

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 13, 2017

Elisabeth A. Shumaker
Clerk of Court

ZACHARIAH L JOHNSON,

Plaintiff - Appellant,

v.

JERRY CLARK, in his individual and official capacity as Natrona County Detention Center Administrator; MARK BENTON, in his individual and official capacity as former Sheriff of Natrona County Sheriff's Department; GUS HOLBROOK, in his individual and official capacity as Sheriff of Natrona County Sheriff's Department,

Defendants - Appellees.

No. 17-8071
(D.C. No. 2:16-CV-00225-SWS)
(D. Wyo.)

ORDER

Before **TYMKOVICH**, Chief Judge, **HOLMES**, and **MATHESON**, Circuit Judges.

This matter is before the court on the jurisdictional show cause order it issued on September 20, 2017; appellee Sheriff Gus Holbrook's motion to dismiss the appeal for lack of jurisdiction, and *pro se* appellant Zachariah L. Johnson's combined response to both the jurisdictional show cause order and Sheriff Holbrook's motion to dismiss. Upon consideration of these materials, the district court docket, and the applicable law, the court dismisses Mr. Johnson's appeal for the reasons it sets forth below.

In August 2016, Mr. Johnson filed a prisoner civil rights complaint, alleging claims against Sheriff Holbrook in his individual and official capacities and against the Natrona County Sheriff's Department, the Natrona County Detention Center, and its former and current employees acting in their official capacity. The district court terminated claims against Jerry Clark and Mark Benton following receipt of a notice of their deaths.

On August 25, 2017, the district court entered an order: (1) granting Sheriff Holbrook's motion to dismiss; (2) granting in part and denying in part the Detention Center's motion to dismiss Mr. Johnson's claims against both it and all current and former Natrona County employees; and (3) denying Mr. Johnson's request for a temporary restraining order. In its August 25, 2017 order, the district court specifically held that Mr. Johnson stated a plausible claim for relief against the remaining defendants for violation of his First Amendment right to correspond with the media. That claim remains pending in the district court.

Mr. Johnson filed a notice of his intent to appeal the orders granting the respective motions to dismiss. In his combined response to the jurisdictional show cause order and Sheriff Holbrook's motion to dismiss, Mr. Johnson appears to assert his intention to also appeal the district court's termination of claims against Messrs. Clark and Benton and the district court's denial of his request for a temporary restraining order. Regardless the intended scope of Mr. Johnson's appeal, however, no aspect of the district court's August 25, 2017 order is final for purposes of appeal. *See Utah v. Norton*, 396 F.3d 1281, 1286 (10th Cir. 2005) (final decisions require nothing more than execution of judgment).

First, denial of a temporary restraining order is not generally appealable unless “the order in reality operates as a preliminary injunction, or . . . the order is appealable as a final order under 28 U.S.C. § 1291.” *See Populist Party v. Herschler*, 746 F.2d 656 , 661 n.2 (10th Cir. 1984). Mr. Johnson has not established that the district court’s denial of a temporary restraining order in this case falls within either of these exceptions.

Second, except in limited circumstances that are not present here, this court’s appellate jurisdiction is limited to review of final decisions. 28 U.S.C. § 1291; *see also United States v. Nixon*, 418 U.S. 683, 690-92 (1974) (“The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals.”); *Albright v. Unum Life Ins. Co.*, 59 F.3d 1089, 1092 (10th Cir. 1995) (“Under § 1291, we have jurisdiction only over ‘final’ decisions of the district court—that is, those decisions that leave nothing for the court to do but execute judgment.” (citation and internal quotation marks omitted)). Because Mr. Johnson’s First Amendment claim remains pending before the district court, the district court’s August 25, 2017 order is not yet final and this court lacks jurisdiction over this appeal.

APPEAL DISMISSED.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in black ink, appearing to read "LA Lee".

by: Lisa A. Lee
Counsel to the Clerk