

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 17, 2021*
Decided August 17, 2021

Before

MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 20-1313

DAVID PANNELL,
Plaintiff-Appellant,

Appeal from the United States District Court
for the Southern District of Indiana,
Terre Haute Division.

v.

No. 2:18-cv-00522-JRS-DLP

SARAH EADS, et al.,
Defendants-Appellees.

James R. Sweeney II,
Judge.

ORDER

David Pannell, an Indiana prisoner, appeals the dismissal of two claims arising from the decision of prison staff to confiscate his legal books and to limit his access to the prison's library. He alleges, first, that they did so to retaliate against him for filing grievances, thereby violating his rights under the First Amendment. *See* 42 U.S.C. § 1983. He also claims that they took his property without a hearing, violating his right

* We have agreed to decide this 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).

to due process under the Fourteenth Amendment. *Id.* The district court dismissed the suit for failing to state a claim. It correctly dismissed the due-process claim, reasoning that a post-deprivation tort remedy provides Pannell with adequate process for the allegedly unauthorized taking of his books. But, as the defendants concede, the district court applied the wrong standard to Pannell's First Amendment claim, requiring that we vacate the judgment on that claim and remand.

Pannell brought nearly 90 legal books with him when he transferred from Indiana State Penitentiary to Putnamville Correctional Facility in May 2018. Corrections officers allowed him to keep ten books in his cell, explaining that he could access the other books at the prison library three times a week. Three months later, when the library changed its schedule, Pannell could access those books only two days a week. He complained, both informally and then through the grievance process, that the prison librarian, Sarah Eads, and others were restricting his access to the courts by so limiting his access to his books in the library. Around this time, Eads inventoried Pannell's books and determined that a third of them were stolen. Pannell received a conduct report for possessing stolen property, and those books were confiscated.

Believing that prison officials wrongly disciplined him and stole his library books, Pannell filed new grievances and then sued in state court on two claims relevant here. He alleges that the defendants first violated the First Amendment by restricting access to his legal books and the library to retaliate for his past grievances; second, they violated his rights under the Fourteenth Amendment by confiscating the books without a hearing in which he could prove that they were his. Defendants removed the case to federal court, where Pannell has three strikes, 28 U.S.C. § 1915(g), and faces a filing bar. *See Support Sys. Int'l v. Mack*, 45 F.3d 185, 186 (7th Cir. 1995). The district court ruled that Pannell's complaint fell outside of the filing bar, *see Pannell v. Neal*, Nos. 17-1536, 17-1573 (Apr. 11, 2017 Order), and the defendants do not dispute this on appeal.

The district court dismissed Pannell's amended complaint at screening for failing to state a claim. 28 U.S.C. § 1915A(b). The judge explained that Pannell "ple[aded] himself out of court" on his First Amendment claim by admitting that he filed more grievances despite defendants' alleged retaliation. The judge also dismissed the Fourteenth Amendment claim, reasoning that Pannell had an available and adequate post-deprivation remedy, the Indiana Tort Claims Act. Ind. Code § 34-13-3-7.

On appeal, Pannell argues—and defendants agree—that the district court applied the wrong standard to his First Amendment claim and it must be reinstated.

We ruled in *Douglas v. Reeves*, 964 F.3d 643, 646 (7th Cir. 2020), that the test for determining whether prison staff violated a prisoner's First Amendment right to bring grievances is objective: would the response of prison staff to a prisoner's grievance deter a prisoner of "ordinary firmness" from seeking redress. *Id.* The actual persistence of the plaintiff in continuing to file grievances despite alleged retaliation by prison staff is "irrelevant." *Id.* But as the defendants concede, the district court focused on Pannell's undeterred persistence in filing new grievances after the defendants removed library access and law books, rather than on how an "ordinary" inmate would react. Following the defendants' suggestion, we remand the First Amendment claim for that inquiry.

But the remand on this claim is narrow. First, it covers only the defendants personally involved in removing access to the books. *See Grieveson v. Anderson*, 538 F.3d 763, 776 (7th Cir. 2008). The parties dispute who was personally involved, so the district court will need to resolve this dispute. Also on remand, the district court can consider the availability of possible defenses. A few weeks before the district court dismissed this suit, an Indiana court dismissed on the merits a nearly identical complaint in state court. *See Pannell v. Carter*, 157 N.E.3d 1263 (Ind. Ct. App. 2020). The conclusion of the state proceedings on this same claim may raise the prospect of a preclusion defense. Finally, if the prison found after a disciplinary proceeding that Pannell did not own the books (and as a result confiscated them and lengthened his custody), then a civil-rights suit that, to succeed, requires a finding that he owned the books, may be blocked. *See Savory v. Cannon*, 947 F.3d 409, 423–24 (7th Cir. 2019) (en banc).

Pannell's Fourteenth Amendment claim—that the defendants took his books without first providing a hearing at which he could establish his ownership of them—fails. He contends that the defendants stole his books by ignoring the regular process for discipline. This process requires that "[b]efore imposing any disciplinary action," the prison "shall" give the inmate a chance to contest allegations against him. Ind. Code Ann. § 11-11-5-5. But an allegation that prison officials stole an inmate's property by using unauthorized means to take it does not state a due-process violation if the state provides him with an "adequate post-deprivation remedy." *See Hudson v. Palmer*, 468 U.S. 517, 536 (1984). The Indiana Tort Claims Act provides a post-deprivation remedy for the precise kind of theft of property that Pannell has alleged. Because Pannell does not argue that this remedy is inadequate, his due-process claim fails.

Accordingly, we VACATE the judgment on the First Amendment claim and REMAND it for further proceedings. In all other respects, we AFFIRM.