

STATE OF MICHIGAN
COURT OF APPEALS

STANLEY BOSWELL,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT
OF CORRECTIONS,

Defendant-Appellee..

UNPUBLISHED

August 6, 1996

No. 178803

LC No. 94-2558 CZ

Before: Marilyn Kelly, P.J., and MacKenzie and R. J. Ernst*, JJ.

MEMORANDUM.

Plaintiff inmate appeals as of right from the circuit court's order granting summary disposition in favor of defendant. The order dismissed plaintiff's 42 USC 1983 action seeking injunctive relief and money damages to compensate plaintiff for alleged violations of his right to have out-of-cell exercise time. We affirm.

This Court reviews de novo a trial court's determination concerning a motion for summary disposition. A motion for summary disposition under MCR 2.116(C)(8) tests the legal basis of the complaint. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Taking the factual allegations of the complaint as true, the motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

Plaintiff was given a major misconduct ticket and housed in punitive segregation. Department of Corrections policy holds that inmates who have received a major misconduct ticket are subject to sanctions which include being placed in toplock. Policy also holds that prisoners placed in toplock are restricted to their own cells and are not automatically entitled to out-of-cell exercise time. Plaintiff's argument that he should have been allowed out-of-cell exercise time fails since the rules clearly state that inmates confined in *punitive* segregation "shall be provided such exercise only after being confined to

* Circuit judge, sitting on the Court of Appeals by assignment.

punitive segregation for more than 30 consecutive days...”. PD-04.05.120(A). Plaintiff does not argue that he did not receive the major misconduct ticket or that he was not confined in punitive segregation. Therefore, the Department violated no rules when depriving plaintiff of out-of-cell exercise while being held in punitive segregation, and summary disposition was proper.

Plaintiff’s claim that denying him out-of-cell exercise time violates the Eighth Amendment is not preserved for appeal because it was not raised at the trial court level, and would not have been decisive to the outcome of plaintiff’s case had it been raised. Plaintiff did not allege that he was totally deprived of exercise time, only for the thirty days of his discipline. See *Patterson v Mintzes*, 71 F2d 284, 289 (CA 6, 1983). Consequently, plaintiff’s Eighth Amendment claim fails.

Affirmed.

/s/ Marilyn Kelly
/s/ Barbara B. MacKenzie
/s/ Richard J. Ernst