

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Martinez v. Aaron

570 F.2d 317 (10th Cir. 1978) · No. No. 77-1395 · Decided January 23, 1978

SUMMARY

The Tenth Circuit affirmed dismissal as frivolous of a 42 U.S.C. § 1983 action brought by inmates alleging that prison officials stole or confiscated personal property during a dormitory shakedown. The court approved the district court’s preliminary procedure of obtaining an investigative record from prison officials to assess the claims under 28 U.S.C. § 1915, and recognized administrative or grievance procedures as an alternative means of developing that record without imposing an exhaustion requirement.

CASE DETAILS

COURT	United States Court of Appeals for the Tenth Circuit
WRITING FOR THE COURT	Per Curiam; Seth, Chief Judge; Holloway; McWilliams; Barrett; Doyle; McKay
JURISDICTION	Federal
DECIDED	January 23, 1978
DOCKET	No. 77-1395
DISPOSITION	affirmed
PROCEDURAL POSTURE	The inmate plaintiffs appealed dismissal of their 42 U.S.C. § 1983 complaint as frivolous under 28 U.S.C. § 1915(a) and (d) during preliminary proceedings.
STANDARD OF REVIEW	Review of dismissal of an in forma pauperis complaint as frivolous under 28 U.S.C. § 1915(a) and (d); the court also reviewed the propriety of the trial court's preliminary record-development procedure.
PRECEDENTIAL VALUE	Published, en banc Tenth Circuit opinion
PARTIES	David L. Martinez, The other inmate plaintiffs v. Ralph L. Aaron, Warden, Capt. Joe F. Martinez, Lt. Benito Gonzales, Adelaido Martinez, Clyde Malley, Mike Hanrahan, Dr. Mark Orner, Other employees of the New Mexico Department of Corrections

TOPICS

section 1983

prisoners rights

civil procedure

administrative law

motions to dismiss

PRACTICE AREAS

Civil rights

Prisoner litigation

Federal civil procedure

QUESTIONS PRESENTED

1. Whether the trial court properly dismissed the inmates' § 1983 complaint as frivolous during preliminary in forma pauperis proceedings.
2. Whether a trial court may require prison officials to investigate the incident, interview witnesses, and compile an administrative record before deciding the preliminary § 1915 issues.
3. Whether development of facts through state prison administrative or grievance procedures may be used as an alternative method of creating the record, without imposing an exhaustion requirement.

HOLDINGS

1. The complaint was properly dismissed as frivolous because the plaintiffs could make no rational legal or factual argument supporting their claim on the record presented.
2. A trial court may, and in this case properly did, require prison officials to investigate the allegations, interview relevant witnesses, and compile a record before proceeding beyond the preliminary § 1915 stage.
3. If the court-ordered investigation could not be used, the trial court could alternatively require state prison authorities to develop a record through available administrative or grievance procedures, but that requirement would not constitute exhaustion of remedies.

KEY QUOTATIONS

“We consider this order and practice to be not only proper but necessary for the orderly consideration of the issues in this case and in other cases of this nature.” (¶ 19)

“This is, of course, not an exhaustion requirement and is especially important for the reasons alluded to above; thus again to develop the facts as to the color of state law and to enable the trial court to make the preliminary decisions without having to sort the toothpaste and underwear in the first instance.” (¶ 21)

FACTUAL BACKGROUND

During a routine dormitory shakedown at the New Mexico State Penitentiary, prison officers found weapons and sorted prisoners' property to determine what constituted contraband. The inmates alleged that officers improperly stole or confiscated items such as cigarettes, coffee, toothpaste, underwear, and towels, and characterized the conduct as harassment. The complaint sought damages and an injunction under 42 U.S.C. § 1983.

PROCEDURAL HISTORY

Twelve inmates of the New Mexico State Penitentiary alleged that correctional officers stole or confiscated personal property during a dormitory shakedown and sought damages and injunctive relief. Before requiring an

answer, the trial court ordered prison officials to investigate the incident, interview relevant witnesses, and compile a written report to be filed with the defendants' answer. The trial court then dismissed the complaint as frivolous under § 1915(a) and (d), and the Tenth Circuit affirmed both the dismissal and the record-development procedure.

DISPOSITION

affirmed

CASES CITED

- Ragan v. Cox, 305 F.2d 58 (10th Cir.)
- Harbolt v. Alldredge, 464 F.2d 1243 (10th Cir.)
- Bennett v. Passic, 545 F.2d 1260 (10th Cir.)
- Ellis v. United States, 356 U.S. 674, 78 S. Ct. 974, 2 L. Ed. 2d 1060
- Coppedge v. United States, 369 U.S. 438, 82 S. Ct. 917, 8 L. Ed. 2d 21
- Reed v. United States, 438 F.2d 1154 (10th Cir.)

OPINION

PER CURIAM.

570 F.2d 317 David L. MARTINEZ, Petitioner-Appellant, Gregory L. Sharpe, Braulio Rodriguez, Ronald Lancaster, Eldridge Green, Richard Maldarude, Clarence Whiteley, James Cochran, Sandy Scott, Reynaldo Madrid, William J. Rowland, Joseph Bell, James Ranson, James Chiaramonte, David Crawford, Mike Colby, Roy Preas, Charles Crismore, Ronald Lee McDonald, Jessie X. Clark, Defendants, v. Ralph L. AARON, Warden, Capt.

Joe F. Martinez, Lt. Benito Gonzales, Adelaido Martinez (Superintendent of Security), Clyde Malley, warden, Mike Hanrahan, Secretary of Corrections, Dr. Mark Orner, Individually and in their official capacities as Warden of the Penitentiary of New Mexico and other employees of the New Mexico Department of Corrections, Respondents-Appellees. No. 77-1395. United States Court of Appeals, Tenth Circuit.

Submitted Dec. 9, 1977. Decided Jan. 23, 1978. David L. Martinez pro se. Toney Anaya, State Atty. Gen., Ralph W. Muxlow III, Asst. Atty. Gen., Santa Fe, N.M., on behalf of appellees. Before SETH, Chief Judge, and HOLLOWAY, McWILLIAMS, BARRETT, DOYLE and McKAY, Circuit Judges, sitting en banc. PER CURIAM: 1 This was commenced as an action under 42 U.S.C. § 1983, brought by twelve inmates of the New Mexico State Penitentiary.

The complaint asserts the theft and confiscation of described personal property of the plaintiffs by the defendant correctional officers during the course of a routine shakedown. The shakedown or

search was of a dormitory in the prison occupied by a considerable number of prisoners including the plaintiffs.

The shakedown and stealing are also advanced as harassment of the prisoners. The section 1983 cause of action seems to be based on the theft confiscation of personal property. An injunction and damages are sought. 2 The trial court dismissed the complaint under section 1915(a) and (d) as frivolous in the preliminary proceedings.

The basic requirement in these circumstances was set forth in *Ragan v. Cox*, 305 F.2d 58 (10th Cir.); see also *Harbolt v. Alldredge*, 464 F.2d 1243 (10th Cir.), and *Bennett v. Passic*, 545 F.2d 1260 (10th Cir.). 3 It is obvious that the routine shakedown was a disciplinary and security device to enforce the prison rules prohibiting the possession of contraband.

The definitions of contraband are clear, and on appeal the petitioners appear to make no serious challenge as to definitions or even as to the determination by the officers as to what was contraband and what was not.

The remaining items such as cigarettes, coffee, toothpaste, and underwear are asserted as having been stolen by the defendant officers. Weapons were found by the shakedown. 4 The determination as to what was contraband was made by the prison officers during the shakedown generally depending on whether the items were purchased from the prison store or not.

As to the underwear reported stolen, the determination whether it was contraband apparently depended on its color. The toothpaste and hand towels were also sorted by the officers. 5 An explanation of the shakedown sorting was made by the prison officials during the course of an interrogation at the prison as ordered by the trial court.

The prisoners were likewise interrogated at the prison under the same order as hereinafter described. 6 The plaintiffs can make no rational arguments on the law or the facts to support their claim. The tests for dismissal under the circumstances were the same as applied to persons not proceeding under affidavits of poverty.

The action is in conformity with the standards and admonitions in the criminal cases such as *Ellis v. United States*, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060, and *Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21. 7 As indicated above, the trial court ordered before answer that the prison officials conduct an investigation of the incident to include an interrogation of those concerned.

The transcripts of the interrogations (not required to be under oath), and an explanation by the officials were to be attached to the answer of defendants. This was done, and an administrative record was thereby constructed to enable the trial court to decide the jurisdictional issues and make a determination under section 1915(a). 8 It is apparent that such a record was necessary to enable

the trial court to decide the preliminary issues including those of jurisdiction, to be used with the affidavits and exhibits.

This was especially so as to the allegations by plaintiffs as to color of state law. The plaintiffs had the burden of developing these matters to support at least the theft allegations in their complaint. It is necessary that some sort of record be produced to enable the court to go forward.

The trial court's order in part is as follows: 9 "This matter coming before the Court upon a Complaint pursuant to 42 U.S.C. § 1983, claiming violation of civil rights by inmates at the New Mexico State Penitentiary, and it appearing that proper and judicial processing of the claims cannot be achieved without additional information from appropriate state officials of the Department of Corrections, State of New Mexico.

10 "IT IS ORDERED: 11 "(1) The answer to the Complaint, including the report required herein, shall be filed no later than sixty (60) days from the date of the entry of this Order. 12 "(2) No answer or motions addressed to the complaint shall be filed until the measures set forth herein shall have been taken and completed. 13 "(3) Officials responsible for the operation of the New Mexico State Penitentiary are directed to undertake a review of the subject matter of the complaint: 14 "a. to ascertain the facts and circumstances; 15 "b. to consider whether any action can and should be taken by the institution to resolve the subject matter of the complaint; and 16 "c. to determine whether other like complaints, whether pending in this court or elsewhere, are related to this complaint and should be taken up and considered together.

17 "(4) In the conduct of the review, a written report shall be compiled and filed with the Court. Authorization is granted to interview all witnesses including the plaintiffs and appropriate officers of the New Mexico State Penitentiary. Wherever appropriate, medical or psychiatric examinations shall be made and included in the written report. 18 "(5) All reports made in the course of the review shall be attached to and filed with defendants' answers to the complaint."

19 We consider this order and practice to be not only proper but necessary for the orderly consideration of the issues in this case and in other cases of this nature. The order could very well require witnesses to be sworn. It comes at a stage in the proceedings when it may be more useful to all parties than would be the use of interrogatories. See *Reed v. United States*, 438 F.2d 1154 (10th Cir.).

In our view, the presence or absence of affidavits with the complaint make no difference as to the manner in which the initial section 1915 determination is made. 20 We must observe that a record for comparable purposes is required in actions brought by federal prisoners.

We thus expressly approve the procedure here followed by the trial court. 21 We must also hold that if the method described above could not have been followed, and as an alternative thereto, that

a "record" could have been made by the imposition of a requirement that it be developed by the state authorities by use of administrative or grievance procedures provided for the state prison.

This is, of course, not an exhaustion requirement and is especially important for the reasons alluded to above; thus again to develop the facts as to the color of state law and to enable the trial court to make the preliminary decisions without having to sort the toothpaste and underwear in the first instance. 22 Either of the above requirements is comparable to the administrative law doctrine of primary jurisdiction, and we see no reason why it should not be borrowed to apply to this entirely dissimilar situation but to accomplish the same result.

Thus the state prison administration, at a level where the facts can be adequately developed, first examines and considers the incident, circumstances, and conditions which gave rise to the asserted cause of action and develops a record before the court must proceed beyond the preliminary stages. 23 AFFIRMED.