

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

DEC 28 1990

TENTH CIRCUIT

ROBERT L. HOECKER
Clerk

TIMOTHY STALLARD,

Plaintiff-Appellant,

v.

STEVEN DAVIES; RAYMOND ROBERTS;
WAYNE SHIPMAN; PHILIP L.
TINDER; W.T. MADDEN; LT. SMITH;
M. SLUSHER,

Defendants-Appellees.

No. 89-3320
(D.C. No. 89-3400-S)
(D. Kansas)

ORDER AND JUDGMENT*

Before ANDERSON, BALDOCK, and EBEL, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. Therefore, the case is ordered submitted without oral argument. We nevertheless grant Stallard's request to proceed in forma pauperis.

This case involves a complaint filed pursuant to 42 U.S.C. § 1983. Plaintiff, an inmate at the Kansas State Penitentiary, Lansing, Kansas, claims that the defendants violated his constitutional rights by punishing him for refusing to work on an

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

assigned work detail. According to plaintiff, defendants did not comply with Kansas State Prison General Order 18-101, which entitles all inmates to an in-person classification review prior to any work assignment. Plaintiff asserts that he had a Fourteenth Amendment liberty interest in the pre-classification review which defendants violated. In addition, plaintiff contends that the punishment meted out against him was cruel and unusual and constituted an impermissible restriction on his First Amendment right to religious freedom. The district court, Saffels, J., dismissed the complaint for failure to state a claim. We affirm the district court on all but the Eighth Amendment claim, which we remand for further consideration consistent with this order and judgment.

FOURTEENTH AMENDMENT CLAIM

The Fourteenth Amendment prohibits any state from depriving a person of life, liberty, or property without due process of law. Plaintiff here asserts that defendants deprived him of a valid liberty interest when they assigned him to work in the "furniture repair and refinish shop" without first interviewing him. According to plaintiff, such a pre-assignment interview was required by Kansas State Prison General Order No. 18-101. We reject plaintiff's argument for two independent reasons.

In the first place, plaintiff has misinterpreted the terms of the General Order and mistakenly concluded that he was entitled to pre-job-assignment consultation. In our view, consultation interviews are required only for those inmates who -- unlike

plaintiff -- choose to participate in an inmate program plan. This is confirmed by both the Kansas Administrative Regulations and the prison order in question. According to § 44-5-105 of the Kansas Administrative Regulations:

Within one month after each inmate's admission or re-admission evaluation, an initial classification committee shall meet with the offender to develop a program plan. . . . The program plan shall include various tasks which the inmate agrees to perform over an estimated period of time . . . includ[ing] activities in education, vocational training, psychological or psychiatric counseling or therapy, work, hobbies or leisure time activities, and participation in social, special interest or special counseling. . . . Any inmate may elect not to participate in a formal program plan. . . . [and] shall not be penalized for [such] refusal. . . . The inmate shall nevertheless be subject to all the regulations of the secretary and the orders of the principal administrator, and shall be required to participate in any work assignments which are made by the unit team.

Id. (emphasis added). The general order relied on by plaintiff merely follows up on this regulation: "all inmates shall be present at their initial classification to provide their input as to preferences in programming." Plaintiff's Complaint at 8 (emphasis added).¹

On March 1, 1989 -- more than five months before the re-classification at issue here -- plaintiff here declined to enter into a program plan agreement with prison administrators. See Plaintiff's Complaint, Exhibit 4. This was his right under K.A.R § 44-5-105. Nevertheless, by refusing to participate in the

¹ Plaintiff's exhibit 2, a letter from Administrative Officer Mary E. Chambers, also deals exclusively with participation in the program plan. It in no way contradicts § 44-5-105 in its holding that non-participating inmates "shall [nevertheless] be required to participate in any work assignments . . . made by the unit team."

prison programming plan, plaintiff unavoidably forfeited his right to avail himself of the benefits which accompany participation in such a program. We therefore conclude that plaintiff had no claim to a classification interview; rather, the inmate was "required to participate in any work assignments . . . made by the unit team." K.A.R. 44-5-105(c)(1).

Futhermore, even if defendants had promised a re-classification interview to all inmates, it is by no means clear that reneging on such a promise would constitute a violation of the Fourteenth Amendment. In Hewitt v. Helms, 459 U.S. 460, 469 (1982), the Supreme Court noted that "we have never held that statutes and regulations governing the daily operation of a prison system conferred any liberty interest in and of themselves." The Court reasoned that:

The creation of procedural guidelines to channel the decision-making of prison officials is . . . a salutary development. It would be ironic to hold that when a State embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause. The adoption of such procedural guidelines, without more, suggests that it is these restrictions alone, and not those federal courts might impose under the Fourteenth Amendment, that the State chose to require.

Id. at 471. We think it obvious that the general orders cited by plaintiff are nothing more than procedural guidelines adopted for the internal administration of the Kansas State Penitentiary in Lansing. They make no pretense to elevate or expand the liberty interests of inmates, as evidenced by the fact that the Kansas code and Kansas Administrative Regulations remain silent on the subject. Indeed, we question whether an individual prison has the

authority to unilaterally confer Fourteenth Amendment liberty interests on state prisoners. Therefore, even if plaintiff correctly interpreted the general order in question, we still conclude that there was no Fourteenth Amendment violation by defendants.

FIRST AMENDMENT CLAIM

As punishment for his refusal to comply with the work re-assignment, Stallard was assigned to cell house "X". There he was permitted to attend religious services for no more than one hour per week. Plaintiff asserts that such punishment violated his First Amendment right to free exercise of religion. We disagree.

In Turner v. Safley, 482 U.S. 78, 84 (1987), the Supreme Court acknowledged that "courts are ill-equipped to deal with the increasingly urgent problems of prison administration." The Court accordingly held that "a lesser standard of scrutiny is appropriate in determining the constitutionality of prison rules." Id. at 85. Thus, where a prison regulation "impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Id. at 89. There can be no dispute that administrative confinement like that ordered against plaintiff is reasonably related to the legitimate penological interest of maintaining order and discipline among prison inmates. We therefore conclude that the prison regulation limiting prisoners to one hour of religious services per week is a valid one which represents an acceptable accommodation between the

prisoner's First Amendment rights and the prison's interest in maintaining order.

EIGHTH AMENDMENT CLAIM

Plaintiff finally claims that the conditions in the "X" cell house, where he was sent for refusing to comply with his job re-assignment, were so unsanitary and dangerous as to amount to cruel and unusual punishment. Specifically, he contends that cell house "X" is characterized by "extreme fire hazards," "insect and vermin infestation," lack of recreational facilities and opportunities for exercise, and dangerous fellow inmates "suffering from extreme mental illness, or aggressive homosexuals whom(sic) have repeatedly molested other . . . inmates." Pl. Complaint at 13.

The district court apparently misunderstood this contention, holding that "plaintiff has made no allegations that the work assignment was violative of the constitutional prohibition against cruel and unusual punishment." Order at 2. We think it is obvious that plaintiff's Eighth Amendment claim challenges the conditions of his confinement in cell house "X" -- not the work assignment which he initially refused. We accordingly remand this claim to the district court and direct it to follow the Supreme Court's admonitions against "deliberate indifference" and "unnecessary and wanton infliction of pain" which is "totally without penological justification." Rhodes v. Chapman, 452 U.S. 337, 342 (1981) See also Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986) (prolonged restriction on exercise threatened inmate's physical health and implicated Eighth Amendment); Ramos

v. Lamm, 639 F.2d 559, 568 (10th Cir. 1980) (state must provide inmate with a "healthy habilitative environment"), cert. denied, 450 U.S. 1041 (1981).

CONCLUSION

For the reasons set forth above, we AFFIRM the district court's dismissal of all claims but the Eighth Amendment claim, which we REMAND for further consideration.

Entered for the Court

David M. Ebel
Circuit Judge