

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1912
Summary Calendar

BUFFORD McDONALD,

Plaintiff-Appellant,

versus

JIMMY DON BOYDSTON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas
(2:92-CV-0209)

(May 24, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

The prisoner in this case brings a section 1983 case alleging that jail officials violated his constitutional rights by punishing him without adequate due process and by denying him access to the courts. Finding no reversible error we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

On October 14, 1991, Bufford McDonald was transferred to the Potter County Correctional Center (the "Jail") from another institution operated by the Texas Department of Criminal Justice, Institutional Division. Bufford was transferred to Potter County so that he could litigate a probate case regarding the estate of a relative.

McDonald alleged that at about 6:00 p.m. on the date he arrived at the Jail, Officer Henry confiscated certain items that McDonald possessed. Henry and another officer handed McDonald a disciplinary report, which allegedly charged him with smuggling contraband items into the Jail. McDonald signed a waiver of the 24-hour delay between the notice and his disciplinary hearing.

The next day, McDonald had a disciplinary hearing before Bill Paschal, Audy Jones, and Ella Moore. McDonald has alleged that Paschal, who presided, refused to tell him what he was charged with, refused to read him the disciplinary report or let him read it, did not ask him how he pleaded, and did not allow him to call witnesses. McDonald alleged that he was only allowed to state how he came into possession of the contraband items. Paschal told McDonald that the board gave him seven days in solitary confinement, but allegedly did not tell him what he was convicted of. The disciplinary report states that he was charged with and convicted of "rigging stingers" (a "stinger" is a device made from

an electrical cord used to heat liquids), and with having contraband in his cell.

Later, on the day of his hearing, McDonald was placed in solitary, where he remained until the evening of October 21.

McDonald alleged that he went to the probate court October 22, 1991, to select a jury for his case, in which he was proceeding pro se. He alleged that while in solitary, he was not allowed to go to the law library to prepare for trial--specifically, so that he could learn how to select a jury. McDonald alleged that this denial of access to the courts caused him to lose his probate case.

II

On July 30, 1992, McDonald filed a pro se complaint against jail officials under 42 U.S.C. § 1983 alleging a denial of adequate due process and a denial of access to the courts. The magistrate judge dismissed the denial of adequate due process claim and granted the defendants summary judgment with respect to McDonald's denial of access to the courts claim.

III

A

On appeal, McDonald first argues that because his isolation was for punitive purposes, instead of administrative--pre-hearing--purposes, the elevated due process requirements of Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), applied to his disciplinary hearing. Because he was not allowed to call witnesses, McDonald asserts that the Wolff standards were

violated. Id. at 563-66, 94 S.Ct. at 2978-80. The defendants contend that the less formal disciplinary hearing with which they provided McDonald was adequate under Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983).

In Dzana v. Foti, 829 F.2d 558, 561 (5th Cir. 1987), we analyzed the question of whether the elevated Wolff standards or the lesser Hewitt standards applied as follows:

A key consideration is the type of sanction imposed on the prisoner and any collateral consequences that sanction may carry with it . . . Thus, the Supreme Court has held [in Wolff] that a prisoner punished by solitary confinement and loss of good-time credits must receive: (1) "advance written notice," at least twenty-four hours before the hearing, of the charges against him; (2) a "written statement of the factfinders as to the evidence relied on and the reasons for the disciplinary action taken"; and (3) the opportunity "to call witnesses and present documentary evidence," so long as this right does not create a security risk. . . . However, when a prisoner faces only a few days of administrative segregation pending a hearing, with no effect on parole, "informal nonadversary evidentiary review will suffice, with "some notice" to the prisoner and an "opportunity to present a statement." . . .

The key question . . . is whether [the prisoner] in facing [a given sanction] resembles more closely the prisoners in Wolff, who faced segregation and loss of good time, or the prisoner[] in [Hewitt] . . ., who faced only segregation.

(Citations omitted).

In McCrae v. Hankins, 720 F.2d 863 (5th Cir. 1983), we held that a prisoner facing disciplinary isolation for less than a month, similar to the sanction in Hewitt, was entitled to the Hewitt standards of due process. In Dzana, 829 F.2d at 561-62, we held that a prisoner facing disciplinary isolation and revocation

of an Immigration and Naturalization Service bond was entitled to the elevated Wolff standards of due process. This was because "[l]oss of bond, like loss of good-time credits, can affect the amount of time the prisoner spends behind bars under confinement." Id. at 562.

In the instant case, McDonald only faced isolated confinement instead of his normal confinement with the general population. This sanction more closely parallels the disciplinary confinement in Hewitt and McCrae instead of the actual increase in time spent behind bars in Wolff and Danza.¹ McDonald acknowledged in his complaint that he had some notice² regarding a contraband charge,

¹In Pembroke v. Wood County, 981 F.2d 225, 229 (5th Cir. 1993), we held, "the use of punitive isolation without affording due process is unacceptable and violates the 14th Amendment." Although we cited Wolff, id. at 229 n.9, we did not however, elaborate on the amount of process due to Pembroke because he was not provided with any due process. Later in Walker v. Navarro County Jail, 4 F.3d 410, 412 (5th Cir. 1993), and Mitchell v. Sheriff Dep't, Lubbock County Texas, 995 F.2d 60, 63 (5th Cir. 1993), we indicated that it was arguable that punitive segregation alone entitled the prisoners to a Wolff hearing. To the extent these decisions may be construed as providing that the touchstone of Wolff protections is the purpose of the sanction--punitive versus administrative--instead of the nature of the sanction--change in degree of confinement versus increase in days behind bars--they are inconsistent with the earlier Fifth Circuit precedents of McCrae and Dzana. We must follow the earlier of conflicting panel decisions. Paura v. United States Parole Commission, 18 F.3d 1188, 1189 (5th Cir. 1994).

²McDonald asserts that because he was originally charged with smuggling contraband into the Jail, but was convicted of possession of contraband, his original notice was inadequate. We note that possession of contraband would appear to be a lesser-included offense of smuggling that contraband. In any case, McDonald admitted that he had the contraband in his possession at the disciplinary hearing. Under the relaxed standard of Hewitt, 459

was allowed to make a statement³ as to how he came into possession of the contraband, and had an informal nonadversary hearing before three jail officials. We hold that this level of process was sufficient under McCrae.⁴

B

McDonald next challenges the magistrate judge's grant of summary judgment to the defendants on his denial of access to court claim. In effect, McDonald contends that he was denied access to the law library until the day before his probate trial, thus, preventing him from adequately preparing himself for the trial. We will assume, arguendo, that the constitutional right of prisoners to access of courts is applicable here where McDonald was litigating a personal probate matter.

In Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985), this court held that the right to access to the courts "includes the

U.S.at 467, 103 S.Ct. at 874, requiring only "some notice," McDonald received adequate notice.

³In his complaint, McDonald stated that he was allowed to make a limited statement at the disciplinary hearing. Before the magistrate judge, McDonald stated that he could not remember what he was allowed to say at the disciplinary hearing. On appeal, McDonald now asserts that he was not allowed to make any statement at his disciplinary hearing. When reviewing McDonald's motion to dismiss, the district court properly looked to McDonald's complaint and found that he made a limited statement. See O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985).

⁴Because we hold that the process granted McDonald was sufficient under McCrae and Hewitt, we need not remand for a determination of whether the prison or jail regulations create such a liberty interest. Even assuming arguendo that they do, McDonald's liberty interest was adequately protected.

ability to file a legally sufficient claim." In Mann v. Smith, 796 F.2d 7983-85 (5th Cir. 1986), we held that where a plaintiff filed a legally sufficient complaint and had a trial, he was not denied access to the courts despite his limited access to an attorney. Similarly, in this case, McDonald filed a legally sufficient claim that triggered a jury trial and participated in the jury trial despite his limited access to the law library. Moreover, the Department of Corrections transferred McDonald to the Potter County Correctional Center for the purpose of allowing him to participate in the trial, and the jail officials made sure McDonald was transported to the trial. Finally, McDonald fails to adequately explain why he did not conduct research in a law library prior to his transfer to the Potter County Correctional Center or why he failed to request a continuance if he was unprepared. Under these facts, we cannot say that McDonald was denied access to the courts.

IV

For the foregoing reasons, the order and judgment of the district court are

A F F I R M E D.