

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

March 29, 2018

Elisabeth A. Shumaker
Clerk of Court

CHESTER L. BIRD,

Petitioner - Appellant,

v.

MICHAEL PACHECO, Warden,
Wyoming State Penitentiary, Wyoming
Department of Corrections; WYOMING
ATTORNEY GENERAL,

Respondents - Appellees.

No. 18-8009
(D.C. No. 2:17-CV-00053-ABJ)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE**, **MATHESON**, and **EID**, Circuit Judges.

Chester Bird, a Wyoming state prisoner appearing pro se, seeks a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2241 petition for federal habeas relief. Because Bird has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), we deny his request for a COA and dismiss this matter.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I

In 1994, Bird pleaded guilty to sexual assault in the first degree, kidnapping, and status as a habitual criminal. The Wyoming state district court sentenced Bird to two concurrent life sentences. While incarcerated, Bird was the subject of a disciplinary proceeding involving the dissemination of pornographic material within the prison. Bird seeks to appeal both the legality of this disciplinary proceeding and the penalty imposed.

On August 29, 2016, Captain Shawn Hobson—a corrections officer with the Wyoming Department of Corrections—filed a Conduct Violation Report against Bird. The report explained how Bird, a five-year employee of the prison print shop, had improvised internet connectors to access the internet and download pornographic images, which he and other inmates then distributed and sold throughout the prison. Bird was charged with three major disciplinary violations: (1) “Conspiracy to Commit Fraud,” based on his agreement with other inmates to sell pornographic material and conceal their conduct; (2) “Tampering with Evidence,” based on his alteration of internet connectors; and (3) “Contraband Instrument of Escape,” based on his use of a computer to connect to the internet and email. ROA at 18. Bird signed the report, acknowledging that he was aware of the charges, his rights, and the scheduled disciplinary hearing. Importantly, Bird initialed next to a paragraph that explained, in part: “I understand it is my responsibility to convey, in written form, a . . . request for witnesses Failure to so request through the hearing officer 24 hours prior to the scheduled hearing will result in negating these rights.” *Id.* at 20 (capitalization altered).

Sergeant Clyde Goodman presided over the disciplinary hearing on September 6, 2016. The hearing record includes a box titled “Inmate’s Requested Witnesses,” and in the box, states “none.” *Id.* at 28 (capitalization altered). Bird attended the hearing and pleaded not guilty to all charges. Goodman found Bird guilty on all charges and sentenced him to sixty days in disciplinary segregation. The record reflects that Goodman relied on the disciplinary report, investigation report, and testimony of reporting staff to find Bird guilty. Bird appealed the decision the next day. On October 5, 2016, the Warden upheld Goodman’s decision.

On March 24, 2017, Bird filed this 28 U.S.C. § 2241 petition¹ for federal habeas relief in the United States District Court for the District of Wyoming. He alleged (1) the disciplinary proceedings deprived him of due process; (2) his disciplinary convictions adversely affected his liberty interest in parole or commutation; and (3) his disciplinary segregation violated his liberty interest in avoiding atypical and significant hardship. The parties then filed cross-motions for summary judgment.

¹ These types of cases are sometimes brought under 42 U.S.C. § 1983 as an attack on an inmate’s “conditions of confinement” rather than a 28 U.S.C. § 2241 attack on the “execution of the sentence.” We believe this case was properly brought under § 2241, because “a § 2241 action challenging prison disciplinary proceedings, such as the deprivation of good-time credits, is not challenging prison *conditions*, it is challenging an action affecting the fact or duration of the petitioner’s custody.” *McIntosh v. U.S. Parole Comm’n*, 115 F.3d 809, 812 (10th Cir. 1997); *see also Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (concluding that an inmate’s “claim for declaratory relief and money damages, based on allegations of [due process violations during a disciplinary proceeding] that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983”).

On January 9, 2018, the district court denied Bird's motion, granted the State's motion, and denied Bird a COA. Bird has since filed a timely notice of appeal, as well as an application for a COA.

II

Bird may appeal the denial of his § 2241 petition only if a COA is issued. *See* 28 U.S.C. § 2253(c)(1); *Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir. 2000). A COA will issue only if Bird makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make the requisite showing, he must demonstrate that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted).

Before this court, Bird appears to have abandoned his second and third arguments, and now solely argues that the disciplinary proceedings deprived him of due process under the Fourteenth Amendment. Bird's due process argument is broken into four parts. Specifically, he argues "his constitutional right to due process under the Fourteenth Amendment to the Constitution of the United States was violated when he was [(1)] arbitrarily denied staff witnesses, [(2)] the charging officer gave false testimony, [(3)] there was 'no evidence' to support the guilty finding and [(4)] he received punishments other than a fine." *Aplt. Br.* at 1.

To begin, we note that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). To satisfy due process in a

prison disciplinary proceeding, “the inmate must receive: (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.” *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985). There must also be “some evidence in the record” supporting the charge. *Id.* at 454–56. We conclude that these minimal procedural requirements were satisfied here and that no jurist could reasonably assert that Bird has made “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

As for the specific objections Bird asserts, they do not deserve encouragement to proceed further. We address these claims in turn.

First, Bird argues that the district court erred in granting summary judgment against his claim that the State violated his due process rights by depriving him of the opportunity to present witnesses at his disciplinary hearing. Aplt. Br. at 10–11. To satisfy due process, an inmate must receive “an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense.” *Hill*, 472 U.S. at 454.

The district court found no genuine dispute of material fact as to this claim because “the record . . . indicates [Bird] requested no witnesses.” ROA at 158; *see also id.* at 28 (hearing record, stating “none” under “Inmate’s Requested Witnesses”). We are skeptical that there is no genuine dispute of material fact on this point. The State’s response to Bird’s petition contains the following admission:

Paragraph 27. Admit that “[d]uring the course of the disciplinary hearing, Bird advised Goodman that he (Bird) could not defend himself if he (Bird) was not permitted to call staff witnesses[.]” Respondents lack knowledge or information sufficient to form a belief about the truth of Bird’s assertion regarding Sergeant Goodman’s nonverbal response.

D. Ct. Dkt. No. 4 at 4 (alterations in original); *see also* ROA at 10, ¶ 27. This cuts against the notation in the hearing record that Bird did not request any witnesses.

In addition, Bird submitted a signed affidavit stating, in relevant part:

In accordance with WDOC P&P #3.102, on August 30, 2016, and August 31, 2016, I submitted separate written requests to Sergeant Clyde Goodman (“Goodman”), Disciplinary Hearing Officer for the WDOC, for staff witnesses or their reports and evidence for my disciplinary hearing. At the time, I was housed in Pod 1 of E-Unit (Disciplinary Segregation), Cell 201, and turned the requests over to correctional officers for placement in the mailbox.

D. Ct. Dkt. No. 15 at 5, ¶ 19. Under Federal Rule of Civil Procedure 56(c)(4), “[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” Bird’s statement about the requests he personally wrote and filed was “made on personal knowledge,” and would be admissible in evidence. This further calls into question whether Bird requested witnesses.

Yet, a prisoner cannot maintain a due process claim for failure to permit witness testimony unless he also shows that the testimony “would have affected the outcome of his case.” *Chesson v. Jaquez*, 986 F.2d 363, 366 (10th Cir. 1993). Here, there is no indication that the testimony of unnamed staff witnesses at the disciplinary hearing would

have altered the outcome of the proceeding. As such, Bird has failed to show that the denial of witnesses—assuming for the sake of argument that Bird was denied staff witnesses—was a due process violation. Simply put, a denial of witnesses is not a per se violation of due process in the context of prison disciplinary proceedings. *See Wolff*, 418 U.S. at 566–67.

Bird’s second claim is that the charging officer gave false testimony. Aplt. Br. at 8, 11. This is not a cognizable due process claim in this context. *See Hill*, 472 U.S. at 455 (“Ascertaining whether [the due process] standard is satisfied does not require examination of the entire record, *independent assessment of the credibility of witnesses*, or weighing of the evidence.” (emphasis added)).

His third claim is that there was no evidence to support the hearing officer’s finding of guilt. Aplt. Br. at 9, 11–12. Our review is limited to whether there was “*some evidence*” to support the decision. *Hill*, 472 U.S. at 455; *see also id.* at 456 (“Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances.”). The record shows that Goodman relied on the disciplinary report, investigation report, and the testimony of Hobson. *See ROA* at 28. Goodman specifically identified that Hobson testified as to the evidence found at Bird’s work station. *See id.* Jurists could not reasonably debate that there was “*some evidence*” supporting Goodman’s decision.

Fourth, Bird argues that Wyoming law limits punishment for prisoner misconduct to fines. Aplt. Br. at 9–10 (citing Wyo. Stat. § 7-16-204). But Bird’s “claims of state law

violations are not cognizable in a federal habeas action.” *Montez*, 208 F.3d at 865; *see also* 28 U.S.C. § 2241(c)(3) (limiting actions to “violation[s] of the Constitution or laws or treaties of the United States”). Regardless, Bird misunderstands Wyoming law. The relevant Wyoming statute states: “The department of corrections shall adopt rules and regulations to establish a system for punishing prisoner misconduct through the imposition of fines to be deducted from compensation earned as provided under W.S. § 7-16-203.” Wyo. Stat. § 7-16-204. Nothing in the statute purports to *limit* the types of punishments for prisoner misconduct. Further, this statute is found in Article 2, titled “Prison Labor.” *Id.* §§ 7-16-201 to -206. The section explicitly referenced in § 7-16-204 is § 7-16-203, which relates to how inmates earn money through prison labor. *Id.* § 7-16-203. Section § 7-16-204 is not *limiting* punishments for prisoner misconduct, but explicitly *permitting* fines to be deducted from prisoner income earned through prison labor. Because no reasonable jurist could conclude that Wyo. Stat. § 7-16-204 forbids any type of punishment for prisoner misconduct other than fines, we also deny Bird’s request for a COA as to this issue.

III

In sum, Bird has failed to make a substantial showing of the denial of a constitutional right. Accordingly, his application for a COA is DENIED. This matter is DISMISSED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge