope. Based on this evidence, we conclude that Mr. Bowens' notice of appeal was timely. See Fed. R. App. P. 4(c)(1).

Nothing in the record demonstrates that Mr. Bowens timely filed a second amended complaint as directed by the February 5, 2013, order. On appeal, he argues that he requires the assistance of an attorney given his health and also argues the merits of his claim. However, his filing to this court does not substitute for his lack of filing in the district court. Accordingly, the district court did not abuse its discretion in dismissing the complaint. See Cosby v. Meadors, 351 F.3d 1324, 1326 (10th Cir. 2003) (standard of review).

AFFIRMED. We DENY Mr. Bowens' motion for leave to proceed without

prepayment of costs or fees and order immediate payment of the unpaid balance due.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge