IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eric Maple, Petitioner	:	
	:	No. 107 M.D. 2020
v.	:	
	:	Submitted: December 4, 2020
Pennsylvania Department of Corrections, Respondent	:	

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE J. ANDREW CROMPTON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: September 30, 2021

Eric Maple filed a petition for review (PFR),[1] *pro se*, in this Court's original jurisdiction on February 19, 2020. Maple alleges that the Pennsylvania Department of Corrections (DOC) violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution,[2] section 5901 of the Prisons and Parole Code (Code), 61 Pa.C.S §5901, and administrative regulations. In response, the DOC filed preliminary objections (POs), arguing that Maple failed to state a claim upon which relief may be granted. After it filed POs, the DOC filed an application for relief

[1] After filing his PFR, this Court alerted Maple that his filing was defective because he did not pay the appropriate filing fee. On February 18, 2020, he requested to file *in forma pauperis*, and this Court granted that request on February 27, 2020.

[2] U.S. Const. amend. VIII and XIV.

seeking to dismiss the PFR and to revoke Maple's *in forma pauperis* status. Upon consideration of the DOC's POs, we overrule the POs in part, and sustain them in part.

Maple, at the time his PFR was filed, was confined in the Level Five Restricted Housing Unit (RHU) within the Diversionary Treatment Unit at the State Correctional Institution (SCI) at Houtzdale.[3] (PFR ¶2.) In his PFR, Maple generally alleged that the DOC denied him meaningful exercise by failing to provide him with the proper footwear to perform cardiovascular exercise necessary for his health. (PFR ¶4.)

The PFR reveals the following factual allegations. Maple has been in solitary confinement since September 2016. (PFR ¶10.) He was placed on "restricted release" in 2017, which requires approval from the Secretary of Corrections to release him from solitary confinement. (PFR ¶11.) He was placed in an RHU at SCI-Houtzdale in May of 2019. (PFR ¶12.) SCI-Houtzdale prisoners are not permitted to wear white canvas sneakers, as dictated by the DOC's policy, DC-ADM 801, and are instead issued rubber slippers, which are required to be used for outdoor exercise in the spring and summer months.[4] (PFR ¶¶13, 15.) Maple requested appropriate footwear for exercise, but the DOC denied his request. (PFR ¶19.) Maple injured his ankle while trying to exercise in these slippers on or about October 11, 2019. (PFR ¶16.) He alerted medical staff of the injury and nothing happened. (PFR ¶17.)[5] Between July

[3] On April 20, 2021, by letter, Maple notified this Court that he had been moved to SCI-Phoenix.

[4] Prisoners are provided with boots in the winter months, which they can only wear outdoors. (PFR ¶¶23-24.) Maple explained that outdoor exercise occurs between 7:00 a.m. and 9:00 a.m. (PFR ¶25.)

[5] Attached to Maple's PFR as Exhibit D is a final decision from the Office of Inmate Grievances and Appeals, which states:

(Footnote continued on next page…)

2019 and October 2019, Maple was diagnosed with edema[6] in his lower extremities due to lack of exercise. (PFR ¶18.) Maple argues that he was healthy before being placed in the RHU. (PFR ¶26.)[7] He alleges that cardiovascular exercise is needed to ensure good mental and physical health and it is not safe to perform high impact or low impact cardiovascular exercise in slippers or without proper footwear. (PFR ¶¶20-21.) Following his injury, he filed "an inmate complaint," which was denied. (PFR ¶22.) Several prisoners have injured themselves while exercising in these slippers or have discontinued cardiovascular exercise. (PFR ¶14.)[8]

Legally, Maple argues that these facts constitute a denial of meaningful exercise, which is a violation of his Eighth and Fourteenth Amendment rights under the United States Constitution, and a violation of section 5901 of the Code, 61 Pa.C.S. §5901. (PFR ¶5.) Specifically, he argues that the denial of meaningful exercise

---

> On [October 11, 2019], you [(Maple)] injured your ankle while exercising because you were provided with improper footwear. You say that on [October 12, 2019], you gave a sick call request to CO1 Martin to give [to] Nurse Kathie; however, you were never seen at sick call. You say that at pill line that evening you showed Nurse Kathie your swollen ankle. . . . As an RHU inmate, you have been provided with appropriate footwear. It was recommended that you reach out to Activities Department Staff for information regarding exercise.

(PFR Exhibit D.)

[6] "Edema is swelling caused by excess fluid trapped in [tissue]." Mayo Clinic, *Edema*, https://www.mayoclinic.org/diseases-conditions/edema/symptoms-causes/syc-20366493 (last visited September 28, 2021).

[7] In his PFR, Maple numbered two paragraphs as number 25. Therefore, we have cited to the PFR as if Maple had numbered the paragraphs correctly.

[8] Maple attached three affidavits to his PFR from three separate prisoners, who all alleged minor injuries due to exercising in the same footwear. *See* PFR Exhibits A, B, C.

constitutes cruel and unusual punishment because he has been in solitary confinement since September of 2016 and has been diagnosed with a mental illness. (PFR ¶¶6-7.) He argues that the denial of meaningful exercise constitutes deliberate indifference to his medical needs. (PFR ¶8.) Maple seeks injunctive relief requiring him to be provided "safe footwear," and to be transferred to the general population or an RHU where proper footwear is permitted during exercise. (PFR ¶¶9, 28, 31.)[9] He seeks a declaration that the DOC violated his constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and "relevant state laws and rules." (PFR ¶29.) He is also seeking damages under 42 Pa.C.S. §8303, costs and expenses, and any relief deemed appropriate by this Court. (PFR ¶¶30, 32-33.)

The DOC filed POs to the PFR on March 25, 2020. The DOC argues that: (1) Maple is not entitled to the footwear of his choice under *Bullock v. Horn*, 720 A.2d 1079 (Pa. Cmwlth. 1998); (2) the Eighth Amendment does not require an inmate to have sneakers for cardiovascular exercise; (3) Maple failed to state a constitutionally protected property right to possess the footwear of his choice; and (4) section 5901 of the Code, 61 Pa.C.S. §5901, only requires that physical exercise be safe and practical and does not mandate specific footwear.

After the DOC filed its POs, it filed an application for relief on August 11, 2020. The application for relief alleged that under the so-called "three strikes" rule of section 6602(f) of the Prison Litigation Reform Act (PLRA), 42 Pa.C.S. §6602(f), if a prisoner has previously filed prison conditions litigation and three or more of those civil actions have been dismissed under 61 Pa.C.S. §6602(e)(2), the court may dismiss the action. The DOC alleges that the current action constitutes prison conditions litigation under 42 Pa.C.S. §6601. The DOC argues that Maple has at least three strikes

[9] In the request for relief portion of his PFR, Maple started to renumber his paragraphs. For the sake of clarity, we will continue to cite as explained in note 7, *supra*.

and asks this Court to take judicial notice of that fact. In support, the DOC attaches as an exhibit an order, dated June 30, 2020, from the United States District Court for the Middle District of Pennsylvania (district court), which revoked Maple's *in forma pauperis* status due to his accumulation of three strikes.

Maple responds that at the time of the filing of his PFR and granting of his *in forma pauperis* status, this Court interpreted the PLRA such that a civil action that was dismissed without prejudice did not constitute a strike and, although the United States Supreme Court in *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721 (2020), ruled that a dismissal without prejudice constitutes a strike, *Lomax's* holding is not retroactive. Furthermore, Maple argues that the district court did not make a decision as to whether the dismissal of his case, *Maple v. Beard* (W.D. Pa., No. 4:06-cv-0390-JEJ-JVW), counted as a strike because he was given leave to amend and that case survived dismissal. Lastly, Maple avers that he is in imminent danger of serious bodily harm, exempting him from dismissal under 42 Pa.C.S. §6602(f). On September 16, 2020, we ordered that the DOC's application be decided with the DOC's POs.

Discussion

A) Preliminary Objections

Maple is seeking injunctive, declaratory, and monetary relief. He claims that he is entitled to an injunction requiring him to be provided with what he deems appropriate footwear and/or transferred to the general population or an RHU where proper footwear is permitted. He is seeking a declaration that the DOC violated his Eighth and Fourteenth Amendment rights and acted contrary to state laws and regulations.[10] Lastly, he is seeking damages pursuant to 42 Pa.C.S. §8303. Parts of Maple's argument are unclear; however, to the extent that Maple requests an injunction

[10] It appears that Maple is referencing 61 Pa.C.S. §5901 and Title 37, Chapter 93, of the Pennsylvania Administrative Code, 37 Pa. Code §§93.1-.308.

directing the DOC to transfer him back to the general population and to provide him footwear that is safe for exercise, it appears that he is relying on the same constitutional and/or statutory grounds upon which he is seeking a declaratory judgment.

In reviewing preliminary objections, all material facts averred in the petition for review, and all reasonable inferences that can be drawn from them, are admitted as true. *Vattimo v. Lower Bucks Hospital, Inc.*, 465 A.2d 1231, 1232 (Pa. 1983); *Fletcher v. Pennsylvania Property & Casualty Insurance Guaranty Association*, 914 A.2d 477, 479 n.2 (Pa. Cmwlth. 2007), *aff'd*, 985 A.2d 678 (Pa. 2009). However, a court need not accept as true conclusions of law, unwarranted inferences, argumentative allegations, or expressions of opinion. *Portalatin v. Department of Corrections*, 979 A.2d 944, 947 (Pa. Cmwlth. 2009). "Preliminary objections should be sustained only in cases that are clear and free from doubt." *Pennsylvania AFL-CIO ex rel. George v. Commonwealth*, 757 A.2d 917, 920 (Pa. 2000).

1. Section 5901 of the Code

Maple argues that under section 5901(a)(2) of the Code, 61 Pa.C.S. §5901(a)(2), physical exercise must be safe and practical, and that the judges of the several courts are to decide whether exercise is safe or practical. The DOC's response is that section 5901(a)(2) does not require that Maple be given the footwear of his choice.

Section 5901(a) provides, in full:

a) Physical exercise.--

> (1) A chief administrator who may or shall have in charge any inmate, whether the inmate has been tried or not, shall provide the inmate with at least two hours of daily physical exercise in the open, weather permitting, and, upon such days on which the weather

> is inclement, with two hours of daily physical exercise inside of the correctional institution.
>
> (2) **The physical exercise must be safe and practical, and the judges of several courts are to be the judges thereof.**
>
> (3) Inmates in segregation or disciplinary status shall receive a minimum of at least one hour of daily exercise five days per week.

61 Pa.C.S. §5901 (emphasis added). Many of the cases discussing section 5901(a) concern subsection (a)(1), pertaining to weather. *See Brooks-Bey v. Pennsylvania Department of Corrections* (Pa. Cmwlth., No. 17 M.D. 2010, filed Feb. 8, 2013) (unreported); *Gay v. Beard* (Pa. Cmwlth., No. 332 M.D. 2010, filed Apr. 13, 2011) (unreported), *aff'd*, 46 A.3d 1285 (Pa. 2012). However, in *Buehl v. Beard*, 54 A.3d 412, 417 (Pa. Cmwlth. 2012), *aff'd*, 91 A.3d 100 (Pa. 2014), we noted that an order requiring safe and practical exercise as stated in the statute is a remedy available to inmates. Thus, the question is whether the physical exercise that Maple is permitted is safe and practical.

Maple's allegations are sufficient to plead a claim that exercising while in rubber slippers is neither safe nor practical. Maple avers that he is not permitted to wear white canvas sneakers during exercise and is instead issued rubber slippers that he must wear during the spring and summer months. (PFR ¶¶13, 15.) He requested proper footwear, but his request was denied. (PFR ¶19.) He injured himself on October 11, 2019, while attempting to exercise in these slippers and was diagnosed with edema in his lower extremities due to the lack of exercise. (PFR ¶¶16, 18.)

The word "safe" has been defined as "free from harm, injury, or risk." Webster's Third New International Dictionary 1998 (3d ed. 1993). The word "practical" has been defined as "actually or actively engaged in some course of action."

Id. at 1780. As stated in his pleadings, Maple's exercise was not free from harm or injury, and certainly was not risk free. Maple clearly alleges, albeit in different terms, that because he was not able to actively engage in exercise, he developed a medical condition. The DOC counters that section 5901 does not apply to footwear, but it does not provide any authority placing footwear beyond the grasp of section 5901. Section 5901 applies to all exercise, requiring that it be safe and practical. It is certainly conceivable that the absence of appropriate footwear suitable for rigorous exercise could bear upon the determination of whether the exercise available to an inmate is safe and practical.

At this preliminary objection stage, we must conclude that Maple has pleaded a viable claim that the exercise available to him was not safe or practical. Hence, we overrule the DOC's POs as to Maple's claim that his statutory rights were violated under section 5901.

2. Constitutional Violations

In his PFR, Maple alleges that the denial of suitable footwear constitutes a denial of meaningful exercise, which constitutes deliberate indifference to conditions of confinement as well as cruel and unusual punishment, in violation of the Eighth Amendment.

In response to this allegation, the DOC argues that the Eighth Amendment does not require an inmate to choose his footwear for cardiovascular exercise, and under the Fourteenth Amendment, Maple does not have a constitutionally protected property right in obtaining the footwear of his choice. The DOC maintains that it has broad discretion to craft and enforce policies related to inmate clothing and apparel, as prison needs change. The DOC argues that the RHU is generally used to house

prisoners who are assaultive or otherwise dangerous to themselves or others in the general population, and, therefore, its decisions are entitled to deference.

In response, Maple argues that he is entitled to meaningful exercise while in solitary confinement and that the failure to provide him with the proper footwear constitutes an unreasonable risk of irreparable harm. He argues that meaningful exercise is necessary to preserve his mental and physical health, and he is constitutionally guaranteed this right. He maintains that his placement without appropriate footwear has caused him to become suicidal and has otherwise deteriorated his mental health. He states that it is obvious that his physical health has deteriorated due to the edema that he developed in his lower leg and the injury he suffered while exercising in the rubber slippers.

a. Eighth Amendment

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Pennsylvania jurisprudence recognizes Eighth Amendment claims resulting from the conditions of confinement. *Tindell v. Department of Corrections*, 87 A.3d 1029 (Pa. Cmwlth. 2014). Regarding these kinds of claims, we have said that

> [a]lthough correctional institutions are by their very nature restrictive and even harsh, the Eighth Amendment requires that the conditions of confinement do not include "unnecessary and wanton" inflictions of pain that are "totally without penological justification." *Rhodes v. Chapman*, 452 U.S. 337, 346 . . . (1981). The United States Supreme Court has made clear that the Constitution does not mandate comfortable prisons, but "having stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer v.*

> *Brennan*, [511 U.S. 825, 833 (1994)]; *see also DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 199-200 . . . (1989) ("When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."). Prison officials must ensure that inmates are not deprived of the "minimal civilized measure of life's necessities," including food, clothing, shelter, sanitation, medical care, and personal safety. [*Rhodes*, 452 U.S. at 346]; *see also* [*Farmer*, 511 U.S. at 833]; *Hutto v. Finney*, 437 U.S. 678, 686 . . . (1978).

Tindell, 87 A.3d at 1041. In *Tindell*, we also explained that

> in order to establish that prison conditions violate the Eighth Amendment a prisoner must establish that prison officials were deliberately indifferent to conditions of confinement that constitute cruel and unusual punishment. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). In demonstrating that conditions of confinement are cruel and unusual, a prisoner may establish that some conditions of confinement "have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example a low cell temperature at night combined with a failure to issue blankets." *Id.* at 305 . . .; *see also* [*Hutto*, 437 U.S. at 688] (remedial order supported by "the interdependence of the conditions producing the violation" of the Eighth Amendment ban on cruel and unusual punishment). However, the Court has cautioned that not "all prison conditions are a seamless web for Eighth Amendment purposes. Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." [*Wilson*, 501 U.S. at 303]. Moreover, the use of restricted housing units or isolation cells alone has not been held to constitute a violation of the Eighth Amendment ban on cruel and unusual punishment. [*Hutto*, 437 U.S. at

> 685, 687]; *Rivera v. Pennsylvania Department of Corrections*, 837 A.2d 525 (Pa. Super. 2003) (holding conditions of confinement in long term segregation unit at SCI Pittsburgh did not constitute cruel and unusual punishment).

Tindell, 87 A.3d at 1041-42.

Upon review, we conclude that Maple's averments do not show that DOC officials have deprived him of the "*minimal* civilized measure of life's necessities." *Id*. at 1041 (emphasis added). He does not argue that he was deprived of *all* exercise. Crucially, Maple argues that he was deprived footwear that would allow him to have more meaningful exercise. He does not allege that he was precluded from all movement, such as walking. We conclude that the allegations and claims made by Maple in the instant matter do not rise to a violation of his Eighth Amendment rights. However, this holding should not be construed as a conclusion that the kind of claim brought by Maple is categorically foreclosed under the Eighth Amendment. Because Maple has failed to mount a viable Eighth Amendment challenge to the DOC's practice, we will not interfere with the DOC's discretionary actions.

b. Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. To maintain a due process challenge, a party must initially establish a deprivation of a protected liberty or property interest; only if the party establishes the deprivation of a protected interest will this Court consider what procedural mechanism is required to satisfy due process. *Miller v. Workers' Compensation Appeal Board (Pavex, Inc.)*, 918 A.2d 809, 812 (Pa. Cmwlth. 2007). "[A] prisoner certainly is not entitled to the clothing of his choice in prison." *Bullock*, 720 A.2d at 1082.

In *Bronson v. Central Office Review Committee*, 721 A.2d 357 (Pa. 1998), the Pennsylvania Supreme Court held that even if an inmate invoked this Court's original jurisdiction in an attempt to color the confiscation of his clothing as a violation of a protected constitutional property right, his claim would fail. *Id*. at 359. The Court explained that prison inmates do not enjoy the same level of constitutional protections as non-incarcerated individuals, and that necessarily, certain rights and privileges are withdrawn or limited. *Id*. The Court held that, "[u]nless 'an inmate can identify a personal or property interest . . . not limited by [DOC] regulations and which [have] been affected by a final decision of the [DOC],' the decision is not an adjudication subject to [this C]ourt's review." *Id*. Further, the Court noted that, "[i]ndeed, department directives specify exactly what personal property may be possessed or purchased either in the prison commissary or through outside sources. In light of the limitations placed on inmate possession of personal property by the [DOC, the inmate's] claim that his protected constitutional rights have been violated fails." *Id*. at 359-60 (citation omitted).

Here, Maple has failed to establish a constitutionally protected property interest. First and foremost, as we explained in *Bullock*, inmates are not entitled to the clothing of their choice and do not have the right to possess whatever personal items they may choose. Second, even though DOC has not raised an argument under *Bronson* as a preliminary objection, "whenever a court discovers that it lacks jurisdiction over the subject matter or a cause of action, it is compelled to dismiss the matter under all circumstances . . . ." *Seitel Data, Ltd. v. Center Township*, 92 A.3d 851, 859 (Pa. Cmwlth. 2014) (quoting *Hughes v. Pennsylvania State Police*, 619 A.2d 390, 393 (Pa. Cmwlth. 1992)). In his brief, Maple argues that DC-ADM 801(6)(a)(10) requires him to be provided with slip-on canvas footwear, which he claims is adequate for exercise.

Our Supreme Court's holding in *Bronson* is applicable here. Maple has failed to identify a property interest not limited by DOC regulations. In his brief, Maple plainly argues that he is entitled to different footwear than what he is provided *under DOC regulations*. Because Maple's choice of footwear is clearly subject to DOC regulations, we are without jurisdiction to review his complaints. *See Buehl v. Horn*, 761 A.2d 1247, 1249 (Pa. Cmwlth. 2000) (holding that under *Bronson*, an inmate failed to establish a due process violation occurred when typewriters were removed from law library).

3. Maple's Right to The Housing Unit of His Choice

Next, we address Maple's contention that Title 37, Chapter 93 of the Pennsylvania Administrative Code, 37 Pa. Code §§93.1-.308, confers upon him the relief that he seeks. In his PFR, Maple cites to "the Pa. Admin. Code at title 37 chapter 93" as authority for relief. (PFR at 1.) Outside of this bald reference to this title and chapter, Maple makes no reference in his PFR as to how these regulations entitle him to relief. However, as far as the DOC interprets Maple's claims, it argues that Maple is not entitled to relief under 37 Pa. Code §93.11. Maple does not counter this contention in his brief. This regulation provides, in full, that

> (a) An inmate does not have a right to be housed in a particular facility or in a particular area within a facility.
>
> (b) Confinement in [an] RHU. . . , other than under procedures established for inmate discipline, will not be done for punitive purposes. The [DOC] will maintain written procedures which describe the reasons for housing an inmate in the RHU and require due process in accordance and with established principles of law for an inmate who is housed in the RHU. Inmates confined in the RHU will be reviewed periodically by facility staff.

37 Pa. Code §93.11. It is evident from the plain text of this regulation that Maple is not entitled to relief. To the extent that Maple requests a transfer out of the RHU so that he can have the footwear he desires, it is clear that this regulation impedes relief as he does not have a right to be housed in the unit of his choice.

4. Section 8303 of the Judicial Code, 42 Pa.C.S. §8303

We address Maple's contention that he is entitled to damages under 42 Pa.C.S. §8303. The DOC directs this Court's attention to *Maute v. Frank*, 670 A.2d 737 (Pa. Cmwlth. 1996), and argues that 42 Pa.C.S. §8303 is a mandamus statute, and that Maple has an alternative to this relief under Section 1983 of the United States Code, 42 U.S.C. §1983.

This Court explained in *Maute*:

> A mandamus action will compel official performance of a ministerial act when the plaintiff establishes **a clear legal right**, the defendant has a corresponding duty, and there is no appropriate remedy at law. *Delaware River Port Authority v. Thornburgh*,[ ]493 A.2d 1351 ([Pa. Cmwlth.] 1985); *Adamo v. Cini*, 656 A.2d 576 (Pa. Cmwlth. 1995). Because the purpose of mandamus is not to establish legal rights but to enforce those rights which have already been clearly established, *Hamm v. Board of Education for the School District of Philadelphia*,[ ]470 A.2d 189 ([Pa. Cmwlth.] 1984), for [the inmate] to successfully maintain this action, he must show that his claim for relief is so clear that the Prison Officials have no choice but to give him the materials he claims necessary . . . , *i.e.*, it is a ministerial or mandatory but not a discretionary duty. *Aiken v. Radnor Township Board of Supervisors*,[ ]476 A.2d 1383 ([Pa. Cmwlth.] 1984).

Maute, 670 A.2d at 739 (emphasis added). Section 8303 of the Judicial Code provides that "[a] person who is adjudged in an action in the nature of mandamus to have failed or refused without lawful justification to perform a duty required by law shall be liable

in damages to the person aggrieved by such failure or refusal." 42 Pa.C.S. §8303. It does not appear that Maple is seeking mandamus relief pursuant to his claim under section 5901. However, if he were, such relief would be precluded under section 5901. *See Buehl*, 54 A.3d at 417 ("In short, the usual principles of mandamus do not apply in a section 5901 proceeding."). Therefore, to the extent he raised any mandamus claim beyond section 5901, which it is unclear that he did, he is not entitled to relief because he failed to show a clear legal right. Thus, we cannot say that the DOC failed to perform any duty required by law which would entitle Maple to damages under section 8303 of the Judicial Code.

Because we have concluded that Maple is not entitled to relief on any of his other claims, except his statutory claim under section 5901, we need not examine his claims for injunctive or declaratory relief any further, and the DOC's POs are sustained as to these claims respectively.

B) Application for Relief Under the PLRA

The DOC separately filed an application for relief with this Court seeking to revoke Maple's *in forma pauperis* status, and to dismiss his PFR as it constitutes abusive litigation. The DOC avers that the current action constitutes prison conditions litigation. The DOC asks this Court to take judicial notice of a June 30, 2020 order of the district court, which revoked Maple's *in forma pauperis* status in a federal case and cited to three cases that allegedly constitute strikes. The DOC avers that this litigation therefore is subject to dismissal under 42 Pa.C.S. §6602.

Section 6602(f) of the PLRA, also known as the "three strikes rule" provides, in full:

> **(f) Abusive litigation.--**If the prisoner has previously filed prison conditions litigation and:

> (1) three or more of these prior civil actions have been dismissed pursuant to subsection (e)(2)[11]; or
>
> (2) the prisoner has previously filed prison conditions litigation against a person named as a defendant in the instant action or a person serving in the same official capacity as a named defendant and a court made a finding that the prior action was filed in bad faith or that the prisoner knowingly presented false evidence or testimony at a hearing or trial;
>
> **the court may dismiss the action**. The court shall not, however, dismiss a request for preliminary injunctive relief or a temporary restraining order which makes a credible allegation that the prisoner is in imminent danger of serious bodily injury.

42 Pa.C.S. §6602(f). In sum, section 6602(f) allows a court to revoke a prisoner's *in forma pauperis* status if he has filed three or more civil actions involving prison conditions litigation that were dismissed as frivolous, malicious, or for failure to state a claim. *Brown v. Pennsylvania Department of Corrections*, 58 A.3d 118, 121 (Pa. Cmwlth. 2012).

The DOC has failed to convince this Court or provide us with information that would allow us to determine whether Maple has sufficient strikes under the PLRA

---

[11] Section 6602(e)(2) provides, in full:

> **(e) Dismissal of litigation.--**Notwithstanding any filing fee which has been paid, the court shall dismiss prison conditions litigation at any time, including prior to service on the defendant, if the court determines any of the following:
>
> * * *
>
> (2) The prison conditions litigation is frivolous or malicious or fails to state a claim upon which relief may be granted or the defendant is entitled to assert a valid affirmative defense, including immunity, which, if asserted, would preclude the relief.

42 Pa.C.S. §6602(e)(2).

to revoke his *in forma pauperis* status. The text of the order[12] provides that the district court revoked Maple's *in forma pauperis* status under the three strikes provision of the Federal Prison Litigation Reform Act of 1996 (Federal PLRA), codified at 28 U.S.C. §1915(g), because he had three prior actions or appeals dismissed as frivolous, malicious, or for failure to state a viable claim. (Application for Relief, Exhibit A). The district court identified three prior cases where Maple's claims were dismissed and counted as a strike for the purposes of the Federal PLRA. The first was *Derek Clifton v. Religious Accommodation Committee*, (M.D. Pa., No. 3:13-cv-2680-YK, dated April 14, 2014, and August 14, 2014). The district court stated that this complaint was dismissed "pursuant to 28 U.S.C. §1915(e)(2)(B)(ii) for failure to state a claim and affording Maple and other plaintiffs the opportunity to amend; subsequent order entered specifically dismissing Maple from the action based on his failure to file an amended complaint." (Application for Relief, Exhibit A). The second was *Maple v. Beard* (M.D. Pa., No. 4:06-cv-0360-JEJ-JVW, dated April 3, 2006 and October 2, 2006), which was dismissed as frivolous pursuant to 28 U.S.C. §1915(e)(2)(B)(i), with a motion for leave to amend that was denied. The third and final case, *Maple v. Overmyer* (M.D. Pa., No. 1:17-cv-0182-SPB, dated August 21, 2017, July 7, 2018, and October 17, 2018), following a grant of *in forma pauperis* status to Maple, was dismissed for failure to state a claim, with a subsequent request for leave to amend denied, as well as a request for reconsideration denied.

[12] We find it appropriate to take judicial notice of the order appended to the application for relief. "Judicial notice can be taken of pleadings and judgments in other proceedings where appropriate." *Krenzel v. Southeastern Pennsylvania Transportation Authority*, 840 A.2d 450, 454 (Pa. Cmwlth. 2003) (citing *Commonwealth v. Tau Kappa Epsilon*, 609 A.2d 791, 793 n.2 (Pa. 1992); Pa. R.E. 201(f)). *See Commonwealth v. Greer*, 866 A.2d 433, 435 (Pa. Super. 2005) (taking judicial notice of orders entered in federal court).

Pursuant to our PLRA, prison conditions litigation is defined as a civil proceeding arising under Federal or State law with respect to the conditions of confinement, or the effects of actions by a government party on the life of an individual confined in prison. 42 Pa.C.S. §6601. Our PLRA requires that cases which are dismissed must constitute *prison conditions litigation* to count as a strike. *See Brown v. James*, 822 A.2d 128, 128 (Pa. Cmwlth. 2003) ("[T]he 'three strikes' rule[] authorizes the trial court to dismiss prison conditions litigation brought by a 'frequent filer' prisoner if the prisoner has filed previous 'prison conditions litigation' and three or more of those actions have been dismissed pursuant to Section 6602(e)(2) . . . .") Although federal cases certainly can be counted as strikes, *Brown*, 822 A.2d at 130-31, the order appended to the application as Exhibit A is insufficient to prove that these cases constituted prison conditions litigation within the meaning of our PLRA. The only facts about these cases that we glean from the order is that they were dismissed for failure to state a claim or as frivolous. There is no indication whatsoever that these cases would constitute "prison conditions litigation" within the meaning of our PLRA. Moreover, the DOC has failed to provide the Court with adequate citations[13] to these cases which would enable us to inspect their contents. It is a basic principle that "[w]e decline to become substitute counsel," where a party has failed to properly develop an issue. *Aveline v. Pennsylvania Board of Probation and Parole*, 729 A.2d 1254, 1256 n.5 (Pa. Cmwlth. 1999).[14]

[13] The citations provided in the order consist of case names, federal docket numbers, court abbreviations and dates. The DOC has not provided us a citation that would enable us, through reasonable available channels, to identify precisely what decisions we are to review.

[14] Notwithstanding the foregoing, section 6602(f) does not *require* this Court to dismiss litigation. Courts "*may dismiss* the prison conditions complaint filed by an abusive litigator without even having to decide that, in fact, the complaint is frivolous." *Jae v. Good*, 946 A.2d 802, 807 (Pa.
(Footnote continued on next page…)

Conclusion

Based on the foregoing, we overrule the DOC's POs as far as they challenge Maple's right to relief under 61 Pa.C.S. §5901(a)(2). However, we sustain the DOC's POs to all of Maple's other claims, as he has failed to show any constitutional infraction, or violation of a regulation that would warrant any of the injunctive, declaratory, or mandamus relief that he seeks.

_____

PATRICIA A. McCULLOUGH, Judge

Cmwlth. 2008) (emphasis added). Thus, even if Maple is an abusive litigator, we are not compelled to dismiss claims under the three strikes rule.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eric Maple, Petitioner	:	No. 107 M.D. 2020
v.	:	
Pennsylvania Department of Corrections, Respondent	:	

ORDER

AND NOW, this 30th day of September, 2021, the preliminary objections filed on behalf of the Pennsylvania Department of Corrections are SUSTAINED in part and OVERRULED in part, and Eric Maple's petition for review is DISMISSED as to all claims, except for his claim of entitlement to safe and practical exercise under 61 Pa.C.S. §5901(a)(2). The Pennsylvania Department of Corrections is directed to file an answer in 30 days. The Pennsylvania Department of Corrections' application for relief is DENIED.

_____

PATRICIA A. McCULLOUGH, Judge