IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3408
(Summary Calendar)

LEONARD DOWELL,

Plaintiff-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Louisiana

(CA 89 545 A M1)
June 29, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Leonard Dowell is before this court a second time on matters arising from incidents occurring while he

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

was a prisoner of the State of Louisiana. This appeal follows remand of Dowell's first appeal of his civil rights action under 42 U.S.C. § 1983. He now challenges various rulings by the district court on remand, including (1) concerns about the summary judgment in favor of the Defendants on the issue of their alleged conspiracy to convict Dowell unjustly of a disciplinary violation and deprive him of his preferred prison job; (2) the court's failure to discuss the alleged willful destruction of the tape recording of the disciplinary proceedings; (3) the court's denial of appointment of counsel, its handling of Dowell's habeas claim; (4) the failure of the disciplinary board to provide written reasons for imposition of his discipline; and (5) the Secretary's alleged untimely issuance of Dowell's appeal decision. For the reasons set forth below, we affirm some of the rulings of the district court but vacate and remand others for further consistent proceedings.

I

FACTS AND PROCEEDINGS

At all relevant times, Dowell was a state prisoner serving a term of imprisonment at the Hunt Correctional Center in St. Gabriel, Louisiana. He was released from prison in about October 1992, having completed serving his sentence.[1] Dowell filed this action in July 1989, styled an application for TRO and injunctive relief, naming as defendants Warden Whitley and then Secretary of

[1] See Dowell v. Lensing, No. 92-3951, Habeas Corpus AppealsQdisposition pending.

the Department of Public Safety and Corrections, Bruce Lynn. The magistrate judge ordered Dowell's pleading filed as a § 1983 action. In December 1989, Dowell filed an amended complaint adding as defendants the following prison officers and officials: Warden Lensing, Warden Boker (properly, Boeker), Sgts. Cooper and Farrell, Lt. Cruse, Captain Girard (properly, Girod), and Geautrouex (properly, Gautreaux).

The amended complaint alleged that (1) Dowell's conviction and commitment to prison are invalid (a habeas claim); (2) because of his age Dowell is physically unable to do the field work required of him; (3) Dowell was denied due process at his disciplinary hearing because he was convicted of defiance; and (4) in retaliation for Dowell's use of the Department of Corrections' Administrative Remedy Procedure ("ARP") against "A" team, defendants Girod, Cooper, Farrell, Cruse, Boeker, and Gautreaux conspired to charge Dowell with, and convict him of, defiance. Dowell alleged that Warden Boeker and Sgt. Cooper did this in order to discredit him and his contributions to the phone crew. Dowell requested declaratory and injunctive relief, and compensatory and punitive damages.

The magistrate judge held a Spears hearing on the original complaint, following which he filed his report recommending dismissal with prejudice as frivolous. The magistrate judge did not advert to Dowell's claim of retaliation because it was not alleged in Dowell's original complaint. The magistrate judge did not thereafter prepare a report to discuss the additional

allegations and the retaliation claim contained in the amended complaint. His only disposition of the new claims was to write on the first page of the amended complaint that they were "frivolous for the same reasons as set out in the prior Magistrate's Report." The district court dismissed Dowell's action on the basis of the magistrate judge's report, adopting it as the court's opinion, and Dowell timely appealed.

On appeal, we sustained the district court's holding that Dowell had not been denied due process at his disciplinary hearing as there was evidence of his guilt, i.e., the report of Sgt. Cooper, the guard whom Dowell allegedly defied. We declined to rule, however, on Dowell's claims, raised newly upon appeal, that (1) the board failed to specify the facts it relied on, and (2) Dowell did not receive a timely decision from Secretary Lynn on Dowell's appeal of the board's decision.

In that first appeal we also affirmed the district court's ruling that the field work Dowell was required to do did not constitute cruel and unusual punishment. We further concluded that the district court did not err by treating Dowell's claim of illegal imprisonment as a petition for habeas relief, and considering it as such separately.

We did find in Dowell's favor, however, that he had made more than conclusional allegations in support of his claim of retaliation for using a prison administrative remedy. Accordingly, we held that the district court erred by dismissing this claim as frivolous without first conducting a Spears hearing on it. We

therefore remanded again "so that a Spears hearing may be held on Dowell's claim of retaliation."

On second remand, Dowell was given leave to amend his complaint by adding claims that (1) he was denied due process by a conspiracy of the members of the disciplinary board and others not to specify the reasons for the punishment imposed by the board (which the board in fact failed to do); (2) the board conspired not to specify the factual basis for the finding of guilty of defiance; and (3) Dowell did not receive an appeal return (notification of the ruling) within 120 days, as allegedly required by the prison rules. The defendants filed answers to the complaint as thus amended.

The defendants then filed motions for summary judgment, supported by memoranda, an affidavit of Secretary Bruce Lynn, and other documents. Defendants also attached a copy of Louisiana's Disciplinary Rules and Procedures for Adult Prisoners. Dowell filed two unsworn oppositions, and one under penalty of perjury.

In the opposition made under penalty of perjury, Dowell repeated his allegations of conspiracy. He asserted that the defendants retaliated against him because he had filed for an administrative remedy against "A" team. He also asserted that the defendants willfully destroyed the tape of his disciplinary board hearing in order to avoid federal court review of the unfair proceedings. Appellees claim that the tape was destroyed because Dowell failed to request that it be preserved.

The magistrate judge did not hold a Spears hearing as

suggested by this court. The magistrate judge did, however, file two reports recommending that the defendants' summary judgment motions be granted. He concluded that there was no "evidence that the defendants conspired in any manner to either have the plaintiff issued a fabricated disciplinary report or to have the plaintiff transferred from one job assignment to another." Dowell filed sworn objections to the report. The district court, holding that all of Dowell's claims lacked merit, granted the defendants' motions for summary judgment and dismissed the action.

II

ANALYSIS

A. Summary Judgment

Rule 56(c), Fed. R. Civ. P., provides that the district court shall render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To avoid summary judgment, the opposing party "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Our standard of review of a summary judgment ruling is the same as the district court's, and it must be based on the evidence which was presented in the district court. Simon v. United States,

711 F.2d 740, 743 (5th Cir. 1983). Dowell's objections to the magistrate judge's first report, being made under penalty of perjury, constituted an affidavit. So did his similarly made opposition to the summary judgment motion.

B. Conspiracy to Destroy the Tape

In his objections to the report, Dowell averred that on November 9, 1988, Sgt. Cooper, Captain Girod, and two other prison officials willfully violated disciplinary procedure by allowing him to be placed in lockdown on a baseless charge of "threat to security." He asserted that on December 11, 1988, he sought administrative remedies against the four, but that as a result of their "clout" his request was not considered.

Later in December 1988, says Dowell, he was questioned by Cooper, Girod, Warden Boeker, and another official about his ARP request. Boeker assertedly asked Dowell, in "an ill-will manner," if he liked his job in the phone crew and told him that "all trouble makers have a job in the hot sun in the fields." Dowell averred that out of vindictiveness and as a reprisal, Cooper, Girod, and a Major Hebert issued and approved the May 10, 1989, disciplinary report charging him with defiance. Dowell also asserted collusion on the part of the board members and Secretary Lynn relative to his board hearing and his appeal. Dowell asserted that, on its face, the disciplinary report failed validly to state a charge of defiance. In his objections to defendants' motion, Dowell asserted further that to avoid court review the defendants willfully destroyed the tape of the disciplinary board proceedings.

On somewhat similar facts, we have vacated a summary judgment for defendants and remanded for further proceedings. Robichaux v. Boeker, No. 90-3507, slip op. at 2-3 (5th Cir., Nov. 6, 1990) (unpublished), copy attached. Accordingly, we now vacate the district court's grant of summary judgment to these defendants on this point and remand the case for further proceedings.

We also vacate the district court's judgment insofar as it denied relief on Dowell's related claim that the key defendants willfully destroyed the tape recording of the disciplinary board proceedings. The magistrate judge and district court failed to discuss this point in their opinions.

C. Failure to Appoint Counsel

Dowell contends that he is entitled to relief for the district court's failure to appoint counsel to represent him. He filed a motion for appointment of counsel in March 1991, which motion the magistrate judge denied. But Dowell did not appeal this ruling to the district court. Therefore we lack jurisdiction to consider it. See Colburn v. Bunge Towing, Inc., 883 F.2d 372, 379 (5th Cir. 1989).

D. Unlawful Imprisonment

Dowell has asserted that he was entitled to relief for unlawful imprisonment. He also asserts that the district court should not have separated his habeas claims from his other allegations. As we held, on Dowell's prior appeal, that this was proper, it is now the law of the case and thus not open to argument. See Lyons v. Fisher, 888 F.2d 1071, 1074 (5th Cir.

1989), cert. denied, 495 U.S. 948 (1990). Furthermore, we can take judicial notice of the record in No. 92-3951, wherein it appears that Dowell completed service of his sentence in or about October 1992. See Dowell v. Lensing, No. 92-3951; p.1; see also MacMillan Bloedel Ltd. v. Flintkote Co., 760 F.2d 580, 587 (5th Cir. 1985). Completing his sentence rendered moot his claims for injunctive relief. See Hernandez v. Garrison, 916 F.2d 291, 293 (5th Cir. 1990).

E. Written Reasons

Dowell contends that he is entitled to relief on grounds that the disciplinary board failed to give written reasons for the imposition of his sentence. The stated reason for the finding of guilty was "The officer version is determined to be more credible than the inmate." The officer's version is set forth in the same report. This is adequate to comply with the requirement in Wolff v. McDonnell, 418 U.S. 539, 564, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), that there be a statement of "`reasons' for the disciplinary action."

F. Timely Issuance of a Decision

Dowell contends that he is entitled to relief on grounds that Secretary Lynn did not issue his decision on Dowell's appeal from the disciplinary board's ruling within 120 days, as required by the 1986 disciplinary rule book for prisoners. The Secretary rendered his decision on July 12, 1989, 61 days after the disciplinary hearing, but Dowell apparently did not receive it until October 17, 1989.

The rule book provides that "[t]he Secretary will issue all appeal decisions within 120 days of the date of the last hearing for each case." The mandatory "shall" is not used; neither does the rule book state that any consequence would result from the Secretary's failure to comply. See id.

The record shows that the Secretary issued his decision timely, if "issued" means "rendered." Neither the record nor Dowell suggests who is responsible for delivery of the decision to the inmate or, in this instance, who was responsible for the delay in delivering the Secretary's decision to Dowell.

The magistrate judge concluded: "The absence of both substantive predicates to govern official decisionmaking and explicitly mandatory language requiring a particular outcome compels the conclusion that the disciplinary rules do not create a protected liberty interest based on an untimely appeal decision." This ruling, which the district court adopted, is correct. See Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 459-63, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989).

III

CONCLUSION

We find no reversible error on the part of the district court in this case on any claim by Dowell except on the one contesting the court's grant of summary judgment in favor of the defendants on Dowell's claim of invalidity of the disciplinary charge of defiance and the related claim of willful destruction of the tape recording. We therefore affirm the judgment of the district court in all other

respects, but vacate that portion of the summary judgment and remand for reconsideration of the issues therein implicated.

AFFIRMED in part, and VACATED and REMANDED in part.