STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0710

Raymond L. Semler,
Appellant,

vs.

Wendy K. McGowan, et al.,
Respondents.

Filed January 6, 2020
Affirmed
Reilly, Judge

Ramsey County District Court
File No. 62-CV-18-6461

Raymond L. Semler, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Michael N. Leonard, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and Cochran, Judge.

U N P U B L I S H E D O P I N I O N

REILLY, Judge

Pro se appellant challenges the dismissal of his claims arising out of alleged violations of his constitutional rights while committed to the Minnesota Sex Offender Program. Appellant asserts that the district court erred by determining that (1) some of his claims are barred under the doctrine of collateral estoppel; (2) he did not state a viable due-

process claim; and (3) some of his claims are barred by the doctrine of qualified immunity. Because the district court did not err, we affirm.

FACTS

Appellant Raymond L. Semler is civilly committed to the Minnesota Sex Offender Program (MSOP). MSOP has various facility policies in place, including a mail policy and a policy pertaining to sending property out of the facility. MSOP's mail policy provides that MSOP clients are required to leave outgoing mail, excluding privileged mail, unsealed in the "general outgoing mailbox." Staff visually inspect and scan all outgoing mail except privileged mail and read outgoing mail "if there is a reasonable suspicion the contents constitute a risk to the safety and security of the facility, specific individuals or the general public, or when there is a reason to believe the client or the recipient is involved in criminal activity." The purpose of the mail policy is to "provide procedures for managing incoming and outgoing client mail to prevent the possible introduction of contraband and maintain the safety and security of the facility, staff and public."

MSOP's policy pertaining to sending property out of the facility provides procedures for clients to send property and personal documents out of the facility with visitors. Mail is not included in the list of property or documents clients may send out with visitors. Clients are required to sign a Notice and Receipt of Secured Items form (N&R form) and bring it to special services in order to send items out with visitors. MSOP staff document the items on the form and then place the property in a designated area. The client receives a property tag, brings the property tag to the visit, and gives the tag to the visitors. After the visit, an MSOP staff member retrieves the property from the designated area.

In May and June of 2018, appellant had various items approved by MSOP staff and documented on two separate N&R forms. Appellant intended to send the items out of the facility with his parents when they came for a visit. Security Counselors Wendy McGowan and Christopher Hall were posted in the visiting area on the day of appellant's visits with his parents. Appellant gave McGowan a property tag indicating that he had property to be sent out with his parents. McGowan retrieved the property from the property cage and scanned the property to ensure the items listed on the N&R forms were included. McGowan, Officer Kevin Carlson, and Unit Director Derrick Koecher reviewed and discussed eight of the items and determined that appellant "failed to comply with [the] Client Mail" policy because appellant attempted to send various items of mail out of the facility on the visit. The team decided that appellant would be issued a Major Behavioral Expectations Report (BER) for failure to comply with the mail policy as well as other misconduct. The items were secured. Appellant was informed of the BER the following day.

Appellant attended his BER hearing and was allowed to present a defense. Appellant was found in violation of MSOP policies and assigned six days of restricted status. He appealed this decision to Assistant Facility Director Terry Kneisel, requesting that the BER be dismissed. Kneisel affirmed the BER and restrictions. Appellant then appealed Kneisel's decision to the MSOP chief executive officer. MSOP Deputy Director James Berg responded and affirmed the BER.

In September 2018, appellant filed a complaint with the Ramsey County District Court alleging that respondents-MSOP-employees,[1] had violated his rights under the United States Constitution. Specifically, appellant asserted that "[Respondents] had no reasonable justification or reasonable suspicion to confiscate, read, and hold [appellant's] mail which had already been approved by Property Staff prior to [appellant's] visit." Appellant also asserted that

> [Respondents] violated [appellant's] Constitutional rights to: (1) be free from unjustified freedom of expression (correspondence); (2) unjustified illegal search and seizure; (3) unjustified due process of law; (4) denial of due process of law at the [BER] Hearing [appellant] attended, as the hearing panel stated and held: "It did not matter that the mail was approved to be sent out by property staff," [appellant] was circumventing the mail policy, and assigned [appellant] 6 days of RS3; (5) unjustified holding of legal mail to [appellant's] attorney.

Finally, appellant alleged that "[Respondents] clearly violated their own policies and procedures without any due process of law." Appellant requested declaratory and injunctive relief, equitable relief and to "enjoin future violations."

Respondents moved to dismiss appellant's complaint pursuant to Minn. R. Civ. P. 12.02(e), arguing that appellant's claims should be dismissed because: they were barred by collateral estoppel, appellant failed to state a claim for substantive or procedural due process violations, the inspection and securing of appellant's mail did not violate the First

[1] Respondents-MSOP-employees include: Wendy K. McGowan, Christopher M. Hall, Derrick J. Koecher, Kevin Carlson, Scott Benoit, Jaime Wuori, Steve Sajdak, Amanda Furey, Rebecca Benson, Terry Kneisel, Cory Vargason, James Berg, and Jensina Rosen.

or Fourth Amendments, and the respondents in their individual capacities are entitled to qualified immunity.

The district court granted respondents' motion to dismiss for failure to state a claim and dismissed appellant's complaint with prejudice. The district court determined that: appellant's claims are barred by collateral estoppel, appellant failed to state a procedural or substantive due process claim and, alternatively, respondents are entitled to qualified immunity. This appeal follows.

D E C I S I O N

"In reviewing cases involving dismissal for failure to state a claim upon which relief can be granted pursuant to Rule 12.02(e), the question before the appellate court is whether the complaint sets forth a legally sufficient claim for relief." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citation omitted). This court considers "only the facts alleged in the complaint, accepting those facts as true[,] and must construe all reasonable inferences in favor of the nonmoving party." *Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008) (citation omitted). "When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before this court is whether the complaint sets forth a legally sufficient claim for relief." *Id*. (citation omitted).

I. The district court did not err when it concluded that some of appellant's claims are barred by collateral estoppel.

Appellant appears to argue that collateral estoppel does not apply to his claims because the issues are not identical to those previously litigated. "Collateral estoppel, also

known as issue preclusion, prohibits a party from relitigating issues that have been previously adjudicated." *Barth v. Stenwick*, 761 N.W.2d 502, 507 (Minn. App. 2009). Collateral estoppel will bar the relitigation of an issue when:

> (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits in the prior proceeding; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id. at 508. "A basic prerequisite to the application of collateral estoppel is that the issue now involved is identical to one previously litigated." *Id*. at 509. "For collateral-estoppel purposes, issues are identical when the issues presented by [the current] litigation are in substance the same as those resolved in the previous litigation." *All Finish Concrete, Inc. v. Erickson*, 899 N.W.2d 557, 567 (Minn. App. 2017) (quotation and citation omitted). "Whether collateral estoppel precludes litigation of an issue is a mixed question of law and fact that we review de novo." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). Because appellant only challenges the district court's determinations that the issues in the present litigation are identical to those in a prior adjudication, we only consider the first element of the collateral-estoppel analysis on appeal.[2]

[2] Though appellant does not contest being a party to the prior adjudications relied on by the district court, we note that appellant was the plaintiff in *Semler v. Ludeman*, No. A08-1123, 2009 WL 1919302 (Minn. App. July 7, 2009) (*Semler 2009*) and *Semler v. Ludeman*, No. 09-cv-732 (ADM/SRN), 2010 WL 145275 (D. Minn. Jan. 8, 2010) (*Semler 2010*), and part of the class of plaintiffs in *Karsjens v. Piper*, 336 F. Supp. 3d 974 (D. Minn. 2018). In all three cases, appellant challenged the constitutionality of various MSOP policies.

With respect to appellant's First Amendment claim, the district court concluded that the first element was satisfied because appellant's current complaint raised the same First Amendment issues as previous litigation in which he was one of the plaintiffs. The district court relied on *Karsjens.* In *Karsjens,* the plaintiffs challenged MSOP's mail policy, arguing that the "policies infringe their speech and association rights under the First Amendment." 336 F.Supp.3d at 994. The *Karsjens* court concluded that the plaintiffs "failed to raise a genuine dispute over whether Defendants' policies implicating speech and association are an unreasonable restriction on Plaintiffs' First Amendment rights as applied to the Class as a whole" and granted summary judgment in favor of defendants. *Id.* In the present matter, appellant argued that by enforcing MSOP policies, the respondents violated his rights under the First Amendment because he "has a Constitutional right to correspond with whomever he wishes." The First Amendment issue in *Karsjens* is substantively the same as the current First Amendment issue. The district court did not err when it concluded that the issue litigated in *Karsjens* is the same as the issue in the present case.

With respect to appellant's Fourth Amendment claim, the district court concluded that the first element was satisfied regarding appellant's "contention that the mail policy violated his Fourth Amendment right against unreasonable searches and seizures." The district court relied on *Semler 2010,* which considered whether MSOP's room search policy violated the Fourth Amendment. 2010 WL 145275, at *1. The district court noted that while the facts in *Semler 2010* were different from the present case, the substantive issue was the same. We conclude that the district court erred in this regard. Appellant's prior claim that MSOP staff violated his Fourth Amendment rights when they conducted random

room searches is not substantively the same as the current issue of whether respondents violated appellant's Fourth Amendment rights when they inspected his outgoing mail. However, even if the district court did err in its analysis, we conclude that the error is harmless.

In *Semler 2010*, the court considered various Fourth Amendment claims regarding MSOP search policies, including policies requiring clients to submit to pat searches following gym use and kitchen work, unclothed visual body searches after contact visits, and random room searches for suspected contraband. *Id*. at *16. The court applied *Bell v. Wolfish*, which requires consideration of "the scope of the particular intrusion, the manner in which [the search] is conducted, the justification for initiating it, and the place in which it is conducted," while also taking into account "the expert judgment" of officials adopting and implementing the policies at issue. 441 U.S. 520, 548, 559, 99 S. Ct. 1861, 1879, 1884 (1979). The *Semler 2010* court ultimately concluded that based on its consideration of the *Bell* factors and the government's interest in institutional security, MSOP's various search policies are reasonable and do not violate MSOP clients' Fourth Amendment rights. 2010 WL 145275, at *22. This same reasoning applies to appellant's present Fourth Amendment claim regarding searches of his mail, as mail searches pursuant to MSOP's mail policy are likewise reasonable under the *Bell* analysis. The scope of the intrusion into client mail is limited, the searches are conducted pursuant to MSOP policy, and are justified by MSOP's need for facility security. As such, while the district court erred in concluding that the issue in *Semler 2010* and the current case are identical for purposes of collateral estoppel, we

conclude that this error is harmless because *Bell* is dispositive of the legal issue in the present case. *See* Minn. R. Civ. P. 61 (requiring court to disregard harmless error).

With respect to appellant's Fourteenth Amendment claim, the district court concluded that collateral estoppel precluded appellant's claim that "MSOP's mail policy violated his rights under the Fourteenth Amendment" because the same Fourteenth Amendment issue was litigated in *Semler 2009*. In *Semler 2009*, this court considered appellant's challenges to actions taken with his non-legal outgoing mail. 2009 WL 1919302, at *3. Appellant claimed that his mail was being "opened, searched, scanned, read, and copied." *Id*. at *2. We noted that appellant "frequently invoked the due-process clause in his complaint" and other papers. *Id*. at *4. We then noted that mailroom procedures are sufficient if "the institution gave notice when mail was rejected, gave the inmate a reasonable opportunity to protest, and referred complaints to a prison official 'other than the person who originally disapproved the correspondence.'" *Id*. (citation omitted). We concluded that the requirements of due process were met because appellant was informed of interferences with his mail and appellant utilized the MSOP internal grievance procedure. *Id*.

In the case at hand, appellant alleged that respondents, "implemented, retained and carried out policies through the MSOP that violated [appellant's] . . . Fourteenth Amendment (Due process, Procedural Due Process and Substantive Due Process) rights." Appellant appears to again challenge MSOP's practice of scanning, reading, and confiscating his mail, and again contends that MSOP's mail policy violates his rights under

the Fourteenth Amendment. The same issue was considered and decided in *Semler 2009*. The district court did not err in so concluding.

II. The district court did not err when it concluded that appellant failed to state a claim for relief based on alleged violations of his procedural and substantive due-process rights.

a. Procedural Due Process

Appellant argues that his procedural due-process rights were violated because he was "arbitrarily punished" for attempting to send mail out on a visit when he had been allowed to do so for the previous 13 years. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976). "To establish the existence of a procedural due process violation, a plaintiff must first show that he had a liberty or property interest and that state action deprived him of that protected interest." *Phillips v. State*, 725 N.W.2d 778, 782 (Minn. App. 2007). The government has no constitutional obligation to provide due process where no protected interest exists. *Id.* "Whether the government has violated a person's procedural due process rights is a question of law that we review de novo." *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012).

In his complaint, appellant asserted that "[respondents] clearly violated their own policies and procedures without any due process of law." First, appellant failed to establish that a protected interest existed because there is no protected interest for an institution's

breach of its own policy. *See Phillips*, 725 N.W.2d at 783 (stating that a university's "failure to follow its procedural rules and regulations does not, by itself, give rise to a protected property or liberty interest").

Moreover, due process requires "notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Sawh*, 823 N.W.2d at 632 (quotation omitted). Even if appellant could establish a protected interest, appellant was afforded both notice and an opportunity to be heard regarding the BER. In his complaint, appellant noted that he was given a BER regarding the incident on June 24, 2018, after he attempted to send mail out on a visit. The BER informed appellant of his alleged violations of MSOP policies. Appellant was then afforded a hearing on the BER on June 28, 2018, where appellant was allowed to present his defense. Appellant subsequently appealed the decision on July 1, 2018 and again on July 5, 2018. Appellant was provided both notice and a meaningful opportunity to be heard. The district court did not err when it dismissed appellant's procedural-due-process claim.

b. Substantive Due Process

Appellant argues that he was denied substantive due process when he received a BER after he attempted to send mail out on a visit. "A cognizable claim of a Fourteenth Amendment substantive due process violation must describe governmental conduct so egregious that it shocks the conscience." *Mumm v. Mornson*, 708 N.W.2d 475, 487 (Minn. 2006) (quotation omitted). "Only the most extreme instances of governmental misconduct satisfy this exacting standard." *Id*.

After reviewing appellant's complaint, we conclude that none of respondents' actions amount to "egregious" conduct that "shocks the conscience." MSOP staff followed facility policies and procedures, none of which have been found to violate the rights of MSOP clients. The district court did not err when it dismissed appellant's substantive-due-process claims.

III. The district court did not err when it concluded that some of appellant's claims are barred by qualified immunity.

Appellant argues that the district court erred when it determined that respondents are entitled to qualified immunity. "Qualified immunity protects government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Williams v. Bd. of Regents of Univ. of Minn.*, 763 N.W.2d 646, 654 (Minn. App. 2009). To determine whether qualified immunity applies, courts first consider whether the plaintiff has alleged facts showing the violation of a constitutional right and second, whether this right was "clearly established" at the time of the alleged violation. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 815-16 (2009). "By focusing on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, the test for qualified immunity is intended both to avoid excessively disrupting government functioning and to deter unlawful conduct." *Simmons v. Fabian*, 743 N.W.2d 281, 286 (Minn. App. 2007) (quotation omitted). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986).

Respondents, in their individual capacities, raised qualified immunity as a defense to appellant's complaint. The district court determined that (1) there was "no known constitutional or statutory right that prevents [respondents] . . . from inspecting and retaining outgoing mail for investigative purposes pursuant to the mail policy"; (2) there was no "clearly established statutory or constitutional right that prohibits all [respondents] from complying and ordering [appellant] to comply with the mail policy"; and (3) that the respondents "acted reasonably," "followed MSOP procedure," and would not have known their actions were unlawful.

We are not aware of any "clearly established law" prohibiting MSOP officials from inspecting and retaining outgoing mail for investigative purposes or prohibiting MSOP officials from complying with and ordering appellant to comply with the MSOP mail policy. And appellant does not provide any legal authority establishing such prohibitions. The district court did not err when it concluded that respondents did not knowingly violate any "clearly established law" and that respondents' actions were not objectively unreasonable.

Affirmed.