FILED
United States Court of Appeals
Tenth Circuit

June 9, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRADLEY C. KESSMAN,

Plaintiff - Appellant,

v.

SGT. MATTHEW ROBERTS; CAPTAIN MOLL, Larimer County Jail; AMANDA JARMAN, H.S.A., Health Services Administrator Larimer County Jail,

Defendants - Appellees.

No. 22-1280
(D.C. No. 1:22-CV-00910-LTB-GPG)
(D. Colo.)

BRADLEY C. KESSMAN,

Plaintiff - Appellant,

v.

SGT. SMOYER; SGT. RYAN MYATT; DEPUTY CHRISTOPHER SMITH; CORPORAL BROWN,

Defendants - Appellees.

No. 22-1385
(D.C. No. 1:22-CV-01860-LTB-GPG)
(D. Colo.)

BRADLEY C. KESSMAN,

Plaintiff - Appellant,

v.

CAPTAIN JUSTIN E. SMITH, the Sheriff; SHAFFER, Lt.; DEPUTY BALKEMA; DEPUTY ZHIZHIN,

No. 22-1390
(D.C. No. 1:22-CV-01859-LTB-GPG)
(D. Colo.)

Defendants - Appellees.

ORDER AND JUDGMENT*

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

In these three cases, Bradley C. Kessman sued various city and county officials based on his arrest and detention in the Larimer County Jail. On the magistrate judge's recommendation, the district court dismissed the amended complaint in each case. Mr. Kessman appeals.[1] But he waived appellate review of the dismissals because he did not object to the magistrate judge's recommendations. And we disagree with his arguments that the district court should have appointed counsel to represent him and that it should have granted his postjudgment motions in the case underlying Appeal No. 22-1280. So we affirm.

Background

In each of these cases, the magistrate judge directed Mr. Kessman to cure deficiencies in his complaint. After concluding that the amended complaints did not

---

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] Mr. Kessman represents himself, so we construe his filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

comply with Federal Rule of Civil Procedure 8, the magistrate judge recommended that the district court dismiss them. The magistrate judge warned Mr. Kessman that his failure to timely object to the recommendations could bar him from appealing findings or conclusions adopted by the district court. Yet Mr. Kessman did not object. The district court adopted the recommendations and dismissed the amended complaints. In each case, Mr. Kessman had moved for appointed counsel. The district court denied the motions for counsel as moot after deciding to dismiss the amended complaints.

After the district court entered judgment in the case underlying Appeal No. 22-1280, Mr. Kessman filed motions titled "Motion to Address All Evidence" and "Motion for Relief from Damages Sustained." 22-1280 Second Suppl. R. at 4, 23. The district court treated the motions as arising under Federal Rule of Civil Procedure 59(e), and it denied them after concluding Mr. Kessman had failed to provide any valid reason to reconsider and vacate the judgment.

Discussion

We first conclude that Mr. Kessman has waived appellate review of the district court's decisions to dismiss his amended complaints. Our firm-waiver rule holds that a party who does not object to a magistrate judge's recommendation "waives appellate review of both factual and legal questions." *Morales-Fernandez v. INS*, 418 F.3d 1116, 1119 (10th Cir. 2005). The rule has two exceptions. First, it does not apply if a pro se litigant has not been advised of the objection deadline and the

consequences of failing to object. *Id.* Second, we will exercise our discretion to overlook the rule if the interests of justice require review. *See id.*

The first exception does not apply here. The magistrate judge's recommendations clearly informed Mr. Kessman of the objection deadlines and the consequences of failing to object.

We turn, then, to the second exception and consider the interests of justice. Several factors help us to evaluate those interests, including "a pro se litigant's effort to comply, the force and plausibility of the explanation for his failure to comply, and the importance of the issues raised." *Id.* at 1120 (italics omitted). In many ways, assessing the importance of the issues "is similar to reviewing for plain error," a standard requiring an appellant "to show (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings."[2] *Duffield v. Jackson*, 545 F.3d 1234, 1238 (10th Cir. 2008) (internal quotation marks omitted).

Applying these factors, we conclude that reviewing the merits would not further the interests of justice. This court directed Mr. Kessman to explain why the firm-waiver rule should not prevent review of the district court's dismissals. Yet his responses do not address the firm-waiver rule in any meaningful way. He does not claim to have made any effort to file timely objections to the recommendations. Nor

[2] Some of our cases treat the existence of plain error as a third, standalone exception to our firm-waiver rule. *See, e.g.*, *Johnson v. Reyna*, 57 F.4th 769, 778 & n.7 (10th Cir. 2023). But as we conclude below, Mr. Kessman has not shown plain error.

does he offer any explanation for his failures to object. And his conclusory statements about the merits of his underlying claims do not show anything resembling plain error in the district court's decisions.

Aside from pressing the merits of his claims, Mr. Kessman argues that the district court should have appointed counsel to represent him and should have granted his postjudgment motions in the case underlying Appeal No. 22-1280.[3] The firm-waiver rule poses no obstacle for these arguments because the magistrate judge's recommendations did not address the motions to appoint counsel or the postjudgment motions. We review the district court's rulings on all these motions for an abuse of discretion. *See Nelson v. City of Albuquerque*, 921 F.3d 925, 929 (10th Cir. 2019) (Rule 59(e) motions); *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995) (motions to appoint counsel).

Mr. Kessman's motions to appoint counsel stated that he had "filed the correct papers to obtain an attorney" and that he could not afford one on his own. 22-1280 Suppl. R. at 4. His motions otherwise discussed the merits of his claims. Considering the reasons supporting his motions for counsel, we see no error in the district court's denying the motions as moot after deciding to dismiss the amended complaints.

[3] Mr. Kessman raises his challenge to the postjudgment rulings through a motion in Appeal No. 22-1280 titled "Motion to Address" various documents. We construe this motion as a supplement to his brief.

Nor do we see any error in the district court's denying the postjudgment motions in the case underlying Appeal No. 22-1280. "Rule 59(e) motions may be granted when the court has misapprehended the facts, a party's position, or the controlling law." *Nelson*, 921 F.3d at 929 (internal quotation marks omitted). Mr. Kessman has not shown that any of these circumstances existed.

Conclusion

We affirm the district court's judgments. We deny Mr. Kessman's motions to proceed without prepaying costs or fees because he has not presented "a reasoned, nonfrivolous argument on the law and facts." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991). We deny all other pending motions in these appeals.

Entered for the Court

Joel M. Carson III
Circuit Judge