FILED
United States Court of Appeals
Tenth Circuit

October 6, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRYCE FRANKLIN,

Petitioner - Appellant,

v.

ALISHA LUCERO,

Respondent - Appellee.

No. 20-2155
(D.C. No. 1:18-CV-00413-JCH-KRS)
(D. New Mexico)

ORDER GRANTING IN PART AND DENYING IN PART A CERTIFICATE OF APPEALABILITY AND AFFIRMING IN PART AND DISMISSING IN PART*

Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

Bryce Franklin, a prisoner in the custody of the New Mexico Department of Corrections ("NMDOC"), filed a *pro se* petition that he styled as a 28 U.S.C. § 2254 petition, challenging the deprivation of his good-time credits. NMDOC deducted Mr. Franklin's good-time credits after finding, through a prison disciplinary proceeding, that he attempted to obtain contraband by placing a letter requesting "orange mana," a term prison officials determined was a codename for Suboxone, in the prison mail system. Mr. Franklin challenges NMDOC's interpretation of the letter he attempted to

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

send, and he raises constitutional challenges to both NMDOC's confiscation of the letter and to the process provided during the disciplinary proceeding.

The district court, treating Mr. Franklin's action as a proceeding under 28 U.S.C. § 2254, denied relief and denied a certificate of appealability ("COA"). Mr. Franklin petitions this court for issuance of a COA and for leave to proceed *in forma pauperis*.[1] We grant Mr. Franklin leave to proceed *in forma pauperis*. But, while we conclude Mr. Franklin's action is properly construed as a proceeding under 28 U.S.C. § 2241 and grant him a COA in part, we affirm the district court's order in part and dismiss this matter as to the claims on which we deny a COA.

I. BACKGROUND

A. Factual History

Mr. Franklin is serving a life sentence. On February 26, 2015, Lieutenant C. Harbour, who was screening mail for the NMDOC, discovered a letter from Mr. Franklin to Christopher Lloyd. According to Lieutenant Harbour's misconduct report, the letter stated,

> I need you to try to find me some orange mana. I got someone you can send it to. I'd like to get some before I go to court. May is coming up soon. If things go bad this maybe [sic] my last opportunity.

ROA at 28. Lieutenant Harbour's report indicated that "orange mana" is a codename for Suboxone, which the prison considers a dangerous drug. Based on this letter, the prison

[1] Because Mr. Franklin proceeds *pro se*, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

charged Mr. Franklin with attempting to introduce contraband into the prison and attempting to possess a dangerous drug.

NMDOC held a disciplinary hearing. Mr. Franklin was present and denied the charges. His defense was that "orange mana" referred to a card in the game "Magic[:] [T]he [G]athering." *Id.* at 27. He presented another prisoner as a witness who testified, "we had been hearing rumors from the streets that there's a new type of [m]ana for this game[,] . . . and [Mr. Franklin] was writing to try and find out about it or to have someone try to get some for him." *Id.* Mr. Franklin similarly testified his reference to "orange mana" was "about magic cards mana." *Id.* He explained, "Orange mana ok right now there are five . . . colors. We heard there was a new color coming out in orange." *Id.* He showed the hearing officer cards or images of cards that say "produce any color," and he explained that, in the game, he could "produce pink mana if I want to[;] I c[ould] produce purple." *Id.* He claimed the letter referenced an upcoming May court hearing in his criminal case because he wanted to bring his Magic cards to court. Finally, he showed the hearing officer his tattoos of certain symbols of mana on his arm.

In addition to presenting a factual defense to the charges, Mr. Franklin requested dismissal of the disciplinary report on the ground that NMDOC had not, prior to the disciplinary hearing, provided him with a copy of the letter that served as the foundation for the report. The hearing officer's decision indicates the letter had not been "included as part of the disciplinary packet as it is talking about engaging in illegal activities," but it "was available at the hearing to be introduced into evidence if requested." *Id.* at 27.

After reviewing the evidence, the hearing officer found Mr. Franklin guilty based on Lieutenant Harbour's report and Mr. Franklin's letter. As punishment, the hearing officer deducted all of Mr. Franklin's earned good-time credits and restricted his non-contact visits for 120 days. Mr. Franklin appealed to the warden, arguing the hearing officer's decision was not based on evidence and the hearing officer failed to follow disciplinary policies. The warden denied his appeal, stating the hearing "substantial[ly] compli[ed] with all policies and procedures." *Id.* at 29. Mr. Franklin sought review from the Secretary of NMDOC; the Secretary also rejected his appeal.

B. Procedural History

Mr. Franklin filed a petition for a writ of habeas corpus in New Mexico state court in the Eighth Judicial District Court. The court dismissed his petition, holding Mr. Franklin had "fail[ed] to facially establish an entitlement to relief as a matter of law." *Id.* at 33. Mr. Franklin did not appeal this dismissal. Rather, Mr. Franklin filed another state petition for habeas corpus, this time in New Mexico's First Judicial District Court. The First Judicial District Court denied Mr. Franklin's petition as untimely and as a second or successive petition. The New Mexico Supreme Court denied certiorari.

Mr. Franklin then commenced this action in the United States District Court for the District of New Mexico, submitting his complaint on a form entitled "Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody." *Id.* at 4. The district court dismissed the petition, concluding Mr. Franklin failed to state a constitutional violation and sufficient evidence supported the result reached through the

disciplinary hearing. The district court also denied Mr. Franklin a COA. Mr. Franklin petitions this court for issuance of a COA.

II. DISCUSSION

We commence our analysis by discussing the nature of Mr. Franklin's action—whether it is a § 2241 or § 2254 proceeding. Then we state the applicable standard for obtaining a COA and analyze whether Mr. Franklin has satisfied that standard on any of his challenges to the prison disciplinary proceeding.

A. Type of Petition

We first consider whether the petition filed here is properly considered under 28 U.S.C. § 2254 or 28 U.S.C. § 2241. For the reasons we now explain, Mr. Franklin's petition is appropriately construed as a § 2241 petition.[2]

When a petitioner is "challenging the execution of his sentence rather than the validity of his conviction," the petition is properly understood as brought pursuant to § 2241, not § 2254. *Hamm v. Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2002). A petitioner's challenge to the deprivation of good-time credits constitutes a challenge to the execution of his sentence. *See McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997)

[2] Mr. Franklin does not argue that the district court failed to accurately characterize his action, and we "cannot take on the responsibility of serving as the litigant's attorney." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). But we have a practice of construing mislabeled § 2254 petitions as § 2241 petitions for purposes of proceedings in this court. *See Hamm v. Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2002); *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000); *see also Caserta v. Kaiser*, No. 00-6108, 2000 WL 1616248, at *1 (10th Cir. Oct. 30, 2000) (unpublished).

("[A] § 2241 attack on the execution of a sentence may challenge some matters that occur at prison, such as deprivation of good-time credits and other prison disciplinary matters."); *United States v. Furman*, 112 F.3d 435, 438 (10th Cir. 1997) (stating arguments "concerning good-time credit and parole procedure[] go to the execution of sentence and, thus, should be brought against defendant's custodian under 28 U.S.C. § 2241"). Accordingly, the district court should have construed Mr. Franklin's filing as a petition for relief under § 2241. This distinction matters.

"The standard of review for a § 2241 [petition] is less demanding" than that for a § 2254 petition. *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1042–43 (10th Cir. 2017). Federal courts consider § 2241 petitions de novo. *Id.* at 1043. Conversely, when reviewing a § 2254 petition where the underlying grounds were adjudicated on the merits by a state court, federal courts review the petition only to determine if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* (quoting 28 U.S.C. § 2254(d)).

Here, the district court construed and analyzed Mr. Franklin's petition as a petition under § 2254, including application of the deference applicable to claims rejected on their merits in state court. But Mr. Franklin's action challenges the denial of good-time credits—a condition of confinement—such that the district court should have construed the petition as arising under § 2241.

When a district court incorrectly analyzes a petition under § 2254 instead of § 2241, "remand to the district court for reconsideration of [the] claims under § 2241 would generally be the appropriate course." *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000). But we need not remand where the claims are "not cognizable in a federal habeas action" or "are without merit." *Id*. With that in mind, we state the standard Mr. Franklin must satisfy to obtain a COA.

B. Certificate of Appealability Standard

To appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court," a petitioner must obtain a COA. 28 U.S.C. § 2253(c)(1)(A). "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires the petitioner to demonstrate "that reasonable jurists could differ as to whether [his constitutional] claims should have been resolved differently." *Lafferty v. Benzon*, 933 F.3d 1237, 1242 (10th Cir. 2019).

Mr. Franklin is incarcerated by a state and therefore cannot proceed unless we grant him a COA, regardless of whether his petition is understood as pursuant to § 2241 or § 2254. *Montez*, 208 F.3d at 868–69. "When reviewing the denial of a habeas petition under § 2241, we review the district court's legal conclusions de novo and accept its factual findings unless clearly erroneous." *Leatherwood*, 861 F.3d at 1042.

C. Claims Relating to the Hearing

"It is well settled that an inmate's liberty interest in his earned good time credits cannot be denied without the minimal safeguards afforded by the Due Process Clause of

the Fourteenth Amendment." *Howard v. U.S. Bureau of Prisons*, 487 F.3d 808, 811 (10th Cir. 2007) (quotation marks omitted). But "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). The relevant due process requirements are "notice of the charges, an opportunity to present witnesses and evidence in defense of those charges, . . . a written statement by the factfinder of the evidence relied on," and "some evidence to support the hearing panel's decision." *Gwinn v. Awmiller*, 354 F.3d 1211, 1219 (10th Cir. 2004) (internal citations omitted). Disclosure of evidence is also required. *Wolff*, 418 U.S. at 559 (citing *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)).

Mr. Franklin raises three due process claims relating to his prison disciplinary proceeding: (1) the prison "never provided a copy of the letter that the charges stem[med] from" and did not allow Mr. Franklin to possess the letter; (2) there was insufficient evidence to support a finding of wrongdoing; and (3) the hearing officer failed to provide a sufficient explanation for the decision. Opening Br. at 7. As we now explain, Mr. Franklin fails to satisfy the standard for a COA on his claims about production of the letter and the sufficiency of the evidence supporting the disciplinary decision. And, although Mr. Franklin satisfies the standard for a COA regarding the sufficiency of the explanation supporting the disciplinary decision, we are able to resolve that claim on the merits at this stage because circuit precedent forecloses Mr. Franklin's argument.

1. Failure to Produce the Letter

Mr. Franklin contends his due process rights were violated by NMDOC's failure to produce a copy of the letter. "Chief among the due process minima outlined in *Wolff* was the right of an inmate to call and present witnesses and documentary evidence in his defense before the disciplinary board." *Ponte v. Real*, 471 U.S. 491, 495 (1985). A prisoner's right to present evidence during a disciplinary proceeding, however, is circumscribed by penological interests, including concerns for safety in the prison. *Id.* Further, a prisoner's claim that his due process rights were violated by restrictions on the presentation of evidence is "subject to harmless error review." *Howard*, 487 F.3d at 813 (quotation marks omitted). Thus, a prisoner must demonstrate that any limitation on the presentation of evidence prejudiced his defense. *Id.* at 813–15.

Assuming, as Mr. Franklin alleges, that he was not permitted access to the letter, Mr. Franklin has not established any prejudice from this limitation on the evidence accessible to him before and during the disciplinary hearing. First, Mr. Franklin was the author of the letter, making him obviously familiar with the letter's contents. Second, records from the prison disciplinary hearing indicate the letter was part of the evidentiary record, and Mr. Franklin never squarely contests this proposition. Third, and most important, the outcome of Mr. Franklin's disciplinary hearing hinged on a single discreet issue: whether "orange mana" referred to Suboxone or to a Magic card. Mr. Franklin was permitted a full and fair opportunity to present evidence on this matter—e.g. calling a fellow prisoner as a witness, presenting Magic cards or pictures of Magic cards, showing his tattoo to the hearing officer. Ultimately, however, the hearing officer rejected

Mr. Franklin's contention that "orange mana" was a reference to a Magic card. And Mr. Franklin does not explain how his ability to view the letter would have strengthened his argument that "orange mana" referred to a Magic card. Therefore, given the discreet nature of the issue before the hearing officer, we hold no reasonable jurist could determine Mr. Franklin has demonstrated that he was prejudiced by the prison's alleged failure to produce the letter. Accordingly, we deny a COA on this issue.

2. Sufficiency of Evidence

Mr. Franklin next argues the hearing officer's decision was not supported by sufficient evidence. The standard for evidentiary sufficiency in the context of prison disciplinary proceedings is whether there is "some evidence" in the record supporting the finding of wrongdoing, "even if the evidence supporting the decision is meager." *Howard*, 487 F.3d at 812 (quotation marks omitted).[3] The record here contains sufficient evidence to support the hearing officer's decision.

It was, and remains, undisputed that Mr. Franklin wrote and attempted to send a letter requesting "orange mana." As just discussed, the discreet factual dispute before the hearing officer was whether "orange mana" meant Suboxone or whether it referenced a rumored, new type of mana in the game "Magic: The Gathering." Mr. Franklin and the prison both presented the hearing officer with evidence supporting their respective

[3] Mr. Franklin argues we should apply a preponderance of the evidence standard because NMDOC's internal policies require a preponderance of the evidence to find an inmate guilty of wrongdoing in a prison disciplinary proceeding. We need not address that contention, however, because the result would be the same under either standard.

interpretations. On the one hand, Lieutenant Harbour's misconduct report stated "orange mana" was code for Suboxone. On the other, Mr. Franklin and another inmate testified that "orange mana" referenced a new playing card. The hearing officer was entitled to discredit Mr. Franklin and the testimony of the inmate he called and, instead, credit the misconduct report and other indications from the letter that Mr. Franklin sought contraband. *See* ROA at 28 (explaining the letter stated, "I got someone you can send it to" and "[i]f things go bad this maybe [sic] my last opportunity"). We therefore deny a COA on this issue.

3. Explanation of Guilt

Mr. Franklin's final argument relating to the prison disciplinary proceeding is that the hearing officer failed to provide a reasoned explanation for finding wrongdoing. The hearing officer, however, provided a written summation of the proceeding and decision. The written form states the hearing officer relied on (1) Lieutenant Harbour's misconduct report, which the hearing officer quoted; (2) the chain of custody of the letter; and (3) the letter and envelope Mr. Franklin attempted to send. Mr. Franklin argues this explanation was insufficient because it simply ratified Lieutenant Harbour's report and did not explain why the hearing officer did not credit the exculpatory testimony.

Mr. Franklin meets the requisite showing for a COA because he demonstrates that reasonable jurists could disagree as to whether this claim should have been resolved differently. *See Lafferty*, 933 F.3d at 1242. The disciplinary decision does not provide an explanation for why the hearing officer credited Lieutenant Harbour's report over Mr. Franklin's position. And some out-of-circuit authority supports Mr. Franklin's

position by concluding that a prison disciplinary officer must explain the basis for his decision to satisfy due process requirements. *Whitford v. Boglino*, 63 F.3d 527, 536–37 (7th Cir. 1995) (per curiam). That one of our sibling circuits agrees with Mr. Franklin's position permits him to meet the standard for issuance of a COA. *United States v. Crooks*, 769 F. App'x 569, 572 (10th Cir. 2019) (unpublished) (holding a disagreement between circuits indicates reasonable jurists could debate a question of law).

But the Seventh Circuit's position imposes a more rigorous requirement on prison disciplinary officers than the standard we have adopted. We have previously held *Wolff*'s requirements were satisfied where the written statement indicated only that the hearing officer relied upon an officer's report. *Mitchell v. Maynard*, 80 F.3d 1433, 1445 (10th Cir. 1996) (holding an inmate "had adequate notice of the conduct he was accused of committing and whose statement had incriminated him" and "[t]he lack of more specific findings also did not hamper our ability to review the proceeding and its findings" where the written statement "stated [the inmate] was found guilty based on an officer's report"); *Taylor v. Wallace*, 931 F.2d 698, 703 (10th Cir. 1991) (holding a written statement "stating the committee found [an inmate] guilty in reliance upon confidential witness statements" was sufficient "[g]iven the explicit description of the conduct set out in the offense report and the obvious institutional concerns implicated" where the inmate was charged with participating in a riot). And our precedent is consistent with that of several other circuits. *See, e.g.*, *King v. Wells*, 760 F.2d 89, 94 (6th Cir. 1985) ("[T]he outcome of the hearing necessarily indicates whose version of the facts was believed, and an express finding on the question is not required."); *Brown v. Frey*, 807 F.2d 1407, 1412–13

(8th Cir. 1986) (holding *Wolff*'s requirement of a written explanation is satisfied where the written decision merely indicated it relied on a report demonstrating the alleged wrongdoing). In line with these cases, we have no difficulty assessing and reviewing the bases on which the disciplinary officer relied in issuing a decision against Mr. Franklin. Therefore, although the existence of a circuit split requires us to grant Mr. Franklin a COA, *Crooks*, 769 F. App'x at 572, our precedent unquestionably resolves the issue against Mr. Franklin. Accordingly, we affirm the district court's denial of habeas relief on this issue.

D. Claims Relating to NMDOC's Refusal to Mail the Letter

Mr. Franklin also raises two claims relating to NMDOC's confiscation of and failure to mail the letter. Before the district court, Mr. Franklin argued the prison's confiscation of his letter violated his First Amendment rights. Before this court, however, Mr. Franklin recharacterizes his claims as implicating due process.[4] Specifically, he now argues the letter could not have been admitted against him at his disciplinary hearing because the prison failed to provide him with (1) notice that the letter was confiscated and (2) a hearing to challenge confiscation. His attempt to recharacterize the arguments

[4] The district court properly rejected Mr. Franklin's First Amendment claims on the ground they were not cognizable in a federal habeas petition. *See, e.g.*, *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012) (holding habeas is not an appropriate vehicle to bring claims unrelated to the fact or duration of confinement; rather, "a prisoner who challenges the conditions of his confinement must do so through a civil rights action"); *McIntosh v. United States Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997) (holding a habeas petition may be used only "to attack the execution of a sentence" or "the validity of a conviction and sentence").

relating to confiscation of the letter as sounding in due process suffers from two fatal defects.

First, Mr. Franklin's petition in the district court did not raise a due process argument regarding the confiscation of the letter. "[T]he rule that we do not consider issues not raised in the district court" covers both "bald faced new issue[s]" and "situations where a litigant changes to a new theory on appeal that falls under the same general category as an argument presented" to the district court. *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015) (internal quotation marks omitted); *see also United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012) (stating, in denying a COA, "as to issues that were not presented to the district court, we adhere to our general rule against considering issues for the first time on appeal"). By arguing in the district court only that the prison violated his First Amendment rights by not mailing the letter, Mr. Franklin forfeited his due process arguments pertaining to the confiscation of the letter.

Second, even if the prison's refusal to send the letter was a due process violation—which is what Mr. Franklin argues—any violation was harmless with respect to the prison disciplinary proceeding. *See Grossman v. Bruce*, 447 F.3d 801, 805 (10th Cir. 2006) (applying harmless error review to a habeas petition regarding a prison disciplinary proceeding). For instance, had the prison photocopied the letter before mailing the letter, the photocopy would have provided ample basis for Lieutenant Harbour to prepare a misconduct report and for a hearing officer to conclude that Mr. Franklin's reference to "orange mana" was an attempt to obtain Suboxone. Thus,

even if the letter had been sent, the evidence supporting a finding of wrongdoing by Mr. Franklin would remain. Accordingly, we deny a COA on this issue.

III. CONCLUSION

We **GRANT** Mr. Franklin's request to proceed *in forma pauperis*. We **DENY** Mr. Franklin's petition for a COA regarding his due process claim that prison officials failed to produce the letter, that insufficient evidence supported the disciplinary decision, and that his First Amendment and due process rights were violated when the prison confiscated the letter. Thus, we **DISMISS** this matter as to those claims. We, however, **GRANT** Mr. Franklin's petition for a COA on his claim that the hearing officer provided an insufficient explanation of its decision; but we **AFFIRM** the district court's denial of relief on that claim because the claim is foreclosed by our precedent.

Entered for the Court

Carolyn B. McHugh
Circuit Judge