

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2802

Summary Calendar

CHRISTOPHER J. MURPHY,

Plaintiff-Appellant,

v.

S. O. WOODS, JR., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-2540)

(May 2, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Christopher J. Murphy, proceeding pro se and in forma pauperis, appeals the district court's dismissal of his complaint, brought pursuant to 42 U.S.C. § 1983, as frivolous. We affirm in part and vacate in part the judgment of the district court and remand for further proceedings.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Christopher J. Murphy (Murphy), an inmate in the Texas Department of Criminal Justice--Institutional Division (TDCJ-ID), filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Texas. Murphy alleged that various officials at the TDCJ-ID violated his Eighth and Fourteenth Amendment rights in that they were deliberately indifferent to his being erroneously subjected to cell restriction for twelve days.

Murphy alleged the following facts. Officer Smietal falsely charged Murphy with creating a disturbance. Murphy was then served with notice that a disciplinary charge had been filed against him. Six days later, Murphy was found guilty of the charge after a disciplinary hearing was held before Officer Boyd. Murphy was sentenced to fifteen days of cell restriction and lost ninety days of "good time" credit.

This decision was overturned on appeal because of procedural deficiencies, and a second hearing was held before Officer Simpson. Murphy was again found guilty, and the same penalties were imposed. However, at the time of the second hearing, Murphy had already served twelve days of the fifteen-day restriction period. According to Murphy, the hearing officer deliberately failed to enter the credit for time served in the hearing record. Although Murphy made repeated requests that supervisory officers correct this error, the matter was not corrected, and Murphy

remained on restricted status, eventually serving a total of twenty-seven days.

After filing an appeal to Warden Peterson, Murphy received notice that an administrative error had been made and that he would be given a twelve-day credit that would apply to any future cell restriction imposed on Murphy. Murphy appealed this decision, arguing that such a remedy would not restore his good-time credit or the promotional status given when an inmate retains a clear six-month record. The decision, however, was made final when reviewed and approved by Warden Peterson and State Classification Chairman S.O. Woods.

Murphy alleged in his complaint that Simpson, the hearing officer, acted with deliberate indifference in failing to note in the hearing record that Murphy possessed a twelve-day cell restriction credit. He further alleged that Peterson and Woods acted with callous indifference in failing to vacate the disciplinary action taken against him because of Simpson's procedural violation. He also alleged that if his case had been properly reviewed in accord with prison regulations, the error would have been discovered and he would not have been placed on cell restriction for the additional period. He thus contended that the additional cell restriction imposed on him resulted in cruel and unusual punishment.

The district court dismissed his complaint as frivolous under 28 U.S.C. § 1915(d). Murphy now appeals.

II.

An in forma pauperis complaint is "frivolous" within the meaning of § 1915(d) if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). A complaint is not automatically frivolous in the context of § 1915(d) because it fails to state a claim, id. at 331, and thus should be dismissed only in limited circumstances. We review § 1915(d) dismissals for an abuse of discretion. Denton v. Hernandez, 112 S. Ct. 1728, 1734 (1992); Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992).

III.

Murphy contends that the district court abused its discretion in dismissing his Eighth Amendment claim. He argues that Simpson--by failing to note Murphy's twelve-day cell restriction credit in the disciplinary hearing record--and Peterson and Woods--by failing to vacate the disciplinary action against him because of Simpson's procedural error--acted with deliberate indifference towards him and thus violated his Eighth Amendment rights. Murphy argues that his Eighth Amendment rights were violated because the additional cell restriction imposed on him amounted to "cruel and unusual" punishment.

Confinement in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards. Hutto v. Finney, 437 U.S. 678, 685 (1978). While punitive isolation is not unconstitutional per se, ". . . it may be, depending on the duration of the confinement and the conditions thereof." Id. at

685, 686. When it is claimed that a prison official has inflicted cruel and unusual punishment, the law mandates an inquiry into the official's state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991). The prisoner must establish that the official acted with "deliberate indifference" to the conditions of his confinement. Id.

Murphy acknowledges that an administrative error had been made concerning the additional cell restriction time imposed on him and that he would be given a twelve-day credit that would apply to any future cell restriction. He has thus failed to establish that the defendants acted with "deliberate indifference" to the conditions of his confinement. See Morgan v. Fancher, No. 92-7326 (5th Cir. June 22, 1993) (unpublished) (determining that an inmate who remained in segregation for twenty-six days because of a clerical error failed to establish that prison officials had acted with "deliberate indifference").

Further, the Eighth Amendment affords prisoners protection against the "wanton and unnecessary infliction of physical pain," as well as against exposure to egregious physical conditions that deprive them of basic human needs. Rhodes v. Chapman, 452 U.S. 337, 347 (1981). However, to the extent that the conditions of which the prisoner complains are restrictive and even harsh, but not "cruel and unusual," they are only part of the penalty that criminal offenders pay for their offenses against society. Id.

Although Murphy alleges that twelve extra days in cell confinement constituted "cruel and unusual" punishment, he has

not alleged that he was subjected to inhumane conditions or was caused any physical pain while he was so confined. The district court therefore did not abuse its discretion in dismissing Murphy's complaint as frivolous insofar as it raised an Eighth Amendment claim.

IV.

Murphy also contends that prison supervisory officials should have vacated the disciplinary action taken against him because of the "procedural violation" which occurred during his second hearing, i.e., the failure to record his twelve days of credit in the hearing record. The district court determined that Murphy received the procedural due process to which he was entitled with respect to his second disciplinary hearing because he received the minimum procedural safeguards required by Wolff v. McDonnell, 418 U.S. 539 (1974). Wolff requires (1) advance written notice of the violation; (2) a written statement of the factfinder as to the evidence relied upon and the reasons for the disciplinary action taken; and (3) the right to present witnesses and documentary evidence if doing so would not be unduly hazardous to institutional safety or correctional goals. Id. at 563-66.

Murphy acknowledged that he received a second hearing because procedural violations occurred during the first hearing, and he did not allege in his complaint that prison officials failed to provide any of the Wolff safeguards with respect to his second hearing. Further, he has alleged no constitutional

provision, statute, or regulation entitling him to have the disciplinary action vacated because of the failure to record his twelve days of credit in the hearing record. The district court, therefore, did not abuse its discretion in dismissing Murphy's claim.

v.

Murphy further contends that prison officials violated prison regulations in failing to give him credit for the time he served in cell restriction before his second hearing and in acting in an arbitrary and capricious manner with respect to his grievance concerning the total amount of time he was being forced to spend in cell restriction. Hence, he contends that the district court abused its discretion in dismissing this part of his complaint.

Generally, a violation of a prison regulation does not establish a constitutional violation. Jackson v. Cain, 864 F.2d 1235, 1251-52 (5th Cir. 1989). However, "substantive limitations placed on the discretion of prison officials by particularized standards or criteria serve[] to create [a] liberty interest." Gibbs v. King, 779 F.2d 1041, 1044 (5th Cir.), cert. denied, 476 U.S. 1117 (1986).

Murphy alleged generally in his complaint that in reviewing his grievance, prison officials did not comply with prison regulations and thus caused him to serve twenty-seven days of cell restriction instead of fifteen. In his brief, Murphy refers to prison regulations that provide that the maximum punishment

which may be imposed on a prisoner in administrative segregation for a disciplinary offense is fifteen days of cell restriction. If the prison regulations to which Murphy refers creates the expectation that an offense will result in no more than a certain maximum punishment and a greater punishment is given, the officials may have violated his substantive due process rights. Jackson, 864 F.2d at 1252. Further, if these regulations do create substantive rights, Murphy was entitled to an administrative decision that was not arbitrary and capricious. See Stewart v. Thigpen, 730 F.2d 1002, 1005 (5th Cir. 1984).

Murphy does not quote the language of the regulations upon which he relies, and it is thus not clear from the record whether they impose substantive limitations on prison officials in the enforcement of their provisions. Murphy's allegations therefore require further factual development before a proper § 1915(d) determination can be made. See Eason v. Thaler, 14 F.3d 8, 9-10 (5th Cir. 1994) (determining that if a plaintiff "might have presented a non-frivolous section 1983 claim" in a Spears hearing or by a questionnaire, then dismissal as frivolous under § 1915(d) was premature).

VI.

For the foregoing reasons, we AFFIRM in part and VACATE in part the judgment of the district court and REMAND for further proceedings consistent with this opinion.