

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted October 24, 2023*

Decided October 25, 2023

BeforeDAVID F. HAMILTON, *Circuit Judge*MICHAEL Y. SCUDDER, *Circuit Judge*JOHN Z. LEE, *Circuit Judge*

No. 23-1381

MICHAEL R. CARRICO,
*Plaintiff-Appellant,**v.*FRANK VANIHEL, et al.,
*Defendants-Appellees.*Appeal from the United States District
Court for the Southern District of
Indiana, Terre Haute Division.

No. 2:20-cv-00472-JPH-MG

James Patrick Hanlon,
*Judge.***ORDER**

Michael Carrico, an Indiana prisoner, appeals the entry of summary judgment rejecting his claims that prison officials violated his constitutional rights in connection

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C). We have substituted Frank Vanihel, the current warden of Wabash Valley Correctional Facility, for Richard Brown. FED. R. APP. P. 43(c)(2).

with his placement in disciplinary and administrative segregation. *See* 42 U.S.C. § 1983. We affirm in part, and remand and vacate in part.

We recount the facts in the light most favorable to Carrico, the non-moving party at summary judgment. *Smallwood v. Williams*, 59 F.4th 306, 310 (7th Cir. 2023). Carrico, while imprisoned at Wabash Valley Correctional Facility, was found guilty by a prison disciplinary committee of possessing a cell phone, possessing a weapon, and inciting a riot. He was sentenced to two years in disciplinary segregation. After completing that term, he was moved to administrative segregation until he could be transferred to general population. (Both kinds of segregation amounted to solitary confinement, with limited visitation and recreation time.) He spent a couple months in administrative segregation and then was moved to a restricted unit with limited privileges, G Cell House. He stayed there for about a year before moving to general population housing.

Carrico then sued the prison officials (the warden, assistant wardens, case-work supervisors, and case workers) who he believed were responsible for violating his constitutional rights. According to his amended complaint, (1) the presiding official at his disciplinary hearing on the rioting charge, Jennifer Rinehart, violated his right to procedural due process when she refused to allow him to present exculpatory evidence and did not provide a written statement of reasons for the disciplinary action; (2) all the defendants violated his right to procedural due process by not periodically reviewing his disciplinary or administrative segregation status; (3) several defendants (those responsible for housing status) placed him in G Cell House, in retaliation for filing this suit; (4) several defendants (those responsible for updating prisoners on facility conditions) violated his rights under the Eighth Amendment when they failed to notify him of a “boil order” that deemed the water unsafe to drink; and (5) all the defendants violated the Eighth Amendment when they placed him in solitary confinement for an excessive length of time. Carrico sought injunctive and declaratory relief as well as damages.

The district court entered summary judgment for the defendants. The court accepted as undisputed the defendants’ statement of facts because Carrico did not support his factual statement with citations to the record. *See* S.D. IND. LOCAL R. 56-1. As for the merits, the court concluded first that issue preclusion barred Carrico from litigating his due process claims because he had asserted the same claims in an earlier unsuccessful habeas petition. Second, the court, despite acknowledging that Carrico had a liberty interest in avoiding segregation, determined that the defendants were entitled to qualified immunity on his due process claim because there was no clearly

established right to meaningful periodic review of his solitary confinement. Third, regarding his claim of retaliatory transfer, the court determined that the designated evidence would not allow a jury to find that he suffered a constitutionally significant deprivation or that his transfer was motivated even in part by retaliation. Fourth, regarding the failure to be notified of the boil order, the court ruled that no jury could conclude that the defendants were deliberately indifferent to his need for safe drinking water. (Carrico does not challenge this ruling, so we say nothing further about it.) And fifth, the court determined that Carrico had not presented evidence from which a factfinder could conclude that his cumulative 28 months in disciplinary and administrative segregation violated the Eighth Amendment.

On appeal, Carrico first argues that the district court should have excused his failure to support his statement of facts with citations because he is proceeding pro se and has little access to legal materials in his prison. Although pro se filings should be construed liberally, *see Grant v. Trs. of Ind. Univ.*, 870 F.3d 562, 569 (7th Cir. 2017), Carrico is not exempt from procedural rules or the consequences of failing to comply with them. *See Hinterberger v. City of Indianapolis*, 966 F.3d 523, 528 (7th Cir. 2020). The district court here did not abuse its discretion in requiring strict compliance with the local rules.

Next, Carrico challenges the district court's determination that issue preclusion bars his claim that Rinehart violated his due process rights at the disciplinary hearing for rioting. He asserts that the court wrongly applied issue preclusion—an affirmative defense that he says the defendants waived by failing to plead it in their answer. He adds that the habeas court denied this claim in his earlier petition for failure to exhaust administrative remedies and thus never reached the merits of his due process claim at issue in this action.

Issue preclusion bars successive litigation of an issue that was actually litigated and essential to the prior judgment. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019). An issue is essential if it is necessary to support the prior judgment. 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4421 (3d ed. 2023). If the court in the first case determines that it cannot reach the merits, then any conclusions on the merits are not essential to its judgment. *Id.* Similarly, the failure to exhaust under 42 U.S.C. § 1997e(a) operates to prevent adjudication on the merits. *Fluker v. County of Kankakee*, 741 F.3d 787, 791–92 (7th Cir. 2013). Put another way, the preclusive effect of a dismissal for failure to exhaust precludes relitigation of only the exhaustion issue. *See Hill v. Potter*, 352 F.3d 1142, 1146–47 (7th Cir. 2003).

We agree with Carrico that issue preclusion does not apply. The habeas court dismissed his claim on exhaustion grounds and never reached the merits. *Carrico v. Zatecky*, No. 19-cv-00078, 2020 WL 95040, at *3 (S.D. Ind. Jan. 8, 2020). Because exhaustion is a threshold issue, that judgment has no preclusive effect on Carrico's claim here seeking redress for Rinehart's alleged violation of his due process rights.

The defendants counter with two arguments supporting summary judgment on this issue. The defendants argue, first, that Carrico's due process claim was actually litigated, given that the deadline to exhaust administrative remedies in the habeas proceedings has passed. But a defendant can waive reliance on an affirmative defense by failing to raise it in the district court, *see Perez v. Wis. Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999), and the defendants here did not pursue such a defense. Second, the defendants now propose for the first time that Carrico's due process claim is barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), because his challenge would necessarily imply the invalidity of disciplinary sanctions. *See Edwards v. Balisok*, 520 U.S. 641, 646–48 (1997). But *Heck* too is a waivable affirmative defense, *Courtney v. Butler*, 66 F.4th 1043, 1049 n.1 (7th Cir. 2023), and the defendants here waived a *Heck* defense by failing to raise it in the district court.

But the question remains whether there was some ground to relieve the defendants from the consequence of their waiver. *See Granberry v. Greer*, 481 U.S. 129, 134–35 (1987); *Carr v. O'Leary*, 167 F.3d 1124, 1126–27 (7th Cir. 1999). We believe a remand is necessary so that the district court can evaluate whether to exercise its discretion and forgive the defendants' waiver of either argument based on grounds rooted in state sovereignty. *See Carr*, 167 F.3d at 1126 (“[A] party's unreasonable delay in advancing a good ground for a change in a previous ruling is normally a compelling ground for deeming even a good ground waived.”).

Carrico also challenges the district court's ruling that the defendants were entitled to qualified immunity for his claim that they did not provide meaningful, periodic review of his segregation status. Relying on a pair of out-of-circuit cases, *see Sims v. Artuz*, 230 F.3d 14, 23–24 (2d Cir. 2000); *Sealey v. Giltner*, 197 F.3d 578, 587–88 (2d Cir. 1999), Carrico contends that there was clearly established law that his time in administrative segregation should be aggregated with his time in disciplinary segregation to afford him meaningful periodic review.

The district court properly concluded that the defendants were entitled to qualified immunity on this claim. To defeat qualified immunity, Carrico needed to show that the law was clearly established such that “every reasonable official” would

understand that his conduct violated Carrico's rights. *Leiser v. Kloth*, 933 F.3d 696, 702 (7th Cir. 2019). For qualified immunity purposes, we look first to decisions of the Supreme Court, or our court. *Doe v. Gray*, 75 F.4th 710, 717 (7th Cir. 2023). Our cases have staked out different approaches to "stacking" or aggregating terms of punishment in different contexts. *Compare Kervin v. Barnes*, 787 F.3d 833, 836 (7th Cir. 2015) (favoring aggregation in due process analysis) *with Pearson v. Ramos*, 237 F.3d 881, 885–86 (7th Cir. 2001) (rejecting stacking in Eighth Amendment context). Although *Kervin* might support the notion that sentences can be aggregated to prove a liberty interest, the case does not constitute clearly established law that aggregation entitles Carrico to periodic review during his relatively short two-month stint in administrative segregation.

Carrico next turns to the court's ruling on his retaliation claim and argues that he did plead a viable claim that several of the defendants retaliated against him for filing this suit. He asserts that, had he not filed this lawsuit, he would have been placed in less restrictive housing than G Cell House. He also argues that the court overlooked circumstantial evidence of causality—including the direct transfer to general population of a prisoner who allegedly had a more dangerous disciplinary record.

We agree with the district court that Carrico did not introduce sufficient evidence from which a reasonable jury could find for him on his retaliation claim. To establish retaliation, a plaintiff must show (1) that he engaged in activity protected by the First Amendment; (2) that the defendants took an adverse action against him; and (3) that the protected conduct was "at least a motivating factor of the adverse action." *Holleman v. Zatecky*, 951 F.3d 873, 878 (7th Cir. 2020). The district court rightly explained that Carrico—by conceding that he had greater privileges in G Cell House than in administrative segregation—failed to introduce evidence from which a jury may infer that he suffered an adverse action.

Lastly, Carrico contends that the district court, in evaluating his Eighth Amendment claim that the defendants detained him in unconstitutionally harsh conditions, considered only the length and not the fact-specific conditions of his confinement. He highlights that he had little visual or human stimuli and faced unsanitary conditions in both the shower and recreation areas, amounting to an "atypical and significant hardship" that he endured for approximately two years. *Hardaway v. Meyerhoff*, 734 F.3d 740, 743 (7th Cir. 2013).

The district court correctly dismissed Carrico's Eighth Amendment claim. The court did acknowledge the actual conditions of Carrico's confinement by citing his deposition statement that the conditions in disciplinary segregation mirrored those of

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administrative segregation. And the court properly considered both the length and conditions of his confinement by comparing his 28 months in solitary confinement to the plaintiff in *Isby*, who lived in administrative segregation for 10 years. *Isby v. Brown*, 856 F.3d 508, 521–24 (7th Cir. 2017).

We have reviewed Carrico's remaining arguments; none merits discussion.

We AFFIRM the entry of summary judgment to each issue except for Carrico's individualized due process claim against Defendant Rinehart. We VACATE the district court's judgment on that claim and REMAND for consideration of whether the defendants' waiver of affirmative defenses should be forgiven.