IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7187
(Summary Calendar)

ARTHUR NICKENS,

Plaintiff-Appellant,

versus

DONALD A. CABANA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Mississippi

(GC89-98-D-O cons./w GC89-260-D-O)

(May 19, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant Arthur Nickens, an inmate in the Mississippi State Penitentiary, filed suit against several corrections officers, under 42 U.S.C. § 1983, alleging violations of his constitutional rights. His allegations implicate six

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

claims, including improper dismissal on grounds of frivolity, due process requirements of notice of disciplinary hearings, propriety of directed verdicts, and refusal to grant a continuance. Concluding that the district court committed no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Proceeding pro se and IFP, Nickens sued numerous prison officials for civil rights violations. His allegations comprise two unrelated incidents.

Original Complaint - The Petition Incident

Prior to May 27, 1988, several inmates prepared a petition to two members of Congress from Mississippi, complaining about prison conditions. Prison superintendent Cabana learned of the petition and ordered it confiscated. Cabana directed investigator McFadden to investigate all inmates who had signed the petition.

On May 27, 1988, Nickens and eleven other inmates who worked in the law library were transferred to maximum security without prior notice. They were segregated for their roles in preparing the petition. On May 31, Nickens received a detention notice advising him of the charges against him. On June 2, he had a classification hearing and was issued three Rule Violation Reports (RVRs) for his part in preparing the petition. John Beck classified the RVRs.

On June 14, 1988, Nickens had a disciplinary hearing before officers Sandra Beck, Brooks, Lester Williams, and Walker. He was found guilty on the three RVRs and ordered into isolation for 20

days. All defendants allegedly conspired to deprive Nickens of his constitutional rights. Nickens sought injunctive, declaratory, and monetary relief.

Amended Complaint - The "Shank" Incident

Nickens moved to amend his original complaint to add new claims. In the motion to amend, he alleged the following: On April 9, 1990, he was in the day room playing dominoes when without provocation inmate Ben Hosey lunged at Nickens. Before any blows were exchanged, however, Nickens tackled Hosey and other inmates broke up the row. Hosey later reported to officer Walton that Nickens had attacked him.

Nickens was issued an RVR for the incident and also was charged with using a "shank," a homemade, sharpened instrument commonly used as weapons by prisoners. No officer witnessed the incident, and no shank was found in Nickens' possession. On April 23, 1990, a disciplinary committee conducted a hearing without notifying Nickens. Nickens complained to a prison official about the hearing. Another hearing was held on April 26, 1990, which Nickens did attend. Without stating any facts in support of his conclusion, Nickens deduced that the second hearing was perfunctory, held only to conceal the impropriety of finding him guilty at the hearing on April 23 of which he received no notice and from which he was therefore absent.

Nickens then filed the amended complaint in which he alleged the following: He was not present at the April 23, 1990, hearing at which he was found guilty of misconduct; he was not given a copy

of the investigator's report, which included exculpatory statements; and the hearing officers were prejudiced against him. Nickens further alleged that his appeal of the committee's decision was disposed of without due process; and that he was exposed to multiple punishment in violation of the Double Jeopardy Clause because he was not only sentenced to isolation for 20 days but apparently was also deprived of two visiting days and was demoted in custody classification.

Nickens stated in his motion for leave to file an amended complaint that Sandra Beck should not have been on the April 23rd and 26th committees because Nickens' suit against her for the petition incident was pending. He did not, however, make such an allegation in his amended complaint.

Spears Hearing - Both Incidents

Nickens had a hearing pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). The magistrate judge opened the hearing by summarizing the foreign allegations, with which summary Nickens agreed.

The Petition Incident. Nickens testified that one of the RVRs for the petition incident stated that he had signed a petition inciting inmates to insurrection and disobedience, but he did not recall signing any petition. He claimed that he never received a copy of the petition that the RVR cited him for signing. He did, however, state under cross-examination that he signed a form certifying that he had received a copy of the completed investigative report and that a copy of the petition was attached

thereto. He had signed the report in two different places but nonetheless alleged that he never received it. He maintained that he had never read the form that he signed.

Nickens also alleged that he was not notified of the reason for his transfer to maximum security until four days after the transfer and that he received a hearing two days after he received the notice. When he did receive notice, Sgt. Howell delivered it. Nickens also stated that all three RVRs for the petition incident are substantially identical.

Nickens argued that he was entitled to a hearing prior to being segregated. Counsel for the defendants told the magistrate judge that the four days from the time of the segregation to the receipt of notice and the two days from that receipt to the classification hearing comported with prison policy.

Nickens acknowledged that he did sign a paper but insists that it was a notice to families, not the petition itself. Because he signed something, he told the committee that he could neither admit nor deny committing the offense regarding the petition. Two of the committee's reports show that Nickens said that he could not deny the charge, and one shows that he said that he could neither deny nor admit it. Nickens conceded that he must have had an opportunity to tell his side of the story to the committee although he could not remember what he had said.

When he appealed administratively, Nickens denied participating in the preparation of an illegal petition or in inciting insurrection. He did state in his appeal that he signed

"a petition, participation in grievances regarding change in visiting policy and current package policy." Nickens said that he signed a notice to inmates' family members, "but it had nothing to do with a work stoppage."

A copy of the notice itself contradicts Nickens' assertion. The notice to families is expressly about a work stoppage.

Nickens sued the following officers for the following reasons: Howell for delivery of the detention notice; McFadden for being the reporting officer; Brooks for serving as a member of the disciplinary committee; John Beck for functioning as the classifying officer; and Lester Williams, Sandra Beck, and Walker for serving on the disciplinary committee.

Officer Herring initially applied for and approved the detention order, said Nickens, who could not explain a document that states that Howell was the applying officer. Nickens did not know whether Herring had anything to do with the alleged delay in the hearing or not.

The Shank Incident. The shank that Nickens was accused of using on inmate Hosey was found away from Nickens' cell. Nickens stated that the date April 23 is crossed out on the disciplinary hearing report and April 26 written over it. The report, as described, is in the record.

The prison attorney responded that the hearing on the shank incident was set for the 23rd but was continued to the 26th because Nickens was in the law library. The report bears the notation "4/23 at Law Library." Nickens conceded that the sole basis for

his conclusion that the decision had been reached on the 23rd is that the date is crossed out and written over.

Nickens stated that he had an opportunity to tell his side of the story to the committee on the 26th but none of his witnesses was present. He asserted that the committee refused to allow him to call them.

On cross-examination, Nickens conceded that he could not recall whether two of his witnesses submitted written statements that were read at the hearing on the 26th. An attorney for the defendants read one of the statements into the record, and Nickens said that he could not recall whether it had been read at the disciplinary hearing. The written statements of the two witnesses are in the record. When Nickens asked to present two more live witnesses, he was told that their testimony would be repetitive.

Nickens claimed that he was actually found guilty on the 23rd, when he was not present, in violation of the Constitution. He also complained that he was denied access to the investigative report of the incident. For reasons unknown to him, Nickens has never served his 20-day sentence. He sued officers Houston, Johnston, and Johnnie Williams as members of the disciplinary committee who purportedly knew that he was not present on the 23rd.

Magistrate Judge's Report and Recommendations

The magistrate judge issued a report that incorporated recommendations that he had announced at the conclusion of the Spears hearing. He recommended that most of the claims about the petition incident be dismissed without prejudice as frivolous

pursuant to 28 U.S.C. § 1915(d). The magistrate judge also recommended that the due process claims against Sandra Beck, Brooks, Lester Williams, Walker, Houston, Johnston, and Johnnie Williams regarding the shank incident be tried. The magistrate judge determined that Nickens' claims of inadequate notice for the petition incident are not frivolous.

In more detail, the magistrate judge determined the following:

1. The claim that Cabana conspired with McFadden to cause Nickens to be charged with a disciplinary offense is conclusional and unsupported. A penitentiary superintendent who orders an investigation into a petition does not automatically violate the Constitution.

2. McFadden's act of issuing RVRs for the circulation of a petition violates no constitutional rights.

3. Howell merely served Nickens with the administrative detention notice. It was a ministerial act that does not implicate the Constitution.

4. John Beck merely classified the RVRs. Every RVR is classified as either minor, serious, or major. The act of classification does not implicate the Constitution.

5. Nickens sued Herring as the person who initiated the administrative detention process. Nickens does not allege that Herring took any part in the delay in the determination of his administrative detention status. Herring's acts do not implicate the Constitution.

6. Nickens sued Puckett for acting on the appeal of the

disciplinary conviction regarding the shank too quickly without conducting an investigation. The Constitution does not require an investigation on appeal or that a certain time elapse before disposing of an appeal.

7. Nickens' claim of denial of due process regarding the shank incident disciplinary hearing should proceed to trial.

Action by the District Court

Over Nickens' objections, the district court adopted the magistrate judge's report. The district court dismissed without prejudice as frivolous, pursuant to 28 U.S.C. § 1915(d), all of the claims against the defendants discussed in items 1-6 above, which are most of the claims regarding the placement of Nickens in administrative detention for the petition incident. The due process claim, that Nickens was not given notice of charges for circulating an illegal petition, proceeded to trial as did the due process claim that he was denied the opportunity to present certain witnesses at the hearing on the shank incident.

The Trial

The Petition Incident. Nickens testified that he was locked down on May 27, 1988, and given no notice of the charges until Tuesday, May 31, 1988. He claimed to have had no knowledge of the petition until 1990, when he received a copy of it in connection with this suit.

He also testified that a "phony document" was presented to him, indicating that he had notice of the charges prior to his detention. Nickens claimed that he did not sign the petition, but

later stated that he did sign the petition to members of Congress. He also testified that he received the RVR on June 2 or 3, 1988, and had a hearing on June 14. He stated that he asked only to see the petition, not to have a copy of it.

Another inmate testified that Nickens was locked down on May 27, 1988, and given notice on May 31. The RVRs were issued on June 3. The district court granted a directed verdict for the defendants on the petition incident claim.

The Shank Incident. Nickens testified that he was found guilty on April 23, 1990. He had a second hearing on April 26. He knows this because the dates were changed on the form. The second hearing was a mere rubber-stamp of the action that was taken in the first hearing. He conceded that he submitted his witness list too late, but asserted that the tardiness was not his fault.

Nickens states that he was prevented from calling Vaughn Laird as a witness on the 26th. Laird stated that he was present on April 23rd and testified at that time, but did not appear on the 26th. Laird stated on cross-examination that he was prevented from testifying on the 23rd when Nickens did not appear, and that he did not appear at a hearing on the 26th when Nickens was present.

Hearing officer Sandra Beck testified that two of the three witnesses listed by Nickens told investigators that they wanted to make their statements in writing rather than in person. She also testified that Laird was present on the 26th and testified at the same hearing at which Nickens appeared. A tape of the hearing on the 26th was played for the jury. The court stated that it heard

both men's voices on the tape.

Nickens asked for a continuance to obtain work logs that, he said, would show that Laird was at work, not at the hearing, that day. He stated that his voice was not on the tape and that the tape must have been altered. The district court granted a directed verdict against Nickens on the shank incident claim.

II

ANALYSIS

A. Conspiracy

Nickens argues that the district court should not have dismissed the conspiracy claim regarding the petition incident as frivolous. He insists that McFadden's conduct of an investigation at Cabana's direction was a conspiracy. He makes only conclusional allegations that the initiation of the investigation of the petition incident makes out a case of conspiracy which should be heard by a jury.

The claim was dismissed as frivolous pursuant to 28 U.S.C. § 1915(d). An IFP complaint may be dismissed as frivolous if it lacks an arguable basis in law or fact. Denton v. Hernandez, ___ U.S. _____, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992). A delusional, irrational, fantastic, or wholly incredible claim may be factually frivolous. Allegations that are merely unlikely, however, are not factually frivolous. Id. A claim that is based on an "indisputably meritless legal theory" is legally frivolous. Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). The standard of review is abuse of discretion.

Denton, 112 S.Ct. at 1734.

A conspiracy cause of action requires that the defendants agreed to commit an unlawful act. Arsenaux v. Roberts, 726 F.2d 1022, 1024 (5th Cir. 1982). Prison officials, however, must have wide discretion in acting to meet the needs of their institutions. Wolff v. McDonnell, 418 U.S. 539, 561-63, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). A legal theory that would classify as unlawful the authority of a prison superintendent to order an investigation into conduct in the prison is meritless.

Additionally, mere conclusional allegations of conspiracy, without reference to material facts, are not grounds for § 1983 relief. Dayse v. Schuldt, 894 F.2d 170, 173 (5th Cir. 1990); but c.f. Leatherman v. Tarrant County Narcotics Unit, ____ U.S. ____, 113 S.Ct. 1160, 1162, 122 L.Ed.2d 517 (1993) (eliminating heightened pleading requirement to defeat claim of municipal liability, not yet applicable to conclusional allegations of conspiracy). Nickens' conclusion that Cabana and McFadden conspired rests solely on the fact of the investigation.

B. Prior Notice

Nickens argues that his claim that he was segregated for the petition incident without prior notice is not frivolous. He argues that prior notice is required before a change in housing. This is simply wrong; prior notice is just not required. Hewitt v. Helms, 459 U.S. 460, 476 n.8, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983).

C. Due Process

Nickens argues that he was denied due process when officials

refused to provide him with a copy of, or access to, the petition. He argues that disclosure was mandatory, citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Even if Brady applies in the context of a prison disciplinary proceeding, it does not require the disclosure of that which the defendant already knows. United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980). While Nickens testified that, at the time of the disciplinary hearing, he had no knowledge of the petition, he ultimately testified and argued to the district court that he knew about the petition and that he did sign it.

D. Directed Verdict - Petition Incident

Nickens argues that the district court should not have directed a verdict against him on the petition incident claim. His one paragraph argument merely asserts that he was punished for conduct that was not proscribed. On motion for directed verdict, the district court must view all of the evidence in a light, and with all reasonable inferences, most favorable to the nonmovant, and must grant the motion if no reasonable juror could decide for the nonmovant. Melton v. Deere & Co., 887 F.2d 1241, 1243-44 (5th Cir. 1989) (citing Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)). The standard of review is the same. Melton, 887 F.2d at 1244 (citing Boeing, 411 F.2d at 367 n.1).

The district court stated that the trial issue relating to the petition incident was not whether Nickens' signing of the petition was proscribed but, rather, whether Nickens had received adequate notice of the charges against him. Nickens himself argued to the

district court that the two issues relating to the petition incident were (1) that he did not receive prior notice of the proceedings, and (2) that he did not receive a copy of, or have access to, the petition. The trial evidence did not concern whether the signing of the petition was proscribed. As the argument relates to evidence not presented at trial, it is irrelevant to the challenged directed verdict.

The directed verdict concerned notice. Our review on that issue mandates affirmance. By Nickens' own allegations and testimony, he was segregated on Friday, May 27, given notice of the charges on Tuesday, May 31, had a classification hearing two or three days later when he was given three RVRs, and had a disciplinary hearing 11 or 12 days after that. Nothing indicates that this procedure denied him due process. See Hewitt, 459 U.S. at 475-76.

E. Directed Verdict - Shank Incident

Nickens next argues that the district court should not have directed a verdict regarding his shank incident claim. He alleges that the tape recording was altered and that Beck perjured herself. But Nickens did not object when the tape was played; neither did he challenge Beck's veracity.

The court listened to the tape recording of the hearing and heard both Laird and Nickens speak at the same hearing. Laird testified that he appeared before Beck, and Beck testified that she presided on the 26th only. Laird at one time said that he testified on the 23rd and later said that he was prevented from

testifying on the 23rd. Laird also said that he did not testify with Nickens on the 26th. Nickens claimed to know that a hearing occurred on the 23rd because of the crossed-out date on the form.

A juror could decide for Nickens only if he or she believed that a hearing occurred on the 23rd when the only evidence to that effect was Laird's contradictory testimony that he did and did not appear at it, plus the crossed-out date into which Nickens reads much meaning; that Laird was credible even though his testimony was inconsistent; that the defendants had perpetrated a fraud on the court by dubbing Laird's testimony on the 23rd (which he said he gave but also said he did not give) with Nickens' testimony on the 26th; and that Beck lied to the court about presiding at the only hearing.

The only fact to which Nickens testified from personal knowledge was the identities of the persons who were present at the hearing on the 26th. A juror could have believed his account of that hearing. A judge may not make credibility determinations on a motion for directed verdict. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253-54, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

It is possible that letting the jury decide the shank incident claim might have been a better choice by the district court than directing a verdict. The likelihood that a reasonable juror would have decided for Nickens, however, is so remote that we are not constrained to reverse the directed verdict.

F. Denial of Motion for Continuance

Nickens argues that the district court should not have denied

his motion for a continuance, as it would have enabled him to call witnesses to testify that Laird was not present on the 26th. He asserts that he would have called (1) a security officer to authenticate his signature on a work roster showing that Laird was in the library on the 26th, and (2) the hearing officer who presided over the hearing on the 23rd.

The grant or denial of a continuance is reviewed for abuse of discretion. Paul Kadair, Inc. v. Sony Corp. of America, 694 F.2d 1017, 1029 (5th Cir. 1983). In denying the motion at the trial held in 1992, the court said, "Well, this case has been pending since 1989. I think you've had adequate time to conduct your discovery." Given the length of time involved and the opportunity to explain facts at an extensive Spears hearing, we would be hard pressed to say that the court abused its discretion in denying the motion for a continuance.

Furthermore, Nickens' assertion that the security officer would testify that his signature is on a log that shows Laird at work on the 26th does not prove that Laird was at the library for that entire day. Additionally, the substance of the proceedings on the 23rd, if any, has been at issue ever since Nickens filed his amended complaint. He must have known that the testimony of the presiding officer at the alleged hearing on the 23rd would have been probative. Given these factors, the district court did not abuse its discretion.

AFFIRMED.