

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8642
(Summary Calendar)

EDWARD REIMER,

Plaintiff-Appellee,

versus

PAUL HASTINGS, ET AL.,

Defendants,

PAUL HASTINGS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-90-CA-294-SC)

(July 19, 1994)

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

PER CURIAM:*

In this civil rights action filed by an inmate of the Hays

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

County (Texas) Jail, implicating availability of reading material, Defendant-Appellant Paul Hastings, Sheriff of Hays County, Texas, appeals the order of the magistrate judge mandating broader access to such materials. For the reasons set forth below, we affirm.

I

FACTS AND PROCEEDINGS

Reimer, individually and as representative of the class of all inmates of the Hays County Jail, instituted this § 1983 civil rights suit against officials of the Hays County Sheriff's Department. The original defendants were Sheriff Hastings and Rod Ellis, a former jail administrator who is no longer a party. Additionally, Larry Haynes, a jail administrator, was named in Reimer's Amended Complaint as a defendant but was not served with the complaint. Thus Sheriff Hastings, in his individual and official capacities, is the sole defendant on appeal.

Reimer alleged that his rights were violated when jail officials denied his requests for the San Antonio Express News newspaper, Sports Illustrated magazine, and materials he needed to participate in a correspondence course. Reimer alleged that defendant Ellis issued a memorandum that banned the receipt by all prisoners of magazines, books, and other printed materials with the exception of legal, religious, and family mail.

Jail policy permitted inmates to read magazines in the library but not in their cells. There, the inmates were allowed to receive only legal and family mail, legal papers, educational materials (excluding hard-cover books), and other paper products, including

soft-cover books, note pads, and toilet paper. Newspapers were considered fire hazards and therefore were not allowed.¹ Neither were hard-cover books allowed in the cells due to the risk that inmates would make weapons of them; but such books could be read in the Resource Center.

The magistrate judge held an evidentiary hearing on class certification and injunctive relief. He recommended a preliminary injunction "requiring the defendants to file with the Clerk of the Court . . . a document setting out in detail a new policy and procedure granting daily access to newspapers for all inmates and . . . requiring the defendants to implement that policy within thirty (30) days of the date of the Court's Injunction Order." The district court certified the class of plaintiffs "for purposes of injunctive relief only," and granted the plaintiff's motion for a preliminary injunction ordering defendants to file "a detailed new policy and procedure granting daily access to newspapers" Subsequently, the defendants filed a Plan to Provide Newspapers to Inmates at Hays County Jail.

The parties consented to a trial by the magistrate judge, after which the defendants filed a Policy Proposed by Defense for Inmates' Access to Newspapers, Magazines, and Educational Materials. In response, Reimer filed Plaintiff's Proposed Prison Policy.

The magistrate judge issued an order granting injunctive

¹ In response to a preliminary injunction order, newspapers have been being provided to the inmates, but not in their cells.

relief that provided:

I. MAGAZINES

. . . [I]nmates should . . . be allowed to subscribe to one magazine of their choice, at their own expense, to be kept in their cells and disposed of as each new issue is received.

II. NEWSPAPERS

. . . Inmates should additionally be allowed to subscribe, at their own expense, to one newspaper of their choice and allowed to keep said paper in their cell for the day of publication, but disposed of upon the arrival of the next issue.

III. EDUCATIONAL MATERIALS

. . . [I]nmates should be allowed to receive educational material directly from a publisher or an educational institution. Should only a hard back [sic] book be available, the inmate should be allowed only one such book in his cell which pertains to the course he is pursuing.

IV. BOOKS

The present jail policy on the distribution and use of books is proper and adequate.

Sheriff Hastings timely appealed this order.

II

ANALYSIS

Sheriff Hastings contends that the magistrate judge's order is contrary to the district court's order because the latter required defendants to submit a policy "granting daily access to newspapers for all Hays County Inmates." (emphasis added). He argues that, as the district court's order does not mention magazines and books but only newspapers, the magistrate judge erred in mandating that

inmates be allowed to keep magazines and books in their cells.

Sheriff Hastings argues further that the magistrate judge should have adopted the defendants' proposed policies on reading materials because: "(A) Those policies were and are adequate; and (B) There is no real evidence that they are not adequate; and (C) They satisfy, if not more than satisfy, basic constitutional requirements." He insists that the policy "is designed to prevent fires and the manufacture of weapons from books, concerns which reasonably relate to legitimate penological objectives, including the preservation of order, discipline, and institutional security."

The decision to grant or deny an injunction rests within the sound discretion of the court, and its decision will not be disturbed unless there has been a clear abuse of discretion. United States v. Board of Educ., 332 F.2d 40, 46 (5th Cir. 1964). Sheriff Hastings provides no authority for his argument that an order providing permanent injunctive relief should not exceed the scope of a preliminary injunction. Moreover, the magistrate judge, prior to issuing his order, instructed the parties to "continue to negotiate and work together in developing an agreed policy for inmates' access to magazines, newspapers, and education [sic] materials," and stated "in the event that the parties are unable to agree, that each party submit to the Court . . . their [sic] separate proposed agreed policy for inmates' access to magazines, newspapers, and educational materials for implementation at the Hays County Jail for the Court's consideration." The scope of relief granted was within that sought by the complaint, and the

consent to trial by magistrate judge was not limited to specific claims. Sheriff Hastings' argument that the magistrate judge erred in fashioning an order that went beyond the scope of the district court's order is without merit.

Sheriff Hastings also contends that the magistrate judge erred in disregarding the fire and security risks created by magazines and books. He states that it is undisputed that seven major fires occurred at the jail during a three-month period, and that all were started by inmates burning newspapers. (We note that all of these fires occurred in the old (now-closed) Hays County Jail; not in the new jail in which the inmates are now housed.)

Absent inconsistency with a "legitimate jail function," an inmate may not be deprived of access to newspapers and magazines. See Mann v. Smith, 796 F.2d 79, 83 (5th Cir. 1986). "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correction system." Pell v. Procunier, 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). A jail regulation that impinges on inmates' constitutional rights is valid if it is reasonably related to legitimate penological interests. Thornburgh v. Abbott, 490 U.S. 401, 404, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); Turner v. Safely, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). An infringement on an inmate's constitutional rights must be "evaluated in light of the central objective of prison administration, safeguarding institutional security." Bell v. Wolfish, 441 U.S. 520, 547,

99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

In Mann, we reversed a district court's ruling that a jail's policy of banning newspapers and magazines served a legitimate purpose. Mann v. Smith, 796 F.2d at 83. There, as in the instant case, fire prevention was the justification offered by the officials for the ban on such reading materials. Id. at 82. We held that a "ban on newspapers and magazines must be struck down under the first amendment if it represents an 'exaggerated response' by jail officials to the legitimate need to 'preserve internal order and discipline and to maintain institutional security.'" Id. at 82 (citing Bell, 441 U.S. at 547-48).

When the "patently underinclusive nature of the regulation" suggests that an exclusion represents an exaggerated response, the exclusion must be struck down under the First Amendment. Id. at 82. In Mann, "the inmates were permitted to have softcover books" and "writing paper and toilet paper were freely available." Id. In the instant case, Hays County inmates are allowed to have paperback books, toilet tissue, and writing pads in their cells; they are not, however, allowed to have magazines, newspapers, or hardback books. This suggests that the exclusion of the reading materials constitutes an "exaggerated response" that must be struck down under the First Amendment.

Sheriff Hastings maintains that hardback books are not allowed in the jail due to the risk that the inmates will fashion the binders of the books into weapons. He offered no evidence that the fashioning of weapons from books was a real concern or that

hardback books provide better material for making weapons than other materials available to inmates, such as writing pads or paperback books. The only testimony of a specific nature was that knives and razor blades had been inserted into hard-cover books.

The Seventh Circuit has held that hardback books could not be excluded as potential projectiles where other objects such as shoes could "just as easily . . . cause injury to guards" Kincaid v. Rusk, 670 F.2d 737, 744 (7th Cir. 1982). The magistrate judge did not abuse his discretion in ordering that "inmates should be allowed to receive educational material directly from a publisher or an educational institution. Should only a hardback book be available, the inmate should be allowed only one such book in his cell which pertains to the course he is pursuing."

Finally, Sheriff Hastings' contention that there was no proof of an unconstitutional policy set by him as chief policymaker for law enforcement matters in Hays County lacks merit. As the Sheriff of Hays County, he was the county's final policymaker in the area of law enforcement. See Turner v. Upton County, 915 F.2d 133, 136 (5th Cir. 1990), cert. denied, 498 U.S. 1069 (1991).

Finding no reversible error, the order of the magistrate judge is in all respects

AFFIRMED.