FILED
United States Court of Appeals
Tenth Circuit

September 7, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TOBI KILMAN,

Plaintiff - Appellant,

v.

ARAPAHOE COUNTY SHERIFF TYLER S. BROWN,

Defendant - Appellee.

No. 21-1104
(D.C. No. 1:20-CV-01648-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MORITZ**, **BALDOCK**, and **EID**, Circuit Judges.**

Tobi Kilman, a pro se litigant and inmate at the Arapahoe County Detention Facility in Centennial, Colorado ("ACDF"), filed this action in the federal district court in the District of Colorado, alleging seven claims pursuant to 42 U.S.C. § 1983. After screening the complaint and granting Kilman's motion to proceed in forma pauperis, the district court dismissed one of his claims as frivolous and dismissed one of the two

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

** 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.

defendants.[1] The remaining defendant, Arapahoe County Sheriff Tyler S. Brown, moved for summary judgment on Kilman's surviving six claims, and the district court granted Sheriff Brown's motion. Specifically, the district court found Kilman failed to exhaust his administrative remedies, as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a).

Kilman now appeals the district court's order dismissing his six non-frivolous claims. He further seeks leave to proceed on appeal in forma pauperis. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's order dismissing his claims. We also grant Kilman's request to proceed in forma pauperis.

I.

Kilman filed this § 1983 suit on June 5, 2020. His first six claims alleged Sheriff Brown violated his Eighth Amendment rights as a result of the conditions of his confinement, which he alleged included (1) "[o]vercrowded cells," (2) 21-hour per-day confinement to these "grossly overcrowded cells," (3) "extreme risk" to COVID-19 due to overcrowding, lack of social distancing, and prolonged daily confinement, (4) "[s]anitation procedures" that "are not up to standard," (5) "[l]ess than an hour of weekly yard time," and (6) "harass[ing]" "[s]earches." ROA Vol. 1 at 12–25.

[1] At this point, the district court reassigned the case to a magistrate judge, and the parties consented to have the magistrate act for the district court, conducting all further proceedings and entering final judgment.

For his seventh claim, Kilman alleged his "First Amendment right to free speech and a redress of grievances has been denied" at ACDF. *Id.* at 25. In support, Kilman stated the following:

> [Kilman] ha[d] been denied a grievance by deputies and sergeants at the jail multiple times. For example, on the morning of May 27, 2020, he asked a Deputy Calloway to file a grievance. This request was made multiple times that day and denied by Calloway each time. On May 29, 2020, he again asked for a grievance and was denied by Deputy Calloway. . . .
>
> It is often used as an excuse by staff that the issue in question "is not grievable," or that the issue in question "is a rule" and therefore not grievable. These were Mr. Calloway's excuses . . . .
>
> Going back briefly to May 27, 2020: after . . . Mr. Kilman was denied a grievance by Mr. Calloway, Mr. Kilman asked for a grievance against Calloway for denying him a grievance. This was also denied, and was denied multiple times later. Mr. Kilman's cellmates, who witnessed these refusals to open grievances by Mr. Calloway, requested that they themselves could be allowed to file grievances against Deputy Calloway. They were told no, which was in violation of their rights.

Id. at 26–27. Kilman asserted this claim against Sheriff Brown, as well as Deputy Calloway. In addition, Kilman attached to his complaint an affidavit signed by two inmates at ACDF attesting "that the information in [this seventh claim] is true and correct." *Id.* at 42.

Shortly after Kilman filed his complaint, the district court dismissed this seventh claim as frivolous and dismissed Deputy Calloway as a defendant. Sheriff Brown later moved for summary judgment on the remaining six claims. In part, Sheriff Brown argued Kilman's "claims must be dismissed for failure to exhaust his administrative remedies under the PLRA." *Id.* at 92. Sheriff Brown explained ACDF "has a two-step grievance procedure and in order to fully exhaust a claim, an inmate not only must file a

grievance, but then must appeal the initial decision if the inmate is unhappy with the initial response." *Id.* at 91–92. But here, Sheriff Brown argued, Kilman had "not fully exhausted any of his grievances related to the claims he . . . assert[ed] in this case since he never filed any appeals of those issues and the time for filing an appeal has expired." *Id.* at 92.

The district court agreed. In the order granting Sheriff Brown's motion for summary judgment, the court noted: "[i]t is undisputed that Mr. Kilman filed a grievance relating to his cell search claim but did not appeal it" and "that Mr. Kilman did not file grievances relating to his other claims." *Id.* at 399. Rather, "[w]hat is in dispute," the court stated, "is whether Mr. Kilman was prevented from making grievances about the claims specific to this lawsuit." *Id.* at 400. To demonstrate that he was thwarted from using the ACDF grievance process, the district court explained Kilman "must produce 'specific facts' as to whether (1) he was actually deterred by the threat or machination from lodging a grievance; and (2) 'a reasonable inmate of ordinary firmness and fortitude' would be deterred by the threat or machination from lodging a grievance." *Id.* at 398 (quoting *May v. Segovia*, 929 F.3d 1223, 1235 (10th Cir. 2019)).

The district court concluded Kilman met neither element. First, the court found Kilman failed to show any genuine dispute that he was prevented from "fil[ing] grievances for each of his claims made here." *Id.* at 401. Moreover, the court noted that "to file a grievance, an inmate is required to speak with a deputy about setting up a grievance on ACDF's electronic kiosk system" but can also "file paper grievances if they prefer." *Id.* at 399. Kilman, the court explained, did "provide[] some specific facts to

support his assertion that he was prevented from filing grievances using a kiosk on two separate days from the same official." *Id.* at 401. Kilman did not, however, "explain how he was able to file certain grievances but not others." *Id.*; *see also id.* at 400 (noting that Kilman filed "at least 30 grievances . . . between October 6, 2018 and September 15, 2020"); *id.* at 402 (noting that "it [wa]s undisputed that Mr. Kilman was able to file (and appeal) at least three grievances in May and June of 2020, which is when Mr. Kilman allege[d] he was prevented from filing grievances that relate to the claims made in this lawsuit").

Second, the district court found Kilman failed to "explain how being denied the ability to file a grievance using the kiosk by one prison official on two separate days would deter a 'reasonable inmate of ordinary firmness and fortitude' from filing a grievance." *Id.* at 401–02. Indeed, even if "Mr. Kilman and other inmates were all thwarted by th[e] one officer," the court explained, "there is no evidence to show that other officials also refused" Kilman from "filing a grievance," especially "where it [wa]s undisputed that Mr. Kilman was able to file (and appeal) at least three grievances in May and June of 2020." *Id.* at 402. And, the court noted, "inmates have ten days in which to submit a grievance and are permitted to submit grievances via handwritten form" rather than through the kiosk system. *Id.* But the district court found "no evidence" shows "that attempts to file grievances with written forms were thwarted." *Id.* Therefore, the court concluded "there [wa]s no genuine dispute of fact as to the availability of Mr. Kilman's administrative remedies" and that "Mr. Kilman failed to exhaust his

administrative remedies." *Id.* The district court then entered final judgment, dismissing Kilman's action without prejudice.

II.

Kilman now appeals the district court's order granting summary judgment to Sheriff Brown, asserting various arguments for why this court "should vacate the [order] and remand the case back [for] discovery proceedings." Aplt. Br. at 10. "We review summary judgment decisions de novo, applying the same legal standard as the district court." *May*, 929 F.3d at 1234 (10th Cir. 2019) (citation omitted). 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). "Because [Kilman] is pro se, we afford his materials a liberal construction but do not act as his advocate." *Campbell v. Jones*, 684 F. App'x 750, 753 (10th Cir. 2017) (unpublished) (citation omitted).[2]

Pursuant to the PLRA, "[n]o action shall be brought with respect to prison conditions under [§ 1983] . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "[T]he prison's procedural requirements define the steps necessary for exhaustion" and an inmate thus "may only exhaust" his administrative remedies "by properly following all the steps laid out in the prison system's grievance procedure."

[2] Although not precedential, we find the discussion in *Campbell* and all other unpublished opinions we rely on herein to be instructive. *See* 10th Cir. R. 32.1 ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *see also* Fed. R. App. P. 32.1.

Calbart v. Sauer, 504 F. App'x 778, 782 (10th Cir. 2012) (unpublished) (citing *Little v. Jones*, 607 F.3d 1245, 1249 (10th Cir. 2010)). "Although a defendant bears the burden of 'proving that the plaintiff did not [exhaust his] administrative remedies,' once the defendant has carried that burden, 'the onus falls on the plaintiff to show that remedies were unavailable to him.'" *May*, 929 F.3d at 1235 (citation omitted).

"Remedies are unavailable if prison officials are 'unable or consistently unwilling to provide any relief,' if 'no ordinary prisoner can make sense of what [the grievance process] demands,' or if 'administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.'" *Campbell*, 684 F. App'x at 753 (quoting *Ross v. Blake*, 136 S. Ct. 1850, 1859–60 (2016)). To show he was thwarted from using the grievance process, an inmate "must produce specific facts that show there is a genuine issue of fact as to whether (1) '[the prison staff's actions] actually did deter [him] from lodging a grievance' and (2) '[their actions] would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance.'" *May*, 929 F.3d at 1235 (citation omitted).[3]

Kilman does not dispute that ACDF has a grievance process, that the grievance process requires inmates to speak to a deputy to set up a grievance in a kiosk system and

[3] Kilman argues that it was Sheriff Brown's burden to show that the remedies were available to Kilman. That is not, however, how our precedent has allocated the parties' respective burdens. *See Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011). Kilman further argues that this is not an appropriate inquiry for summary judgment because he requested a trial. But we have routinely found it appropriate for district courts to reject claims on summary judgment that an inmate has failed to properly exhaust. *See May*, 929 F.3d at 1234–35.

appeal any decision the inmate is unsatisfied with, or that he did not either file a grievance or appeal an unfavorable resolution relating to any claims he brought in this action. He does, however, argue that administrative remedies were unavailable to him because he was "obstructed from the grievance process." Aplt. Br. at 6. For support, Kilman points to his allegations relating to Deputy Calloway's denials of his grievances. He further asserts in his briefs that the "[s]taff at the jail has misled [him] about his grievances" by telling him his "issues were supposedly non-grievable" or by telling him they would enter his grievance in the kiosk system but never did. *Id.* at 8. These latter assertions echo Kilman's general allegations in his seventh claim.

Having construed Kilman's argument liberally and reviewed the record on appeal, we find Kilman has failed to meet his burden to show that he was wrongly prevented from bringing his grievances he asserts as claims here. As an initial matter, Kilman was required to meet two elements, a subjective element and an objective element, to show he was thwarted from using ACDF's grievance process. The district court found he proved neither. While Kilman makes several conclusory statements that "officers denied multiple grievances multiple times," he does not make the argument that any actions by the prison staff "would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance." *May*, 929 F.3d at 1235 (citation and internal quotation marks omitted). This omission is enough to affirm the order below.

Furthermore, we are also unpersuaded that Kilman has shown that any action by prison officials "actually did deter [him] from lodging a grievance" here. *May*, 929 F.3d at 1235 (citation and internal quotation marks omitted). As the district court noted,

Kilman does not connect his allegations about Deputy Calloway's actions—which he supported with an affidavit signed by two inmates—with any of his claims here. Moreover, Kilman's bare and general assertions about other official's actions not only lack a nexus to his claims here, but these assertions are also insufficient to carry Kilman's burden on summary judgment. *See id.* at 1234–35 (explaining that specific facts asserted at summary judgment must be support by the record). This is significant because Kilman has filed over thirty grievances at ACDF and has appealed multiple resolutions to his grievances. In fact, some of these grievances and appeals were initiated around the time he alleged Deputy Calloway refused to initiate some of his undisclosed grievances. In his reply brief, Kilman asserts he "did not file any grievances between 5-9-2020 and 6-13-2020" because "[h]e was not allowed to" and that is why "he filed suit on 6-5-2020." Aplt. Reply at 4. But Kilman provides no explanation for why "[h]e was not allowed to"—other than perhaps his allegations about Deputy Calloway and the other officials. Additionally, such allegations raised in an appellant's brief are not proper evidence for summary judgment. *See May*, 929 F.3d at 1234–35.

Accordingly, it is entirely possible that Deputy Calloway did actually deter Kilman from filing some grievances on two specific dates. But we have no evidence before us that these actions made it such that Kilman was deterred from bringing his grievances or appeals of the claims here. Moreover, Kilman otherwise "fails to offer any explanation as to how the grievance process was so broken as to dissuade him from filing his . . . grievance[s] but not enough to dissuade him from filing" over thirty grievances from October 6, 2018 to September 15, 2020 or the other grievances around the time of

Deputy Calloway's actions. *Id.* at 1235; *see also Calbert*, 504 F. App'x at 784 ("Calbart contends that the administrative remedies were unavailable to him because defendants interfered with his ability to access the necessary grievance forms . . . But Calbart's contention is belied by the numerous grievance forms in the record.").[4]

Kilman raises two additional arguments that we think are inapposite. First, Kilman argues that "[t]he grievance process at ACDF lends itself to a lack of accountability and a lack of credibility." Aplt. Br. at 8–9. Specifically, Kilman asserts that inmates are "completely dependent upon staff to access the grievance process" and the "process makes it nigh-impossible to prove that one has requested a grievance, or—on the other hand—to prove whether or not it has been denied." *Id.* at 9. This argument, however, is beside the point given that Kilman does not challenge the district court's finding that he failed to file the relevant grievances or appeals here.

Second, Kilman argues that the "[d]ismissal of [his] redress of grievances claim"—the seventh claim he raised in his complaint that was dismissed as frivolous—"should preclude the [c]ourt's" grant of summary judgment here. Aplt. Br. at 4. According to Kilman, it is "unjust" that he could not bring his First Amendment claim that he was denied redress of his grievances and, at the same time, be denied an

[4] In granting summary judgment in favor of Sheriff Brown, the district court also relied on the fact that Kilman was "permitted to submit grievances via handwritten form." *See* ROA Vol. 1 at 401–02 (discussing whether a reasonable inmate of ordinary firmness and fortitude would be thwarted from filing a grievance). Kilman argues that he could only file a grievance through the kiosk and not by paper. Because our conclusion does not rely on whether this latter grievance procedure exists at ACDF, we need not address this issue.

opportunity to raise his grievances in federal court. The PLRA, however, does not prevent Kilman from bringing suit in federal district court. Instead, the PLRA first requires inmates like Kilman to "exhaust[]" "available" "administrative remedies" *before* he can bring an action "with respect to prison conditions under" § 1983. 42 U.S.C. § 1997e(a). As explained above, however, Kilman did not dispute he failed to exhaust the ACDF grievance process and failed to show the administrative remedies were unavailable to him.

Therefore, we affirm the district court's order granting summary judgment to Sheriff Brown on Kilman's six non-frivolous claims.

III.

Kilman has also filed a motion to proceed on appeal in forma pauperis. Having reviewed his motion and financial declaration, we grant Kilman's request. We remind Kilman, however, "that this status eliminates only the need for prepayment of the filing fee." *Rachel v. Troutt*, 820 F.3d 390, 399 (10th Cir. 2016). We accordingly direct Kilman to continue making partial payments until the entire fee has been paid. *See id.*[5]

[5] We note, however, that Kilman's history with strikes is complicated and may have been further complicated by the Supreme Court's decision in *Coleman v. Tollefson*, 575 U.S. 532 (2015). Kilman previously accrued two strikes as a result of two actions being dismissed by the district court for failure to state a claim and/or as legally frivolous. *See* 28 U.S.C. § 1915. Kilman appealed both of these dismissals, and we affirmed. In this action, one of Kilman's claims was dismissed as frivolous and the rest were rejected on summary judgment for failure to exhaust administrative remedies. In such a case—a "mixed disposition"—we have assessed a strike against the inmate. *See Thomas v. Parker*, 672 F.3d 1182, 1184–85 (10th Cir. 2012). Kilman does not appeal the dismissal of his claim deemed frivolous but only his claims resolved on summary judgment.

IV.

For the foregoing reasons, we affirm the district court's order and grant Kilman's motion to proceed on appeal in forma pauperis.

Entered for the Court

Allison H. Eid
Circuit Judge

What to do about the previous appeals, the district court's dismissal, or Kilman's decision to not appeal the dismissal of his one claim as frivolous has not been raised by Sheriff Brown and we choose not to address these issues. We note, however, that some of our unpublished cases have inconsistently read *Coleman*'s implications relevant to these issues. *Compare Dawson v. Coffman*, 651 F. App'x 840, 842 n.2 (10th Cir. 2016) (unpublished), *with Vreeland v. Raemisch*, 2021 WL 2453359, at *3 (10th Cir. June 16, 2021) (unpublished).