

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 9, 2023

Christopher M. Wolpert
Clerk of Court

JACOB ANDREW HERRINGTON,

Plaintiff - Appellant,

v.

UNKNOWN POLICE OFFICER #1;
UNKNOWN POLICE OFFICER #2;
UNKNOWN FEMALE 911
DISPATCHER; ABOUT SIX UNKNOWN
POLICE OFFICERS; COLORADO
SPRINGS POLICE DEPARTMENT;
DISTRICT COURT - EL PASO
COUNTY; CHAD CLAYTON MILLER,
Judge,

Defendants - Appellees.

No. 22-1256
(D.C. No. 1:22-CV-01319-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

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

Plaintiff Jacob Andrew Herrington, a Colorado state prisoner proceeding

* 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). This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

pro se,¹ appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint. Plaintiff also seeks leave to proceed *in forma pauperis*. Because Plaintiff failed to cure pleading deficiencies and comply with the district court's local rules, we affirm the district court's dismissal and deny his request to proceed *in forma pauperis*.

I.

Plaintiff is a pretrial detainee at the El Paso County Criminal Justice Center in Colorado Springs, Colorado. In May 2022, Plaintiff initiated these proceedings in the United States District Court for the District of Colorado by filing a pro se prisoner complaint, and a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Plaintiff alleged that his constitutional rights were violated in August 2021 after he contacted 911 and explained that he was being robbed and assaulted. Plaintiff claims that the dispatcher refused to send emergency services and that, ultimately, the police arrived and arrested him. He further alleges that the state district court allowed law enforcement to lie under oath and refused to provide him with a speedy trial.

On June 1, 2022, the assigned magistrate judge entered an order directing Plaintiff to cure certain specified deficiencies in his filings. The order further warned that if Plaintiff failed to cure the deficiencies within thirty days, the magistrate judge would dismiss the action without further notice. Plaintiff filed multiple affidavits,

¹ “Although we liberally construe *pro se* filings, we do not ‘assume the role of advocate.’” Yang v. Archuleta, 525 F.3d 925, 927 n.1 (10th Cir. 2008) (quoting Ledbetter v. City of Topeka, Kan., 318 F.3d 1183, 1187–88 (10th Cir.2003)).

letters, and motions—all of which were nonresponsive to the order directing him to cure deficiencies. And, when the district court mailed Plaintiff a copy of a June 2022 Minute Order, it was returned as undeliverable, which led the district court to conclude Plaintiff failed to file a notice of change of address within five days of any change of address as required by the local rules.

As a result, the district court dismissed the complaint and action without prejudice under Rule 41(b) for failure to cure the deficiencies as directed and for failure to comply with the district court’s local rules. And relying on 28 U.S.C. § 1915(a)(3), the district court certified that we should not take this appeal in forma pauperis because it lacks good faith.

Plaintiff appeals the district court’s dismissal of his complaint.²

II.

First, we address whether we have jurisdiction to hear this appeal. On August 25, 2022, we issued an order informing Plaintiff that his appeal appeared to be untimely. Plaintiff filed his notice of appeal of the district court’s July 8, 2022 order on August 22, 2022, which was beyond the mandatory and jurisdictional 30-day period. We also asked Plaintiff to file a brief explaining why we have jurisdiction to consider an appeal that appeared to be untimely filed.

² This appeal relates only to Plaintiff’s prisoner complaint filed May 26, 2022. We have previously resolved other petitions from Plaintiff, including: Herrington v. Geary, No. 22-1257, 2023 WL 2662910 (10th Cir. Mar. 28, 2023), and Herrington v. Gallagher, No. 22-1254, 2023 WL 5012097 (10th Cir. Aug. 7, 2023).

As an inmate confined in an institution, Plaintiff's filings are subject to the "prison mailbox rule" set forth in Rule 4(c)(1) of the Federal Rules of Appellate Procedure. Rule 4(c)(1) provides:

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

Plaintiff briefed the jurisdictional issue and declared, under penalty of perjury, that he gave his notice of appeal "to case manager/deputy" on August 7 in compliance with 28 U.S.C. § 1746 and Federal Rule of Appellate Procedure 4(c)(1). He further explained that neither the state hospital nor jail in which he was located have a system designed for legal mail. Instead, according to Plaintiff, he must "simply turn[] in outgoing mail" and, because indigent persons cannot access stamps, "unknown parties sort and stamp outgoing mail." And, in a supplemental response, Plaintiff clarified that he is allotted four stamps per month. Consistent with one of Plaintiff's prior appeals, we "liberally construe" these facts "as indicating that first-

class postage was prepaid on his notice of appeal.” Herrington v. Geary, No. 22-1257, 2023 WL 2662910, at *3 (10th Cir. Mar. 28, 2023) (finding appeal timely in same circumstances). Plaintiff has thus satisfied the prison mailbox rule and his appeal was timely.

III.

Turning to the merits, under Federal Rule of Civil Procedure 41(b), a district court may dismiss an action if the plaintiff fails “to comply with [the Federal Rules of Civil Procedure] or any order of court.”³ We review dismissals under Rule 41(b) for abuse of discretion. Olsen v. Mapes, 333 F.3d 1199, 1204 (10th Cir. 2003) (citing Mobley v. McCormick, 40 F.3d 337, 340 (10th Cir. 1994)).

“When the dismissal is without prejudice, an abuse of discretion will generally not be found, because the plaintiff may simply refile the suit.” 8 James Wm. Moore et al., Moore’s Federal Practice ¶ 41.53 (3d ed. 2007). “[D]ismissal is an appropriate disposition against a party who disregards court orders and fails to proceed as required by court rules.” United States ex rel. Jimenez v. Health Net, Inc., 400 F.3d 853, 855 (10th Cir. 2005) (citing Nat’l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 642–43 (1976)).

Plaintiff’s appeal focuses largely on his stated inability to obtain court rules and other legal materials. While we are not unsympathetic to Plaintiff’s position, at

³ Although the language of Rule 41(b) requires that the defendant move to dismiss, the Rule has long been interpreted to permit courts to dismiss actions sua sponte for a plaintiff’s failure to prosecute or comply with the rules of civil procedure or court’s orders. Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962).

no point has he explained specifically how or why he was unable to comply with the magistrate judge's order to cure filing deficiencies. Simply stated, no basis exists on which to find the district court abused its discretion. We thus conclude the district court did not abuse its discretion and properly dismissed the complaint for failure to cure deficiencies and comply with the local rules.

IV.

Plaintiff also moved to proceed in forma pauperis under 28 U.S.C. § 1915(a)(1). The district court certified "pursuant to 28 U.S.C. § 1915(a)(3) that any appeal . . . would not be taken in good faith." Herrington v. Colorado Springs Police Department et al., No. 22-cv-01319, ECF No. 15 (D. Colo. July 8, 2022). We agree with the district court's certification under the statute. Thus, Plaintiff's motion to proceed in forma pauperis is denied.

The district court's dismissal of Plaintiff's complaint and action without prejudice is AFFIRMED and his motion to proceed in forma pauperis is DENIED.

Entered for the Court

Joel M. Carson III
Circuit Judge