IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40587
Summary Calendar

LEONARD REED,

Plaintiff-Appellant,

VERSUS

GARY L. GRIGGS,
Captain, Coffield Unit, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:93-CV-556)

(December 13, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Leonard Reed appeals the dismissal of his state prisoner's 42 U.S.C. § 1983 action as frivolous under 28 U.S.C. § 1915(d). Finding no error, we affirm.

---

[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

Reed, a Texas prisoner proceeding pro se and in forma pauperis (IFP), commenced this action against Captain Gary L. Griggs, corrections officer Rex Nagel, and counsel substitute Doris M. Gaston. Reed alleged that Nagel filed a false disciplinary report against him on May 2, 1993, charging Reed with "Inciting To Riot." The report stated that Reed encouraged two other inmates, H. McKinney and L. Bobby, to engage in a disturbance by answering a "rack time" order by stating: "We ain't racking up, that's hoe ass shit." Reed denied making the statement and alleged that the other two prisoners were not even on the wing at the time of the incident.

Reed further asserted that Griggs and Gaston acted in concert to deny him due process at the subsequent disciplinary hearing. Reed alleged that, prior to the hearing, he asked Gaston to ensure that prisoners Bobby, McKinney, and Kaazim Abul Umar were present at the hearing to testify in Reed's defense. Reed asserted that, at the hearing, Griggs refused to allow Reed to call Umar as a witness and that had he been called, Umar would have testified that Reed did not make the statement and that McKinney and Bobby were not present at the time of the alleged incident.

Reed further averred that Gaston presented unsigned, unsworn statements, which she said she had obtained from Bobby and McKinney concerning the incident, but that Gaston had not spoken with either inmate and had concocted the statements herself. Reed asserted that had McKinney and Bobby been allowed to testify at the hearing,

they would have stated that they were not in the dayroom at the time of the incident, and thus Reed could not have incited them to riot. Reed also submitted an affidavit from Bobby Lee indicating that he had not spoken with Gaston.

Reed maintained that he was found guilty and placed in solitary confinement for fifteen days on the basis of insufficient evidence, that his hearing violated due process, and that he was denied a fair and impartial hearing. He requested an order restraining the defendants from engaging in the conduct of which he complained and $300,000 in damages.

The case was referred to a magistrate judge, who conducted a Spears[1] hearing. Reed gave his version of the incident, denied engaging in the conduct alleged in the disciplinary report, and accused Nagel of writing a false report. Reed acknowledged that he had received prior written notice of the hearing, that he had attended the hearing, that he had had counsel substitute, and that Nagel was present at the hearing. Reed testified that his inmate witnesses were not present at the hearing, and he described their testimony as set out in his complaint.

Reed stated that he told counsel substitute Gaston that he wanted the inmate witnesses to testify. Gaston informed Reed that she had received statements from Lee and McKinney, which she read to Reed before the hearing. But Reed testified that Gaston did not actually interview these witnesses, and he had affidavits from them so stating. In any event, Reed testified that the statements

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

Gaston obtained from the inmates supported his position and that Gaston read the statements into the record at the hearing.

In response to a question from the court, Reed stated that he sued Griggs because he disregarded the statements provided by the inmates. Reed also testified that he believed Griggs deprived him of due process by denying him the right to call his witnesses.

Thereafter, the magistrate judge recommended dismissing Reed's complaint with prejudice as frivolous, observing that Nagel's testimony at the disciplinary hearing provided some evidence to support the finding of guilt, which is all due process requires. The denial of Reed's request to have McKinney and Lee testify on his behalf did not violate due process, the magistrate judge concluded, because Reed was allowed to introduce written statements from these witnesses, and their testimony would have been cumulative. The magistrate judge stated that the record was unclear as to whether Umar's statement was entered into the record, but the statement would have been cumulative, as Umar simply would have corroborated Lee's and McKinney's statements.

The magistrate judge rejected Reed's claim that his right to due process had been violated because Griggs did not believe his evidence. Finally, the magistrate judge concluded that Reed's allegation that Nagel gave him a false disciplinary case failed because Reed was found guilty of the violation. The district court adopted the magistrate judge's recommendation over Reed's objections and dismissed Reed's complaint with prejudice pursuant to § 1915(d).

II.

An IFP complaint may be dismissed as frivolous pursuant to § 1915(D) if it has no arguable basis in law or in fact. Booker v. Koonce, 2 F.3d 114, 115-16 (5th Cir. 1993); see Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992). We review a § 1915(d) dismissal under the abuse-of-discretion standard. Id. at 1734. "Dismissal with prejudice . . . [is] appropriate if the plaintiff has been given an opportunity to expound on the factual allegations by way of a . . . questionnaire or orally via a Spears hearing, but does not assert any facts which would support an arguable claim." Graves v. Hampton, 1 F.3d 315, 319 (5th Cir. 1993) (footnotes omitted).

III.

A.

Reed first argues that the evidence at the disciplinary hearing was insufficient to support the finding that he committed the rule violation. This argument is meritless.

Prison disciplinary proceedings will be overturned "only where there is no evidence whatsoever to support the decision of the prison officials." Reeves v. Pettcox, 19 F.3d 1060, 1062 (5th Cir. 1994). "A de novo factual review is not required." Id.

The record reveals that Nagel testified against Reed at the hearing. According to Reed's brief, Nagel's testimony was consistent with the violation report, which charged Reed with making the statement and inciting inmates McKinney and Lee to riot.

This evidence is sufficient under Hill to support the finding of guilt and to satisfy due process. Thus, this aspect of Reed's complaint lacks an arguable basis in law and was correctly dismissed as frivolous.

Insofar as Reed's brief may be construed as contending that Nagel violated his constitutional rights by filing a false and malicious offense report, this contention fails as a matter of law. In Ordaz v. Martin, No. 93-4170 (5th Cir. Sept. 15, 1993) (unpublished), this court held that a due process claim premised on an alleged false disciplinary report "is indistinguishable from a malicious prosecution claim." Id., slip op. at 12. Although such a claim may form the basis of a § 1983 action, the prisoner must allege "that the [disciplinary proceeding] terminated in his favor." Id., slip op. at 13 (alteration in original). Absent such an allegation, the claim is legally frivolous. Id. Reed cannot possibly prevail on his false and malicious report claim under Ordaz, as the disciplinary proceeding did not terminate in his favor; thus, the district court correctly dismissed the claim as frivolous.

B.

Relying upon Wolff v. McDonnell, 418 U.S. 539 (1974), Reed contends that his due process rights were violated because he was not allowed to present testimony from his inmate witnesses at the disciplinary hearing and that the reason given for refusing to permit the testimony was insufficient under Wolff. The district

court found this claim frivolous, reasoning that Reed was permitted to present written statements from McKinney and Lee, that live testimony from these witnesses would have been cumulative to the written statements, and that testimony from Umar also would have been cumulative.

The district court correctly rejected Reed's claim as frivolous, but recent caselaw from this court indicates that the district court erroneously analyzed the claim under the Wolff standards. In McDonald v. Boydston, No. 93-1912 (5th Cir. May 24, 1994) (unpublished), this court addressed whether a prisoner facing punitive isolation without the loss of good time credits for violating jail rules was entitled to a hearing under the standards set forth in Wolff or the less stringent procedures required by Hewitt v. Helms, 459 U.S. 460 (1983). The court stated:

> 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.

McDonald, slip op. at 4 (quoting Dzana v. Foti, 829 F.2d 558, 561 (5th Cir. 1987)) (internal quotations omitted; alterations in original).

The court observed that McDonald "only faced isolated confinement instead of normal confinement with the general population." Id. at 5. The sanction imposed was seven days in solitary confinement. Id. at 2. The court determined that this "sanction more closely parallels the disciplinary confinement in Hewitt and McCrae [v. Hankins, 720 F.2d 863 (5th Cir. 1983),] instead of the actual increase in time spent behind bars in Wolff and Dzana." Accordingly, the court held that McDonald had no right to call witnesses under Hewitt and McCrae, and his due process rights were not violated. Id. at 5-6.

Similarly, in this case the punishment Reed received for the violation was fifteen days' solitary confinement. Reed has not alleged, and the administrative record does not reflect, that he lost any good time credits. Under the analysis set forth in McDonald, the sanction Reed received more closely resembles the sanction at issue in Hewitt rather than the one involved in Wolff. Therefore, it does not appear that Reed was entitled to the heightened due process standards, including the right to call witnesses, set out in Wolff, but rather, only the informal nonadversary procedures set out in Hewitt, which do not confer upon him the right to all witnesses in his defense.

AFFIRMED.