

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 3, 2022

Christopher M. Wolpert
Clerk of Court

JOEL ALAN TONEY,

Plaintiff - Appellant,

v.

CAPTAIN GELARDO; DEPUTY
CASE; DEPUTY THOMPSON;
DEPUTY SPICER; DEPUTY
BUNNER, DEPUTY LIPON;
PUEBLO COUNTY SHERIFF'S
OFFICE; PUEBLO COUNTY
DETENTION CENTER,

Defendants - Appellees.

No. 22-1036
(D.C. No. 1:21-CV-02428-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

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

Mr. Joel Toney is an inmate who sued prison officials under 42 U.S.C. § 1983, asserting an Eighth Amendment violation for failure to

* Oral argument would not help us decide the appeal, so we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, *res judicata*, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

provide an N-95 mask. The district court summarily dismissed the action, reasoning that Mr. Toney had failed to adequately allege deliberate indifference.

On appeal, Mr. Toney alleges that authorities failed to provide any masks despite repeated requests. But he didn't make this allegation in the complaint, and it's too late to add the allegation here. *See Smith v. Plati*, 258 F.3d 1167, 1172 n.2 (10th Cir. 2001) (considering the allegations made in the complaint but not the allegations asserted in an appellate brief). So we do not consider Mr. Toney's new allegation.

For the allegation that he did not receive an N-95 mask, Mr. Toney doesn't present any reason to question the district court's reasoning. So we affirm the dismissal. *See Nixon v. City and Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015).

Mr. Toney also seeks leave to proceed in forma pauperis. We grant leave because Mr. Toney cannot afford to prepay the filing fee. Mr. Toney must continue making partial payments until the filing fee is paid in full.

Entered for the Court

Robert E. Bacharach
Circuit Judge