

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 5, 2023

Christopher M. Wolpert
Clerk of Court

HESHIMO YAPHET CARR,

Plaintiff - Appellant,

v.

EL PASO COUNTY JAIL; EL PASO
COUNTY BOARD OF COUNTY
COMMISSIONERS; EL PASO COUNTY
SHERIFF OFFICE; WELLPATH, LLC;
BILL ELDER; CY GILLESPIE,

Defendants - Appellees.

No. 23-1104
(D.C. No. 1:21-CV-00392-RBJ-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON, BRISCOE**, and **EID**, Circuit Judges.

Heshimo Yaphet Carr, a Colorado inmate proceeding pro se,¹ sued the El Paso County Jail and other El Paso County entities and officials (collectively, “Appellees”)

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

¹ Because Mr. Carr appears pro se, “we liberally construe his filings, but we will not act as his advocate.” *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

under 42 U.S.C. § 1983. He alleged that Appellees violated his Eighth and Fourteenth Amendment rights by failing to adequately protect him from COVID-19 while he was incarcerated at the El Paso County Jail. The district court dismissed Mr. Carr’s complaint, concluding he failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act (“PLRA”). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Legal Background*

1. Exhaustion Under the PLRA

The PLRA provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner . . . until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). “There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.” *Jones v. Bock*, 549 U.S. 199, 211 (2007). We review de novo a district court’s finding that an inmate failed to exhaust his administrative remedies. *Thomas v. Parker*, 609 F.3d 1114, 1117 (10th Cir. 2010).

A plaintiff exhausts administrative remedies “by properly following all of the steps laid out in the prison system’s grievance procedure.” *Little v. Jones*, 607 F.3d 1245, 1249 (10th Cir. 2010). “The applicable procedural rules that a prisoner must properly exhaust are defined not by the PLRA, but by the prison grievance process itself.” *Jones*, 549 U.S. at 200 (citations and quotations omitted).

The PLRA requires the exhaustion of only those administrative remedies “as are available.” 42 U.S.C. § 1997e(a); *see also Ross v. Blake*, 578 U.S. 632, 643-44 (2016). “[T]he failure [by jail officials] to respond to a grievance within the time limits contained in [a jail’s] grievance policy renders an administrative remedy unavailable.” *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002).

2. El Paso County Jail Grievance Procedures

The El Paso County Jail’s inmate handbook details the jail’s grievance process. An inmate must first seek informal resolution by “bring[ing] the grievance, orally, to the Ward Deputy.” ROA, Vol. 2 at 160. The inmate may then seek formal resolution by “send[ing] a [written] grievance through [a] kiosk.” *Id.*

The written grievance “must detail something personally affecting [the] inmate concerning conditions of confinement.” *Id.* “The details . . . should be specific, including the date, time and location of the incident or situation, other persons involved and how the situation affected the inmate.” *Id.*

An inmate who files a grievance “will receive a response . . . within 10 business days.” *Id.* If the reviewing staff member deems the grievance an “emergency,” the inmate will receive a response within 48 hours. *Id.* at 161. An inmate is entitled to one appeal.

B. *Mr. Carr’s Grievances*

On November 25, 2020, Mr. Carr filed a grievance stating:

THIS IS A[N] EMERGENCY GRIEVANCE OVER THE
JAIL[’]S POLICIES REGARDING COVID-[1]9. THE JAIL
IS FAILING TO PROTECT ME [] FROM COVID-[1]9

AND IT FAILS TO DEAL PROPERLY WITH INMATES WHO CONTRACT COVID-19. I ASK THE JAIL TO FOLLOW THE CDC RECOMMENDATIONS AND THE MEDICAL STANDARD OF CARE.

Id. at 156.

On November 27, 2020, Mr. Carr filed a second grievance stating:

I FILED AN EMERGENCY GRIEVANCE ON 11-25-20 APPROX 12PM OVER THE JAIL[']S POLICIES REGARDING COVID-19. THE JAIL IS FAILING TO PROTECT ME FROM COVID-19 AND IT FAILS TO DEAL PROPERLY WITH INMATES WHO CONTRACT COVID-19. I ASKED THE JAIL TO FOLLOW THE CDC RECOMMENDATIONS AND THE MEDICAL STANDARD OF CARE. THE JAIL DENIED MY GRIEVANCE BY FAILING TO RESPOND WITHIN 48 HOURS. THIS IS AN APPEAL TO SAID GRIEVANCE.

Id. at 157.

On December 3, 2020—six business days after Mr. Carr filed his first grievance—

El Paso County Jail employee Nicole Frahm responded to both grievances. In response to the first one, Ms. Frahm wrote:

We have been working closely with the local and state Health Departments and have followed all recommendations in our response to the COVID-19 pandemic. Your grievance is very general and does not identify an emergency situation. We need you to state your specific concerns, so we can properly address them. At this time your grievance has not been denied, however it will be closed. You will need to submit a separate grievance to clarify your concerns.

Id. at 156. Ms. Frahm responded to Mr. Carr's second grievance by stating: "Your grievance didn't identify an emergency situation and wasn't deemed an emergency grievance." *Id.* at 157.

C. District Court Proceedings

On February 8, 2021, Mr. Carr filed a lawsuit in the District of Colorado alleging the jail failed to adequately protect him from COVID-19. The court dismissed his initial complaint without prejudice for failure to establish he had exhausted administrative remedies as required by the PLRA. Mr. Carr next filed his First Amended Complaint. Appellees sought dismissal for failure to exhaust.

The district court granted Appellees' motion to dismiss, finding "defects in the filing of [Mr. Carr's] formal grievance that . . . constitute failure to exhaust." *Id.* at 280. The court held "the jail . . . was entitled to reject Mr. Carr's initial [grievance] based on its determination that the failure to include many . . . of the details enumerated in the handbook rendered the grievance inadequate." *Id.* at 282. It further noted that Mr. Carr's "subsequent failure to submit a revised grievance" after Ms. Frahm's response "constitute[d] a failure to pursue a remedy that was 'available' in both the colloquial sense and the legal sense." *Id.* Finally, because the reviewing staff member retained discretion to determine which complaints were emergency grievances, the court concluded that the jail's failure to respond to Mr. Carr's self-designated "emergency" grievance within 48 hours did not render the emergency remedy unavailable. *Id.* at 283. The court dismissed Mr. Carr's claims without prejudice.

II. ANALYSIS

On appeal, Mr. Carr argues he exhausted his administrative remedies because jail officials failed to (1) review his original grievance and inform him it was "not considered

[an] emergency” or (2) respond to his grievance within 48 hours.² Aplt. Br. at 2, 4. We disagree.

Although “the failure to respond to a grievance within the time limits contained in [a jail’s] grievance policy renders an administrative remedy unavailable,” *Jernigan*, 304 F.3d at 1032, the El Paso County Jail responded to Mr. Carr’s grievance within the time limit contained in its grievance policy.

First, Ms. Frahm, the reviewing staff member, had discretion to “determine whether or not [his] grievance warrant[ed] an emergency response.” *See* ROA, Vol. 2 at 161. Mr. Carr’s designation of his grievances as emergency filings did not trigger the 48-hour emergency response deadline. Second, the jail’s policy does not state that an inmate will receive a notification within 48 hours if his grievance is not deemed an emergency. The jail thus needed only to respond to Mr. Carr’s grievances within 10 business days. It did. Mr. Carr received a response to both of his grievances six business days after he filed the first one. Once Mr. Carr received this response, he failed to pursue his grievances within the jail’s formal grievance procedure, which constituted a failure to exhaust all available administrative remedies.

² In his reply brief, Mr. Carr additionally alleges the grievance process was unavailable under the PLRA because Appellees intentionally denied him access to the kiosk and otherwise prevented him from filing grievances. *See* Aplt. Reply Br. at 17 (citing *Ross*, 578 U.S. 632). Because Mr. Carr did not raise this argument before the district court and raises this issue for the first time in his reply brief, we decline to review it. *See Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000).

III. CONCLUSION

We affirm the district court's decision that Mr. Carr failed to exhaust his administrative remedies. We grant Mr. Carr's motion to proceed *in forma pauperis* in this appeal and remind him of his obligation to make partial payments until the filing fee has been paid in full.³

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

³ Because Mr. Carr raises arguments in his supplemental brief that were not raised in the district court or in his opening brief, we deny his motion to file a supplement to the opening brief. *See Allen v. Crow*, 2023 WL 5319809, at *3 (10th Cir. Aug. 18, 2023) (unpublished) (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1). We also deny Mr. Carr's motion to supplement the record on appeal. Fed. R. App. P. 10(e)(2). Though Mr. Carr is pro se, he is subject to the same procedural rules governing other litigants. *See United States v. Green*, 886 F.3d 1300, 1307-08 (10th Cir. 2018) (stating that a litigant's pro se status did not excuse failure to comply with a general procedural rule).