FILED
United States Court of Appeals
Tenth Circuit

August 28, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STEPHEN CRAIG BURNETT,

Plaintiff - Appellant,

v.

MARY FALLIN; KEVIN GROSS; MICHAEL ROACH; FRAZIER HENKE; GENE HAYNES; TODD HOLDER; IRMA NEWBURN; MATT TILLY; JOE ALLBAUGH; ROBERT PATTON; JASON BRYANT; JANET DOWLING; ROBERT DOKE; TERRY CLINE; TOM BATES,[*]

Defendants - Appellees.

No. 18-6179
(D.C. No. 5:17-CV-00385-M)
(W.D. Okla.)

ORDER AND JUDGMENT[**]

Before **HOLMES**, **BACHARACH**, and **McHUGH**, Circuit Judges.

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[*] Pursuant to Fed. R. App. P. 43(c)(2), Tom Bates is substituted as the proper defendant-appellee for purposes of Burnett's official capacity claims against defendant-appellee Terry Cline. Cline remains a proper party to the individual capacity claims.

[**] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

This is a pro se appeal by Stephen Craig Burnett, an Oklahoma state prisoner, from the district court's grant of summary judgment in favor of defendants on his civil rights complaint under 42 U.S.C. § 1983. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Burnett was an inmate at the James Crabtree Correctional Center (JCCC) from December 2012 through March 2017, when he was transferred to the Davis Correctional Facility (DCF). In April 2017, shortly after the transfer, Burnett sued fourteen defendants in both their official and individual capacities who he alleged caused or contributed to the unconstitutional conditions of his confinement at JCCC. According to Burnett, overcrowding and understaffing at JCCC combined to create an unconstitutional environment, which included not only deprivations, e.g., not enough toilets, but fears about safety.

Burnett's claim for damages against defendants in their official capacities are barred by Eleventh Amendment immunity, which Burnett did not dispute; instead, he argued he could sue defendants in their official capacities for prospective injunctive relief to prevent future overcrowding and understaffing at JCCC.[1] Burnett also

[1] Defendants Robert Patton and Janet Dowling are no longer DOC employees and Irma Newburn and Matt Tilly are no longer BOC members. As such, these defendants cannot be sued in their official capacities because they cannot implement injunctive relief.

sought a declaration "to the effect that the Defendants have violated his constitutional rights." R., Vol. 1 at 32. As to his claims against defendants in their individual capacities, Burnett sought damages for the alleged unconstitutional conditions of confinement at JCCC, which he maintained began in April 2014 and continued until he was transferred to DCF in March 2017.

The district court referred defendants' motions to a magistrate judge for proposed findings and recommendations. The magistrate judge issued three separate reports and recommendations concerning three groups of defendants: (1) Governor Fallin; (2) Oklahoma Department of Corrections (DOC) employees Joe Allbaugh, Robert Patton, Jason Bryant, and Janet Dowling and members of the Oklahoma Board of Corrections (BOC) Kevin Gross, Michael Roach, Frazier Henke, Gene Haynes, Todd Holder, Irma Newburn, and Matt Tilly; and (3) Oklahoma Fire Marshall, Robert Doke and Oklahoma Commissioner of Health, Terry Cline. The district court overruled Burnett's objections and adopted the reports and recommendations granting summary judgment in favor of defendants.

II. STANDARD OF REVIEW

"We review a district court's grant of summary judgment de novo, applying the same standard as the district court." *Helm v. Kansas*, 656 F.3d 1277, 1284 (10th Cir. 2011). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To avoid summary judgment, a plaintiff must come forward with evidence and cannot rely on "mere speculation, conjecture,

or surmise." *Self v. Crum*, 439 F.3d 1227, 1230 (10th Cir. 2006) (internal quotation marks omitted). "In determining whether summary judgment is proper, we view the evidence in the light most favorable to the non-moving party." *Helm*, 656 F.3d at 1284.

Further, "[w]here . . . a defendant moves for summary judgment to test an affirmative defense, the defendant must demonstrate that no disputed material fact exists regarding the affirmative defense asserted." *Id.* (brackets, ellipses and internal quotation marks omitted). "Once the defendant makes this initial showing, the plaintiff must then demonstrate with specificity the existence of a disputed material fact. If the plaintiff [fails to] meet this burden, the affirmative defense bars her claim, and the defendant is then entitled to summary judgment as a matter of law." *Id*. (brackets, citation and internal quotation marks omitted).

The rules of civil procedure permit a district court to grant a summary judgment motion "on grounds not raised by a party," but only "[a]fter giving notice and a reasonable time to respond." Fed. R. Civ. P. 56(f)(2). Although this court "generally [disfavors] the granting of summary judgment *sua sponte*, a district court may do so if the losing party was on notice that she had to come forward with all of her evidence." *Oldham v. O.K. Farms, Inc*., 871 F.3d 1147, 1150 (10th Cir. 2017) (internal quotation marks omitted). But the failure to give notice is not always fatal, because this court will "still affirm a grant of summary judgment if the losing party suffered no prejudice from the lack of notice." *Id*. (internal quotation marks omitted).

III. LEGAL PRINCIPLES

A. The Eighth Amendment

Under the Eighth Amendment, "prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal quotation marks omitted). With regard to personal safety, inmates have a "constitutional right to be reasonably protected from constant threats of violence and sexual assaults from other inmates," which means that an inmate "does not need to wait until he is actually assaulted before obtaining relief." *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980).

"[A] prison official violates the Eighth Amendment only when two requirements are met." *Farmer*, 511 U.S. at 834. "First, the deprivation alleged must be, objectively, sufficiently serious." *Id*. (internal quotation marks omitted). Second, the official must "know[] of and disregard[] an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Id*. at 837.

To succeed in a § 1983 suit against a supervisor, a plaintiff must demonstrate: "(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation." *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir.

2010). It is not enough to simply be somewhere in the supervisory chain; instead, "a plaintiff must show an affirmative link between the supervisor and the violation, namely the active participation or acquiescence of the supervisor in the constitutional violation by the subordinates." *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006) (internal quotation marks omitted). Stated otherwise, "individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation." *Dodds*, 614 F.3d at 1195 (brackets and internal quotation marks omitted).

B. Legislative Immunity

Absolute legislative immunity is extended to members of the executive branch when they are performing legislative acts. *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id*. at 54. For instance, because choices about prison funding are "discretionary, policymaking decision[s] implicating the budgetary priorities of the [state] and the services the [state] provides," *id*. at 55-56, they are entitled to legislative immunity. *See also Sable v. Myers*, 563 F.3d 1120, 1124-25 (10th Cir. 2009) (holding a mayor's introduction of a budget was a legislative function because it was an integral step in the legislative process).

C. Statute of Limitations

Because § 1983 contains no specific statute of limitations, federal courts apply the state statute of limitations for personal injury actions in suits under § 1983. *See*

Vasquez v. Davis, 882 F.3d 1270, 1275 (10th Cir. 2018). Oklahoma has a two-year statute of limitations for personal injury suits. *See* Okla. Stat. tit. 12, § 95(A)(3). However, "[f]ederal law . . . governs when a § 1983 claim accrues," and provides that a § 1983 claim "accrue[s] when [the plaintiff] had a complete and present cause of action; that is, when he could have filed suit and obtained relief." *Vasquez*, 882 F.3d at 1276 (internal quotation marks omitted).

"[T]his court has not yet decided whether [the continuing violation doctrine] should apply to § 1983 claims." *Id*. at 1277. But assuming the doctrine applies, it "is triggered by continuing unlawful acts but not by continuing damages from the initial violation. Said another way, . . . as [this court] ha[s] defined [it], [the doctrine] appl[ies] . . . *only when a particular defendant allegedly committed wrongful acts within, as well as outside, the limitations period*." *Id*. (citation and internal quotation marks omitted) (emphasis added).

D. Mootness

"Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996). "This requirement exists at all stages of federal judicial proceedings, and it is therefore not enough that the dispute was alive when the suit was filed; the parties must continue to have a personal stake in the outcome." *Id*.

"Where a plaintiff seeks an injunction, his susceptibility to *continuing* injury is of particular importance—past exposure to illegal conduct does not in itself show a

present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects." *Jordan v. Sosa*, 654 F.3d 1012, 1024 (10th Cir. 2011) (brackets, ellipses and internal quotation marks omitted). "Moreover, a plaintiff's continued susceptibility to injury must be reasonably certain; a court will not entertain a claim for injunctive relief where the allegations take it into the area of speculation and conjecture." *Id*. (internal quotation marks omitted). In other words, "[a] claim for equitable relief is moot absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again." *Id*. (internal quotation marks omitted).

The mootness doctrine also applies to claims for declaratory relief. "When we apply the mootness doctrine in the declaratory judgment context . . . what makes a declaratory judgment action a proper judicial resolution of a case or controversy rather than an advisory opinion is the settling of some dispute which affects the behavior of *the defendant toward the plaintiff*." *Id*. at 1025 (brackets and internal quotation marks omitted). But as a first step, "the availability of [declaratory] relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960).

An exception to mootness applies to wrongs capable of repetition yet evading review. *See Jordan*, 654 F.3d at 1034. "The capable-of-repetition exception to the mootness doctrine . . . is a narrow one," and should "only . . . be used in exceptional situations." *Id*. at 1035 (internal quotation marks omitted). Two circumstances must

combine for the exception to apply: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Id*. (brackets and internal quotation marks omitted). "The party asserting that [the] exception applies bears the burden of establishing both prongs." *Id*. (internal quotation marks omitted).

"By its terms, and in the manner that it is typically applied, the 'duration' element of the exception's two-prong test pertains to the duration of the *governmental entity's* alleged infringement on a plaintiff's rights, not upon external circumstances pertaining to the *plaintiff* that may shorten the duration of his exposure to the otherwise ongoing governmental action." *Id*. at n.20. *City of Herriman v. Bell*, 590 F.3d 1176, 1181 (10th Cir. 2010), is illustrative of how the "duration" element has been applied in this circuit: "Regarding the first prong of the exception, neither party disputes that the challenged action—the November 2007 election—was too short in duration to be fully litigated before its conclusion."

IV. ANALYSIS

A. All Defendants

According to Burnett, his claim for injunctive relief is not moot because it falls within "the well-established exception to mootness based on issues that are capable of repetition, but evading review." Aplt. Opening Br. at 9. As to injunctive relief, Burnett says his claims are not moot because "there is no guarantee that [he] will not be transferred back to JCCC, or to another prison with the same conditions." *Id*. To

obtain an injunction, however, Burnett must show a real or immediate threat he will be wronged again—speculation and conjecture will not suffice. Moreover, Burnett cannot meet his burden to prove either prong of the narrow, capable-of-repetition exception to the mootness doctrine. First, Burnett cannot prove the challenged action was too short in duration to be fully litigated before it stopped. To the contrary, Burnett says the infringement on his constitutional rights lasted for several years. Second, even if Burnett could prove the duration element, he cannot prove there is a reasonable expectation he will be subjected to the same conditions again.

As to his declaratory judgment claim, Burnett's sole argument is the district court failed to address it. But because the magistrate judge found no constitutional violation, Burnett did not have a judicially remedial right and could not obtain declaratory relief.

B. Governor Mary Fallin

Burnett's Eighth Amendment claim against Governor Fallin in her individual capacity focused on her alleged failure to obtain adequate funding to ease prison overcrowding and understaffing. He also alleged the Governor failed to appoint liberal-minded people to the parole and pardon board who would be more likely to grant early release, and she granted too few pardons and requests for clemency. The magistrate judge found most of the Governor's conduct was legislative in nature and therefore shielded by absolute legislative immunity, and her administrative conduct failed to give rise to an Eighth Amendment violation. We agree.

Burnett relies primarily on this court's decision in *Savage v. Fallin*, 663 F. App'x 588 (10th Cir. 2016) (unpublished) to argue that Governor Fallin's administrative conduct is not immune from suit. In *Savage*, an Oklahoma state prisoner also sued Governor Fallin and others under § 1983 for an alleged Eighth Amendment violation arising from overcrowding and understaffing at JCCC. *See id*. at 589-90. The district court dismissed the claims against the Governor on the grounds of legislative immunity, but this court reversed because the complaint also contained allegations of conduct that was arguably administrative. *Id*. at 591.

But contrary to Burnett's assertion, the magistrate judge's decision is not at odds with *Savage*. *Savage* concerned the adequacy of the allegations on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Burnett's case, by contrast, was resolved after Governor Fallin *came forward with evidence on summary judgment* that her actions were legislative in nature or could not otherwise form the basis of an Eighth Amendment violation.

Other than to draw unfounded comparisons to *Savage*, Burnett did not present any evidence in response to Governor Fallin's motion for summary judgment; instead, he referred to the allegations in his complaint in which he accused the Governor of failing to secure adequate funding to ease overcrowding and understaffing, including her failure to access "rainy day" or revolving funds. Setting aside the undisputed evidence that the Governor could not access "rainy day" or revolving funds without legislative approval, the Governor's inactions in this regard were within the scope of legislative, discretionary policy-making decisions that

implicated budgetary priorities for the State and thus shielded by legislative immunity.

As to Governor Fallin's "administrative" actions, they cannot form the basis of an Eighth Amendment violation. For example, Burnett alleged the Governor should have appointed liberal-minded people to the parole and pardon board who would be more likely to favor early release, and personally commuted more sentences and granted more requests for clemency. But neither Burnett nor any other prisoner has a constitutional right to receive clemency, a pardon, or parole, *see Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979), *abrogated on other grounds, Sandin v. Conner*, 515 U.S. 472, 480-84 (1995), nor is there any authority to suggest the Governor's failure to appoint people with a certain type of mindset to a review board violates the Eighth Amendment.

C. Members of the BOC

Burnett alleged the unconstitutional conditions of his confinement were the direct result of the BOC's failure, since 2014, to "request a large enough budget increase to either build new prisons, or pay to rent private prisons to resolve the unconstitutional conditions of confinement." R., Vol. 1 at 21. We agree with the magistrate judge that the BOC's actions were within the scope of legislative, discretionary policy-making decisions that implicated budgetary priorities for the State and thus shielded by legislative immunity.

D. Current and Former DOC Employees

1. *Robert Patton*

Robert Patton is the former director of the DOC who, according to Burnett, caused the overcrowding at JCCC when he made the decision in April 2014 to transfer all DOC prisoners housed in county jails to DOC facilities. Burnett further alleged that after Patton made that decision, he failed to "request a large enough budget increase to either build new prisons, or pay to rent private prisons to resolve the unconstitutional conditions of confinement." *Id*. In opposition to summary judgment, Burnett added a new theory for damages from Patton. According to Burnett, in December 2014, Patton "created a 'new formula' for defining capacity to now include 'temporary beds' in addition to the design capacity." *Id*., Vol. 2 at 441-42. "By wording the policy this way, DOC can put as many inmates as they want to in a facility, refer to all those exceeding the design capacity as being in 'temporary beds' and refer to the total as being the 'operational capacity,'" which Burnett described as "subterfuge," "trickery" and "gamesmanship." *Id*. at 442.

The magistrate judge found, and Burnett does not dispute, that Patton "was responsible for compiling and submitting a proposed budget to [the BOC] for approval." *Id*., Vol. 4 at 240. We therefore agree with the magistrate judge that Patton's conduct in submitting proposed budgets was legislative in nature and thus shielded by legislative immunity.

We also agree with the magistrate judge that Burnett's non budget-related claims against Patton are barred by the applicable statute of limitations. The

magistrate judge raised the issue sua sponte and failed to give Burnett notice and an opportunity to respond *before* ruling on the issue, although Burnett presented what he describes as "clear and robust objections" in his objections to the report and recommendation. Aplt. Opening Br. at 10. Whether the opportunity to file objections to the report and recommendation served as adequate "notice" is beside the point, because Burnett suffered no prejudice.

Burnett filed his case on April 5, 2017. To be timely, Burnett had to have filed suit within two years from the date his § 1983 claim against Patton accrued, which was December 2014, at the latest, when Patton allegedly created a "new formula" to determine capacity. Nonetheless, Burnett argues that even if his Eighth Amendment claim against Patton accrued in December 2014, the continuing violation doctrine saves that claim from being time-barred. We disagree. Assuming the doctrine applies to § 1983 claims, it would not save Burnett's claim because there is no evidence that Patton committed wrongful acts outside the limitations period, which ended two years after he allegedly created the "new formula" in December 2014.

2. *Joe Allbaugh*

Joe Allbaugh was the director of the DOC at the time the magistrate judge issued his reports and recommendations. The magistrate judge concluded Burnett could not sue Allbaugh for damages in his individual capacity because there was no evidence Allbaugh personally participated in the alleged Eighth Amendment violation. We agree.

According to Burnett, Allbaugh is liable as "supervisory official" because he "kn[ew] of and disregard[ed] an excessive risk to inmate health and safety, and there is an affirmative link between the constitutional deprivation and the supervisor's conduct." Aplt. Opening Br. at 14. But Burnett failed to come forward with any evidence of a link between Allbaugh and overcrowding and understaffing, or that he ignored the problem; to the contrary, Burnett alleged that Allbaugh "requested a huge increase for the 2017 DOC budget." R., Vol. 1 at 21.

3. *Janet Dowling*

Janet Dowling is the former warden at JCCC. The magistrate judge determined Burnett's claim against her for damages was time-barred. We agree. Although the magistrate judge raised the statute of limitations sua sponte and failed to give Burnett notice before he ruled on the issue, there was no prejudice.

Burnett filed his case on April 5, 2017. To be timely, Burnett must have filed suit within two years from the date his § 1983 claim against Dowling accrued, which according to Burnett, was shortly after Patton made the decision in 2014 to transfer DOC inmates from county jail to DOC facilities. Specifically, Burnett alleged: "Prior to March of 2014, both sides of Plaintiff's housing unit had a dayroom, with four 4 man tables. Inmates housed in their tiny U shaped cubicles had a place to at least walk around." *Id*. at 25. "But when DOC Director Patton transferred about 3,400 inmates into the DOC system, the dayrooms were filled with bunks. . . . Warden Dowling resolved the stated 'dayroom capacity' posted in the dayrooms by the State Fire Marshal, by simply placing a new 'dayroom capacity' sign with a

substantially larger number of inmates over the previous sign." *Id*. at 25-26. To be timely, Burnett had to file suit within two years from March 2014, when Dowling allegedly changed the dayroom capacity sign.

Nonetheless, Burnett argues that even if his Eighth Amendment claim against Dowling accrued in March 2014, the continuing violation doctrine saves his claim from being time-barred. We disagree. There are additional allegations in Burnett's complaint concerning Dowling's conduct while she was the warden, but he provided no dates as to when the conduct took place. For example, Burnett alleged that at some unspecified time while she was warden, Dowling failed to address issues concerning contraband at JCCC. What is undisputed, however, is that Dowling left her position as warden sometime in 2015, which means that Dowling could not have committed any wrongful acts outside the limitations period, which ended two years after she posted new signs in the dayroom, i.e., in March 2106. As such, the continuing violation rule does not apply to save Burnett's claims.

4. *Jason Bryant*

Jason Bryant is alleged to be the current warden at JCCC. The magistrate judge concluded Bryant was entitled to summary judgment on Burnett's claim for damages because there was no evidence that he was deliberately indifferent to Burnett's health and safety. We agree.

In his report and recommendation, the magistrate judge examined Burnett's allegations regarding Bryant's conduct and explained why there was no Eighth Amendment violation. We cannot find any argument in Burnett's brief that addresses

these findings. The closest Burnett comes is when he says "[o]n his [civil rights complaint] pages 7, 10, 12, 13 and 14 Plaintiff alleged several things Warden Bryant could have done, but did not do regarding inmate health and safety protection." Aplt. Opening Br. at 15. But this "argument" does not address how Bryant's conduct met the objective and subjective elements of an Eighth Amendment claim—that Burnett was incarcerated under conditions that posed a substantial risk of serious harm and Bryant knew about the risk and decided to ignore it. This "perfunctory" allegation of error "fails to frame and develop an issue sufficient to invoke appellate review." *Kelley v. City of Albuquerque*, 542 F.3d 802, 819 (10th Cir. 2008) (brackets and internal quotation marks omitted).[2]

E. Doke and Cline

Robert Doke is the Fire Marshall for the State of Oklahoma and Terry Cline was the Oklahoma Commissioner of Health when Burnett filed this suit. In his complaint, Burnett alleged both Doke and Cline were aware of "illegal conditions" at JCCC but "abdicated" their legal responsibilities to enforce state standards "out of deliberate indifference." R., Vol. 1 at 27.

[2] The magistrate judge also granted summary judgment in favor of defendants on Burnett's claim that he was transferred from JCCC to DCF in retaliation for his numerous grievances and lawsuits over the years. Burnett does not raise the issue on appeal, and we deem it forfeited. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue").

The magistrate judge found "the record does not support [Burnett's] contention that Defendants Doke and Cline abdicated their duties by failing to properly inspect JCCC or his allegation that these defendants were deliberately indifferent to his health and safety." *Id*., Vol. 4 at 229.

Once again, we cannot find any argument in Burnett's brief that addresses this issue, other than to say "the court did not even address Plaintiff's claim of supervisory liability regarding Defendants Doke or Cline, [which] was an error of law and abuse of discretion." Aplt. Opening Br. at 14. This perfunctory allegation is insufficient to invoke appellate review.

V. CONCLUSION

The judgment of the district court is affirmed.

Entered for the Court

Carolyn B. McHugh
Circuit Judge