FILED
United States Court of Appeals
Tenth Circuit

October 10, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARCUS THURMAN,

Plaintiff - Appellant,

v.

COUNTY COMMISSIONERS OF OKLAHOMA COUNTY; FNU MILLER; OKLAHOMA UNIVERSITY MEDICAL CENTER; TRAVIS REDMAN,

Defendants - Appellees.

No. 22-6205
(D.C. No. 5:17-CV-00950-G)
(W.D. Okla.)

ORDER AND JUDGMENT*

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

Plaintiff-Appellant Marcus Thurman appeals from the district court's denial of his motion for post-judgment relief under Federal Rule of Civil Procedure Rule 60(b). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I.

This case arose from events of September 5–6, 2015, when Mr. Thurman was arrested and taken into custody in Oklahoma County, Oklahoma. He alleges he was assaulted by Defendant Miller, then given inadequate care for his resulting injuries. *See generally* R. at 17–19. He filed this action on September 5, 2017, bringing claims under 42 U.S.C. § 1983 for use of excessive force and deliberate indifference to his medical needs, in violation of the Eighth and Fourteenth Amendments. He has been a prisoner in Oklahoma throughout this lawsuit.

All claims other than the claim of excessive force by Defendant Miller were dismissed, and Defendant Miller moved for summary judgment on that claim. Mr. Thurman filed a response to Miller's motion and, following a district court order, also filed a letter on March 15, 2021, confirming that his response was directed to Defendant Miller's then-pending second motion for summary judgment (rather than a previously stricken motion).

A United States Magistrate Judge entered a Report and Recommendation (R&R) on April 29, 2021, recommending Defendant Miller's second motion for summary judgment be granted. The initial deadline for Mr. Thurman to object to the R&R was May 17, 2021. He sought more time, stating he had "rec[ei]ve[d] legal mail from the courts on 5-18-21 informing me of a deadline to object on 5-17-21," Suppl. R. at 5, and the court extended the deadline to July 1, 2021.[1] On July 21,

[1] The court had previously extended the deadline to June 15, 2021.

2021, having received no objection, the district court adopted the R&R in full and entered judgment.

Mr. Thurman did not timely appeal from the judgment. Instead, on July 8, 2022, he filed a "Request to Reconsider and Respond Objecting to the Finality of Order Due to Just Cause" in the district court. R. at 512–24. He argued that it "appear[ed] as if" his March 15, 2021, clarification letter was "not received or mailed to [the district] Court," *id.* at 513, and that after receiving the court order requiring clarification he had "no reasonable amount of time to file any comprehensive response," and he had "responded as best as possible given no law library access, legal document access, nor law clerk assistance," *id.* at 514. He also generally described challenges litigating the case and complying with deadlines while incarcerated, including: that he was transferred between facilities multiple times; that he received legal mail and court filings late or not at all because of the transfers and Covid-19 lockdowns; and that he had limited access to the docket, law libraries, and other legal resources, especially during lockdowns. *See id.* at 513. He asked "to complete [his] Objection to Defendant Miller's Second Motion for Summary Judg[]ment," and for "Reconsideration of the Final Order" on that motion. *Id.* at 515.

The district court construed his filing as a motion under Federal Rule of Civil Procedure 60(b)(6), seeking to vacate the judgment and for reconsideration of its ruling on Defendant Miller's second motion for summary judgment. The court denied the motion. Regarding the March 15, 2021, letter, the district court found his objection "meritless," because the letter had, in fact, been received and "expressly

considered" in the R&R. *Id.* at 532. As to the difficulties Mr. Thurman alleged preparing his summary judgment response, the district court reasoned that "if [Mr. Thurman] wished to raise further objections . . . he could have stated as much to [the Magistrate Judge] or following issuance of the R.&R. Instead, he failed to object to the R.&R. and waited nearly a year to file the instant Motion." *Id.* This appeal followed.

II.

"We have jurisdiction under 28 U.S.C. § 1291 to reach the merits of an appeal from a denial of a Rule 60(b) motion, provided the ruling or judgment the Rule 60(b) motion challenged was a final decision of the district court." *Stubblefield v. Windsor Cap. Grp.*, 74 F.3d 990, 993 (10th Cir. 1996) (internal quotation marks and brackets omitted). However, "[a]n appeal from a denial of a Rule 60(b) motion addresses only the district court's order denying the motion, and not the underlying decision itself." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000).

"[R]elief under Rule 60(b)(6) is extraordinary and reserved for exceptional circumstances." *Johnson v. Spencer*, 950 F.3d 680, 701 (10th Cir. 2020) (internal quotation marks omitted). "We review the district court's decision to deny a Rule 60(b)(6) motion for an abuse of discretion." *Id.* (internal quotation marks omitted). We reverse "only if we find a complete absence of a reasonable basis and are certain that the decision is wrong." *Id.* (internal quotation marks omitted).

Moreover, "[a] Rule 60(b) motion is not intended to be a substitute for a direct appeal," and "[a]bsent extraordinary circumstances . . . should not be used to extend the time for an appeal." *Servants of the Paraclete*, 204 F.3d at 1009.

III.

Both parties' briefs extensively argue the merits of Mr. Thurman's claims, as well as ancillary disputed factual matters, including the activities preceding his arrest, and inferences to be drawn from video footage of the underlying events.[2] But these matters are irrelevant to the only issue on appeal, which is the denial of the Rule 60(b)(6) motion.[3] *See Servants of the Paraclete*, 204 F.3d at 1009. We see no abuse of discretion in that decision.

Initially, Mr. Thurman abandons on appeal his first argument to the district court—that his March 15, 2021, letter was not received. Regardless, the district court was correct that the letter was both received and considered in the R&R.

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[2] Because Mr. Thurman 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).

[3] Mr. Thurman's reply brief (captioned "Response Brief of Plaintiff-Appellant") states there is "newly discovered evidence," *see* Aplt. Reply. Br. at 14, evidently referring to the video footage of underlying events and witness testimony he claims "was not considered," *id.* at 16. To the extent he means to raise "newly discovered evidence" as grounds for relief under Rule 60(b), it was not raised at the district court, or in his opening brief, and is therefore waived. *See Little v. Budd Co.*, 955 F.3d 816, 821 (10th Cir. 2020) ("[A]bsent extraordinary circumstances, arguments raised for the first time on appeal are waived."); *Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)).

Mr. Thurman now argues instead that he did not receive the April 29, 2021, R&R until June 22, 2021, or "54 days after" the original deadline to object, and claims there "was no way to meet the deadline." *See* Aplt. Br. at 7.[4] Because he did not raise this argument in the district court, we ordinarily would not consider it. *See Little*, 955 F.3d at 821. But, even liberally construing his general allegations of delayed mail as having preserved the issue for appeal, Mr. Thurman's argument fails. While he now claims he did not know of the R&R and deadline to object until June 22, 2021, that contradicts his own district court filing, in which he stated he "rec[ei]ve[d] . . . mail . . . on 5-18-21 informing me of a deadline to object on 5-17-21." Suppl. R. at 5. Further, the district court extended the deadline to July 1, 2021, which was after Mr. Thurman now says he received the R&R. The record therefore shows he had opportunity to object but neither did so nor sought an additional extension of time. This shows no error or abuse of discretion by the district court.

Beyond that, Mr. Thurman argues generally that the district court "failed to allow for the complete dysfunction of the Oklahoma Department of Corrections Institutional mail system." Aplt. Br. at 7. It is true the district court docket shows that some documents mailed to Mr. Thurman were returned undelivered. But the only specific instances he raises are those above, where his allegations are contradicted by the record. His more general allegations of mail delays are not tied

[4] The pagination of Mr. Thurman's briefs is unclear as filed. We cite to the page numbers in the CM/ECF header of the electronically filed briefs.

to the decision on Defendant Miller's second summary judgment motion and are too general to show any abuse of discretion by the district court.

Lastly, Mr. Thurman argues, again very generally, that he had inadequate opportunity and resources to prepare his response to Defendant Miller's second motion for summary judgment. We are unpersuaded. After multiple extensions of time, Mr. Thurman did file a response, approximately eight months after the motion was first filed. Again, we see no error or abuse of discretion by the district court.

IV.

For the reasons set out above, the district court's denial of Mr. Thurman's construed Rule 60(b)(6) motion is affirmed.

"Defendant-Appellee Travis B. Redmon M.D.'s Motion to Dismiss a Party From the Appeal" is denied as moot.

Mr. Thurman's motion to amend his district court complaint raises an issue outside the scope of the Rule 60(b) ruling and not properly raised on appeal. *See Servants of the Paraclete*, 204 F.3d at 1009. The motion is denied.

Mr. Thurman's motion for leave to proceed without prepayment of costs or fees is granted. He remains obligated to make partial payments and pay the full fee. *See* 28 U.S.C. § 1915(b)(1); *Brown v. Eppler*, 725 F.3d 1221, 1230–31 (10th Cir. 2013).

Entered for the Court

Nancy L. Moritz
Circuit Judge