

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3362  
Summary Calendar

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KEITH THOMPSON,

Plaintiff-Appellant,

versus

BRUCE N. LYNN, Secretary,  
Department of Corrections,  
State of Louisiana, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the  
Middle District of Louisiana  
(CA-90-580-A-M1)

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(July 5, 1994)

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

PER CURIAM:\*

I

Appellant Keith Thompson was an inmate confined in the Louisiana State Penitentiary (LSP) at all times material to this action. He remains confined at LSP. In his amended complaint, he requested compensatory and punitive damages and injunctive relief

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

(release from lockdown) on grounds that he had been illegally placed and retained in punitive lockdown beginning on November 27, 1989. He was still confined in such lockdown when he filed his amended complaint, and he remained there until July 2, 1991. Because he was released from extended lockdown (ELD), his claim for injunctive relief is moot. See Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078, 1084 (5th Cir. 1991).

On November 16, 1989, Thompson requested protection from officers who worked at his housing assignment at Camp D-Raven. At a hearing on the request, appellee LSP Major Clovis Tillery concluded that Thompson should return to Raven, on grounds that there was not support for his request. Thompson was charged in a disciplinary report with aggravated disobedience after he refused direct verbal orders to return to Raven.

Thompson appeared before a disciplinary board on November 27, 1989, for a hearing on the report. Appellee Major Donnie Parker was the board chairman; the other board member was not made a defendant in this action. Upon Thompson's guilty plea, the board found him guilty and ordered him transferred to Camp J Extended Lockdown. Thompson timely appealed from his sentence to appellee Bruce Lynn, then the Secretary of the Department of Public Safety and Corrections. He could not appeal his conviction because he pleaded guilty. On May 24, 1990, a staff member named Sewell granted the appeal on behalf of Thompson, on grounds that "the 120 day limit [for deciding such appeals] has expired."

On May 10, 1990, however, appellees Deputy Warden Richard Peabody and LSP Legal Programs Director Dora Rabalais had filed an "Incident Report" on Thompson. It stated that these two officials had determined that Thompson should be retained in ELD "because he is considered a threat to security based on his past conduct record." The report stated that he had 117 disciplinary-rule violations since April 3, 1985, thirty of which were committed since January 1988.

Pursuant to a procedure that had been established, Thompson was brought before a disciplinary board "for review of his security (custody) classification and to allow him full due process proceedings relevant to the independent administrative review by Deputy Warden Peabody and Dora Rabalais." On May 15, 1990, Thompson appeared before a disciplinary board for a hearing on the incident report. Appellee Lt. Col. Darrel Vannoy was board chairman and appellee J. L. Calvert was the other member. They ordered that Thompson be retained in ELD. Sewell, acting for Lynn, denied Thompson's appeal.

In an administrative-remedy proceeding (ARP), Thompson asserted that because his appeal from his November 27, 1989 disciplinary sentence had been granted (due to the Secretary's failure to act timely), he was entitled to be returned to working-cellblock custody status. Appellee Warden Whitley denied relief on this ARP on grounds that Thompson's proper remedy was to appeal the board's June 15, 1990 decision (which he had done). Sewell, acting

for Lynn, denied Thompson's request for a third-step review of Whitley's ruling.

Relative to Thompson's § 1983 action, the district court denied both sides' motions for summary judgment, as recommended by the magistrate judge. The magistrate judge subsequently held an evidentiary hearing on the merits, at which Thompson and all ten defendants-appellees testified. The magistrate judge filed a report recommending dismissal of the action.

The district court remanded the cause to the magistrate judge for additional findings on "whether defendants violated [Thompson's] due process rights in changing his custody status under the incident report procedure." The magistrate judge concluded that Thompson was not entitled to relief, on grounds that he had no "protected liberty interest in having an appeal decision issued within 120 days" and that there was no "actual change in [his] custody status." The district court, approving both of the magistrate judge's reports, dismissed the action.

## II

On appeal, Thompson contends that he was denied due process by being retained in ELD because he had protected liberty interests (1) in having his aggravated-disobedience appeal decided within 120 days, and (2) in being released from ELD after his appeal was granted, as customarily was done in cases in which the Secretary reversed the disciplinary board's decision on the merits.

This court recently affirmed the dismissal of another LSP inmate's civil rights action which presented similar issues. Bay v. Lynn, No. 92-3409 (5th Cir. April 5, 1993) (unpublished; copy attached hereto). Bay was sentenced to ELD upon his disciplinary-board conviction of aggravated fighting. On appeal, the Warden rather than the Secretary affirmed the decision, and Bay did not receive notice of the appellate decision within 120 days. In his § 1983 action, Bay contended that he was entitled to (1) damages for being detained in ELD and (2) to be released from ELD. Bay apparently did not have an additional disciplinary-board hearing on an incident report, such as Thompson had.

This court held that "[b]ecause the disciplinary rules do not contain a `substantive predicate' mandating the grant of an appeal or any other outcome should the appeal not be rendered within 120 days, the `constitutional minima' were satisfied in this case when Bay received some kind of notice and [the disciplinary-board] hearing." We held further that "although Bay's contention that the Secretary rather than the Warden should have heard his appeal may have some merit in a state court, that error would not be sufficient to trigger a due process violation under McCrae [v. Hankins], 720 F.2d 863, 866-68] (5th Cir. 1983)], because Bay did receive some kind of notice and a hearing. The language of the prison rules setting out the basis for extended lockdown grants no further liberty interest." Slip pp. 6-7 (footnote omitted). Accordingly, in this appeal, Thompson is not entitled to relief.

Thompson contends further, however, that he is entitled to relief on grounds that he was entitled to notice and publication before the "independent review" procedure could be utilized to retain him in ELD. He argues that these steps are required by the decree in Ralph v. Dees, CA 71-94 (M.D. La. 1974) (unpublished). No copy of this decree is in the record, but Thompson purports to quote from it in his brief. In his reply brief, he asserts that the decree provides for expungement from an inmate's record if a disciplinary-board conviction is reversed. His conviction was not reversed, since he appealed only his sentence. He also relies on La. Rev. Stat. Ann. 49:954 (West 1987), which requires publication of agency rules in order for them to become effective.

Bay v. Lynn refutes Thompson's contention, because the court denied relief to inmate Bay, even though he was retained in ELD without having received an incident report or another hearing. Thompson received not only a disciplinary-board hearing on the incident report, but also a review of the board's decision by Sewell, for the Secretary. Thus, under the holding of Bay, Thompson received more process than was due.

### III

Thompson next argues that he was denied equal protection because he was not released from ELD, as inmates customarily are when their appeals to the Secretary are granted on the merits. He does not refer to any evidence in the record to support this contention of such a "customary" practice. In any event, the claim

has no merit because he has not alleged or shown that "without adequate justification, he was treated unfairly compared to other prisoners who were similarly situated." See Hilliard v. Board of Pardons and Paroles, 759 F.2d 1190, 1193 (5th Cir. 1985); Bay v. Lynn.

#### IV

Thompson next contends that the district court reversibly erred by finding that he failed to prove that the defendants conspired to retain him unlawfully in ELD when the Secretary failed to decide his appeal timely from the sentence for aggravated disobedience. The magistrate judge found that, although Peabody and Rabalais agreed on the incident-report-plus-hearing procedure, "there [was] insufficient evidence to support a finding that the purpose of their agreement was to violate [any of Thompson's legal] rights."

"Under § 1983 conspiracy can furnish the conceptual spring for imputing liability from one to another." Villanueva v. McInnis, 723 F.2d 414, 418 (5th Cir. 1984). However, "it remains necessary to prove an actual deprivation of a constitutional right; a conspiracy to deprive is insufficient" as grounds for § 1983 liability. Id. Thompson's conspiracy claim lacks merit because he failed to show that he was deprived of a constitutional right.

V

Finally, Thompson contends that the district court erred by dismissing his claims against LSP Classification Officer Raphael Augustine. He argues that the district court failed to rule on Thompson's motion for entry of a default against Augustine. In his amended complaint filed September 5, 1990, Thompson added Augustine as a defendant. Five days later, an answer was filed on behalf of all defendants except Augustine. On July 1, 1991, Thompson moved for entry of a default against Augustine, for failure to plead or otherwise defend. The magistrate judge denied the motion on grounds that "Augustine was allowed to file his answer [to the amended complaint] prior to this ruling."

Thompson failed to appeal to the district court from the magistrate judge's denial of his motion for entry of a default. Because he did not do so, this court is "without jurisdiction to consider" whether the ruling was erroneous. Colburn v. Bunge Towing, Inc., 883 F.2d 372, 379 (5th Cir. 1989).

VI

For the reasons stated herein, the district court's judgment, dismissing Thompson's complaint, is

A F F I R M E D.