IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4170

Summary Calendar

OSCAR ORDAZ,

Plaintiff-Appellant,

v.

UP MARTIN, WARDEN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(9:92 CV 39)

(September 15, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant Oscar Ordaz, a Texas prisoner, appeals from the district court's dismissal of his pro se, in forma pauperis civil rights complaint as frivolous pursuant to 28 U.S.C. § 1915(d). Finding no reversible error, we affirm the dismissal.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. BACKGROUND

On November 24, 1990, Oscar Ordaz received a disciplinary report from a female prison guard, L. Vian. In the report, Vian alleged that Ordaz was "masturbating in public." She specifically claimed that, while she was making her rounds at about 10:30 p.m., Ordaz stopped her and asked her for some medication while he was masturbating. Ordaz did not deny that he was masturbating, but he claimed that he should not be disciplined because he was only doing so in the privacy of his cell. According to Ordaz, the incident occurred as follows:

> Miss L. Vian was working [on the] 3rd shift--10:00 p.m. to 6:00 a.m. She . . . was doing her count which was at about 10:30 p.m. and while doing her count she was asking all inmate's if we had any maint[enance] problems and also she was passing out Tylenol's and Aspirin's and prison supplies such as 1.60 forms; sick call forms; etc., etc. She was doing all of this while doing her count and passing out supplies if we asked for them. She started on 3-row and th[e]n came down to 2-row (which is how all officers do it, they start on 3-row), and when she got to 2-row and came to my cell and stood in front of my cell, that's when I noticed that it was already 3rd shift. While she stood in front of my cell I was listening to the radio with my headphone's on and looking at a magazine and masturbating.
>
> While she stood in front of my cell I noticed that she was not making any move in going to the next cell[.] I figured she would since I was in the nude but she didn't, so I took off my headphone's and that's when she asked me if I had any maint[enance] problem and I told her no and th[e]n she asked if I needed any medication or prison supplies and I said no to both. While she was asking me all this I was still in my bunk in the nude, so I kind of freaked out and felt kind of embarrassed cause I was in the nude. . . . I never at anytime called her or asked her for any medication while I was masturbating. While she was standing in front of my cell and asking me if I had any problems or needed anything she never at anytime tell me to put my clothe[s] on.

At a disciplinary hearing held on December 3, 1989, Ordaz was found guilty of masturbating in public. As a result of this finding, Ordaz apparently lost 180 days of good time credit and 30 days of commissary privileges, had his status reduced "from s-4 to line class 1," and was restricted to his cell for 15 days. He appealed the outcome of the disciplinary hearing, but the warden affirmed the finding of guilt and the punishment.

A similar incident involving masturbation by Ordaz occurred in December 1990, when another female guard, "Miss J. Burn" filed a disciplinary report concerning "sexual misconduct" by Ordaz. According to Ordaz,

> When I went to the disciplinary hearing, I just went to get sentenced cause I didn't want to go through the humiliation again, which I had before. And I knew I wasn't going to win anyway. The out-come of it was that I lost 90 day's good time and cell restriction for 15 day[s], plus 30 day's commissary restriction.

Yet a third masturbation incident occurred on January 1, 1992, when Ordaz was again written up for "sexual misconduct." The female prison guard who filed the disciplinary report this time, "Miss Z. Layne," claimed that Ordaz called her to his cell so that she could see him masturbating by the cell door. At the disciplinary hearing occurring after this incident, Ordaz was again found guilty. As a result of this finding, he again lost good time credit, commissary privileges, and was restricted to his cell for 15 days.

After this last incident, Ordaz filed a grievance with the warden, C. Martin, and complained about the use of female guards

to make maintenance and security rounds in all-male cell blocks. His complaint read as follows:

> Mr. Martin, I had already told you about these female officers working in Ad-Seg and what the consequence was. You know you're in violation of my constitutional rights 4th and 8th Amendment by invasion of my privacy. I have lost 1 year good time cause of these female officers[.] [I]f they would have never been back here, which its a violation, it would of never happened in the loss of my good time and restrictions I received. By me getting a disciplinary report for sexual misconduct it has made me feel humiliated, embarrassed, d[e]graded and depressed and look[ed] at upon like I'm some pervert. [The] disciplinary reports of sexual misconduct are the only write-ups I've had or else I would have a clean record. Mr. Martin, my 4th and 8th Amendments are still being violated and I will get paid for all this suffering I've gone through for the disciplinary reports I got from these female's which ain't suppose to work in Ad-Seg.

The warden responded by noting that Ordaz's complaint was too "vague and generalized," and by explaining that the "[a]ssignment of staff is the function of unit officials not inmates." Ultimately, he concluded that no action was required.

Ordaz then filed this pro se, in forma pauperis suit in federal district court pursuant to 42 U.S.C. § 1983. He named as defendants the three female prison guards who had filed disciplinary reports for his sexual misconduct, the hearing officer who presided at two of the disciplinary hearings, and Warden Martin. He alleged violations of his privacy and procedural due process rights and sought to recover five thousand dollars from each defendant. He also sought injunctive relief ordering "all female officers to be posted at a reasonable manner from view of my nud[e] body -- Or to have female officers working

in a professional[] manner and accept the consequence that they see or go through while working in Ad-Seg administration."

The district court referred this matter to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1). After conducting a Spears hearing,[1] the magistrate issued a report in which he recommended dismissing Ordaz's claims as frivolous under 28 U.S.C. § 1915(d). The district court, after conducting a de novo review of the magistrate's recommendations and considering Ordaz's objections to those recommendations, adopted the report as its own. It therefore ordered Ordaz's complaint dismissed with prejudice pursuant to § 1915(d). Ordaz filed a timely notice of appeal.

II. SECTION 1915(d) DISMISSALS

28 U.S.C. § 1915(d) authorizes a federal court to dismiss a complaint filed in forma pauperis "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." A 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). According to the Supreme Court, § 1915(d) gives a federal court "not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Id. at 327.

[1] See Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

We review § 1915(d) dismissals--whether based on a determination that the complaint is legally or factually frivolous--for abuse of discretion. See Denton v. Hernandez, 112 S. Ct. 1728, 1734 (1992); Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992). In determining whether a district court has abused its discretion, we consider, among other things, whether (1) the plaintiff is proceeding pro se, (2) the court inappropriately resolved genuine issues of disputed fact, (3) the court applied erroneous legal conclusions, (4) the court has provided a statement of reasons which facilitates intelligent appellate review, and (5) any factual frivolousness could have been remedied through a more specific pleading. Denton, 112 S. Ct. at 1734; Moore, 976 F.2d at 270.

III. THE DISMISSAL OF ORDAZ'S COMPLAINT

On appeal, Ordaz argues that the district court abused its discretion in dismissing his claims as frivolous. Ordaz specifically contends that the district court misconstrued the nature of his claims against two of the female prison guards.[2] He also argues that the district court erred in concluding that the disciplinary hearings, which were presided over by P. Ross, comported with due process. Finally, he maintains that the district court erred in dismissing his various claims against

[2] On appeal, Ordaz has only pursued his claims against defendants Layne and Vian; he has not pursued his claim against Burn, the other female prison guard who allegedly witnessed him masturbating.

Warden Martin, which were apparently predicated on a supervisory liability theory. We address the claims against each of these defendants in turn.

A. Claims Against the Female Prison Guards

Ordaz has consistently maintained that defendants Vian and Layne, two of the female prison guards who filed disciplinary reports in connection with incidents of masturbation, violated his constitutional rights. One of his allegations in this regard is that Vian and Layne violated his Fourth and Eighth Amendment rights to privacy by stopping unnecessarily at his cell to watch him masturbate. Another constitutional violation, according to Ordaz, occurred when the two female prison guards filed false charges of "sexual misconduct" against him. Finally, Ordaz claims that the two guards violated his due process rights by refusing to attempt to resolve the issue informally with him, as required by Texas prison rules.

The district court did not address Ordaz's privacy or false disciplinary report claims; rather, it interpreted Ordaz's complaint as raising only procedural due process claims against the female prison guards. Adopting the magistrate's report and recommendations, the district court determined that, because the female prison guards were not personally involved in disciplinary proceedings, they could not have deprived him of procedural due process. The district court therefore concluded that Ordaz's claims against the female prison guards were frivolous.

We agree with Ordaz that the district court misconstrued the nature of his claims against the female prison guards. It does not necessarily follow, however, that the district court abused its discretion in dismissing these claims as frivolous. As explained below, the district court correctly dismissed Ordaz's privacy claims, his false disciplinary report claim, and his procedural due process claims against the prison guards, because all are based on indisputably meritless legal theories.

1. **Privacy Claims**

Ordaz claims that his Fourth and Eighth Amendment rights, as incorporated by the Fourteenth Amendment, were violated when female prison guards making routine surveillance rounds lingered unnecessarily in front of his prison cell while he was masturbating. Neither theory of liability raises an arguable constitutional claim.

a. *Fourth Amendment theory*.

Ordaz's argument that the female prison guards violated his Fourth Amendment right to privacy when they unnecessarily lingered in front of his cell is legally frivolous within the meaning of § 1915(d). Accepting all of his allegations as true, as we must for § 1915(d) purposes, we conclude that under controlling precedent, there is no reasonable basis for concluding that the female prison officials conducted a "search" within the meaning of the Fourth Amendment. Ordaz's privacy claim predicated on the Fourth Amendment, therefore, lacks an arguable basis in law and was properly dismissed.

We engage in a two-step analysis in determining whether government activity violates the Fourth Amendment. See United States v. York, 895 F.2d 1026, 1028 (5th Cir. 1990). We first consider "whether the activity intrudes upon a reasonable expectation of privacy in such a significant way to make the activity a `search.'" Id. "Then, if we find a `search' has occurred, we determine whether the governmental intrusion was unreasonable given the particular facts of the case." Id.

We are satisfied in this case that the observations allegedly made by the female prison guards did not constitute "searches" within the meaning of the Fourth Amendment. After all, in Hudson v. Palmer, 468 U.S. 517 (1984), the Supreme Court made clear that inmates have no reasonable expectation of privacy in their prison cells. It explained:

> Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cell simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.

Id. at 525-26. From this reasoning, it follows that a prisoner has no reasonable expectation of privacy in the "curtilage" surrounding his prison cell. Consequently, the female guards' observations from this vantage point could not have constituted a search within the meaning of the Fourth Amendment. See United States v. Traynor, 990 F.2d 1153, 1157 (9th Cir. 1993)

(observations made by officers while they are not within the curtilage of a house do not constitute a search under the Fourth Amendment) (citing United States v. Pace, 955 F.2d 270, 273 (5th Cir. 1992)); United States v. Taborda, 635 F.2d 131, 139 (2d Cir. 1980) (observation of objects and activities inside a person's home by unenhanced vision from a location where the observer may properly be does not impair a legitimate expectation of privacy) (emphasis added). Compare Brock v. United States, 223 F.2d 681, 685 (5th Cir. 1955) (standing on a man's premises and looking in his bedroom window is a violation of his Fourth Amendment "right to be left alone").

We recognize that the Sixth Circuit, in discussing prisoners' Fourth Amendment rights, has stated that "there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason." Kent v. Johnson, 821 F.2d 1220, 1226 (6th Cir. 1987). Even assuming that the Sixth Circuit's reasoning is accurate in this regard, however, this is not the claim that Ordaz has made. Rather, Ordaz has alleged that his privacy rights were violated when female prison guards observed him voluntarily exposing himself. In short, Ordaz has not alleged that he was forced to expose himself to, or masturbate in front of, female prison guards. See Franklin v. Martin, 979 F.2d 208 (5th Cir. November 5, 1992) (Table, No. 4392) (unpublished) (rejecting a similar claim). His Fourth Amendment claim is, thus, frivolous.

b. *Eighth Amendment theory.*

Ordaz has also, in our view, failed to raise an arguable Eighth Amendment claim. 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. See Rhodes v. Chapman, 452 U.S. 337, 347 (1981). "[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Id.

In our view, the condition about which Ordaz complains--namely, female prison guards unnecessarily lingering in front of his prison cell while he is masturbating--does not rise to the level of cruel and unusual punishment. After all, we have already held the State of Texas may constitutionally prohibit inmates from masturbating in their cell. See Franklin, Slip. Op. at 3 (citing Bowers v. Hardwick, 478 U.S. 186, 191 (1986)). Unlike medical care, then, masturbation does not qualify as a basic human need or a fundamental right protected under the penumbral right to privacy. See id. That female guards observe prisoners like Ordaz engaging in such conduct hardly rises to the level of cruel and unusual punishment. In any event, the claim has no arguable basis in law and was properly dismissed as frivolous.

2. **False Disciplinary Report Claims**

Ordaz also claims that Vian and Layne filed false charges of "sexual misconduct" against him, charges which led to the loss of good time credit and various privileges. In making this claim, Ordaz essentially seeks to relitigate facts that were adjudicated during the disciplinary hearings at which he was found guilty of masturbating in public. On the undisputed facts of this case, we hold that Ordaz has not raised an arguable claim for the denial of a federal right.

Ordaz's allegation in this regard is indistinguishable from a malicious prosecution claim. Such claims, we have noted, may form the basis of a § 1983 claim, although the issue has not been finally resolved. See Brummett v. Camble, 946 F.2d 1178, 1180 & n.2 (5th Cir. 1991), cert. denied, 112 S. Ct. 2323 (1992). Even assuming that there is a federally protected right to be free from malicious prosecutions (including false disciplinary charges in the confines of a state prison), however, we have held that "a plaintiff may not state a claim under § 1983 for malicious prosecution absent proof that the prosecution terminated in his favor." Id. Our reasoning in this regard is straightforward:

> Absent a . . . requirement of "favorable termination" for the constitutional tort of malicious prosecution, a plaintiff could state a § 1983 claim even in cases in which he was ultimately convicted. In such cases, the federal courts would be forced to permit defendants to relitigate the merits of their criminal prosecutions via § 1983 despite the state court conviction. Such a rule, which poses the prospect of harassment, waste, and endless litigation, conflicts with the most basic principles of federalism.

Id. at 1183.

The concerns highlighted in Brummett apply equally, if not with more force, in the context of § 1983 claims predicated on the filing of false disciplinary charges in state prisons. Without an allegation "that the [disciplinary proceeding] terminated in his favor," Ordaz simply has not made an arguable showing that any federally protected right has been violated. Absent such an allegation, his false disciplinary claim is legally frivolous under our precedent.

3. **Procedural Due Process Claims**

Finally, Ordaz argues that Vian and Layne violated his procedural due process rights by filing a disciplinary report before they attempted to resolve informally the matter of his masturbating. He points specifically to the prison rule which provides that

> [w]hen a TDC Employee witnesses or has knowledge of any act by an inmate which is in violation of the Rules and Regulations of the Department or the Unit, the employee first will attempt, if appropriate, to resolve the matter informally. Such informal resolution may include counseling or a verbal reprimand.

He argues that this regulation creates a liberty interest and that Vian and Layne's failure to follow this rule deprived him of procedural due process. We strongly disagree.

A state creates a protected liberty interest by placing substantive limitations on official discretion. Olim v. Wakinekona, 461 U.S. 238, 249 (1983). An inmate must show that particularized standards or criteria guide the state's decisionmakers. Id. (citations and quotations omitted). If the decisionmaker is not required to base its decisions on objective

and defined criteria, but instead can deny the requested relief for any constitutionally permissible reason or for no reason at all, the state has not created a constitutionally protected liberty interest. Id. (citations and quotations omitted).

Even a cursory reading of the regulation to which Ordaz points reveals that it does not create a protected liberty interest in having disciplinary problems resolved "informally." Rather, the regulation gives the prison employee the discretion to use informal disciplinary action if the employee feels it is "appropriate" under the circumstances. The language is not mandatory and does not provide any standards to guide the prison employees. Ordaz's claim to the contrary is frivolous.

B. Claims Against the Hearing Official

Ordaz has also levelled a procedural due process claim against Ross, the hearing officer who presided at two of the three disciplinary hearings involving alleged masturbation by Ordaz. He has two contentions in this regard. First, he claims that he was not afforded due process because there was no evidence presented to support his guilt other than the statements of the complaining officers. He also contends that Ross did not give him adequate written reasons for his findings of guilt. Again, his contentions are frivolous.

In Wolff v. McDonnell, 418 U.S. 539, 556 (1974), the Supreme Court recognized that prisoners retain some due process rights in the context of disciplinary proceedings--at least where their liberty interests might be affected by a guilty finding.

However, the Court noted that because "[p]rison disciplinary proceedings are not part of a criminal prosecution, . . . the full panoply of rights due a defendant in such proceedings does not apply." Id. Under Wolff, a prisoner facing the loss of good time credit must (1) be given advance written notice of the violation, (2) be given a written statement of the factfinder as to the evidence relied upon and the reasons for the disciplinary action taken, and (3) be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Id. at 565-66.

At the Spears hearing in this case, Ordaz effectively conceded that the disciplinary hearings were conducted in accordance with Wolff. He admitted that he was given at least 24 hours advance written notice of both of the disciplinary hearings, that he was allowed to testify and call witnesses in his defense, and that he was given a copy of the hearing officer's findings. Ordaz also admitted to hearing the testimony of the accusing female prison guards.

Ordaz nonetheless maintains that the written findings he received did not comport with due process because they were not specific enough. He complains that Ross's statement notes only that the findings of guilt were based on the female officers' testimony and report. We recently rejected a similar claim in McShane v. Fregia, 986 F.2d 1418 (5th Cir. Feb. 10, 1993) (Table, No. 92-7312) (unpublished opinion). There we held that

when a prisoner attends a disciplinary proceeding and hears the testimony of the accusing officer, the factfinder's notation that its decision was based upon that testimony is sufficient for purposes of Wolff. Ordaz's allegations are indistinguishable.

As for Ordaz's related claim that there was insufficient evidence to support the hearing officer's findings of guilt, it is also frivolous. Because "the disciplinary proceeding was otherwise fair and adequate, the opportunity that it afforded [Ordaz] to clear himself of misdeeds which he did not commit sufficed" to satisfy due process concerns. See Collins v. King, 743 F.2d 248, 253-54 (5th Cir. 1984). Moreover, to the extent that due process requires some quantum of evidence to support a prison disciplinary finding, the quantum of evidence is small. See Smith v. Rabalais, 659 F.2d 539, 545 (5th Cir. 1981) ("No de novo review of the disciplinary board's factual finding is required, but the courts must consider whether at least the decision is supported by `some facts'--`whether any evidence at all' supports the action taken by prison officials.") (citation omitted), cert. denied, 455 U.S. 992 (1982). In this case, the testimony of the female prison guards indisputably supports Ross's findings of guilt. Ordaz has not raised an arguable due process claim under this theory either.

C. Claims Against the Warden

We turn finally to the claims that Ordaz has asserted against Warden Martin. In particular, Ordaz contends that Warden Martin deprived him of his constitutional rights by (1) denying

his appeals from the disciplinary hearings, (2) denying his grievances with respect to the use of female prison guards, and (3) failing to enforce prison regulations. None of these claims have an arguable basis in law.

Insofar as Ordaz is arguing that Martin violated his right to procedural due process by denying his appeals from the disciplinary findings, his claim is devoid of merit. As discussed above, the procedural requirements of Wolff were satisfied at the disciplinary hearing and there was sufficient evidence to support the guilty findings. Martin simply could not, therefore, be liable for his own actions in denying Ordaz's appeals. Nor could he be liable in a supervisory capacity for the actions of Ross, the hearing officer.

Ordaz's complaint about Warden Martin's denial of his grievance is similarly frivolous. As noted earlier, after the two disciplinary hearings at which Ordaz was found guilty of masturbating in public, Ordaz filed a grievance in which he complained about the use of female prison guards in all-male cell blocks. Our decision in Letcher v. Turner, 968 F.2d 508 (5th Cir. 1992), forecloses this claim. There, we noted that "no constitutional violation occurs when naked male inmates are viewed by female guards if the presence of the female guards is required to protect a legitimate government interest such as maintaining security at a correctional facility." Id. at 510. Because the presence of female prison guards protects the State of Texas's legitimate interests in maintaining security (as well

as the state's legitimate interests in gender neutral employment practices), Ordaz's privacy interests must yield. See Barnett v. Collins, 940 F.2d 1530 (5th Cir. July 31, 1991) (Table, No. 91-1038) (unpublished), cert. denied, 112 S. Ct. 980 (1992); Smith v. Moore, 917 F.2d 560 (5th Cir. Sept. 24, 1990) (Table, No. 90-8068) (unpublished).

Lastly, Ordaz complains that Warden Martin violated his constitutional rights by refusing to comply with Rule 1.34 of the TDC Employees' Manual. This rule provides that

> [w]ardens who observe or have reported to them employees who cannot control their temper or maintain reasonable order and to so conduct themselves as to gain and maintain the respect of inmates shall point out to the employee the necessity for correcting their faults. If after a reasonable time the employee fails to correct them, this shall be considered sufficient cause for dismissal.

The problem with this claim is that the rule to which Ordaz refers does not create any federally protected right in inmates to have disobedient guards disciplined or corrected. It merely gives the Warden the discretion to do so. Ordaz's claim in this regard is frivolous.[3]

IV. CONCLUSION

As the foregoing discussion indicates, we hold that the district court did not abuse its discretion in dismissing Ordaz's

[3] To the extent that Ordaz is seeking to impose supervisory liability on Martin for the acts of Vian and Layne, see Thompkins v. Belt, 828 F.2d 298, 304 (5th Cir. 1987), his claim also lacks an arguable basis in law. We have already held that Vian and Layne violated no constitutional right of Ordaz by observing him masturbate.

civil rights complaint pursuant to § 1915(d). The claims raised in that complaint lack an arguable basis in law and therefore are frivolous. The judgment of the district court is AFFIRMED.