# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
**FILED**
September 4, 2019
Lyle W. Cayce
Clerk

No. 18-60718

VIRGIL LAMONT JARVIS,

Plaintiff–Appellant,

v.

SHERIFF DAVID ALLISON, Pearl River County Sheriff; JULIA FLOWERS, Major/Warden; LISA WAYNE, Lieutenant; CHRIS PENTON, Correctional Officer; JOHNNY BELLAMY, Correctional Officer; JOHN DOE, Captain; JIM PHARES, Correctional Officer; COREY MATAYA, Captain,

Defendants–Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:17-CV-85

Before HIGGINBOTHAM, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:*

Virgil Lamont Jarvis, Mississippi prisoner # 115718, seeks authorization to proceed in forma pauperis (IFP) in an appeal of the magistrate judge's order granting summary judgment and dismissing his 42 U.S.C. § 1983 complaint. He also moves for the appointment of counsel.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Jarvis's motion to proceed IFP on appeal is construed as a challenge to the magistrate judge's certification in writing that his appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997); 28 U.S.C. § 1915(a)(3). Our inquiry into a litigant's good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citations omitted).

According to Jarvis, the magistrate judge incorrectly characterized his complaint and various motions as alleging constitutional violations based on "an inmate on inmate assault" while he was a pretrial detainee at the Lenoir-Rowell Criminal Justice Center (LRCJC) in Pearl River County, Mississippi. He further argues that he was entitled to have the magistrate judge's ruling reviewed by a panel of district judges.

A review of the magistrate judge's order granting summary judgment and denying Jarvis's other motions, however, reveals that the magistrate judge correctly understood Jarvis to be complaining about the actions taken against him by LRCJC officials following his physical altercation with other inmates. Moreover, in his notice of appeal, Jarvis challenged only the order granting summary judgment. He did not file an additional or amended notice of appeal challenging the denial of his post-judgment motion where he requested an "En Banc Hearing" before a panel of district judges. As such, we lack jurisdiction to consider any claims related to the denial of Jarvis's post-judgment motion. *See* FED. R. APP. P. 4(a)(4)(B)(ii); *Taylor v. Johnson*, 257 F.3d 470, 475 (5th Cir. 2001). Jarvis has thus failed to raise a nonfrivolous issue for appeal.

Jarvis next complains that the magistrate judge should have granted his motion to amend his complaint to allege facts concerning a subsequent

altercation with inmates at the LRCJC because that altercation was "a result of officers directing inmates to assault [Jarvis] in retaliation for filing suit." Though Jarvis identifies his filing as a motion to amend, it concerns events that occurred after the filing of his original complaint. As such, it is properly construed as a motion to supplement the complaint rather than a motion to amend. *See* FED. R. CIV. P. 15(d).

Leave to supplement should not be granted where the "transaction, occurrence, or event" is unrelated to the original cause of action. *See id.*; *see also Burns v. Exxon Corp.*, 158 F.3d 336, 343 (5th Cir. 1998). As the magistrate judge observed, the second attack involved different inmates and occurred months after the attack that formed the basis of Jarvis's initial lawsuit. Moreover, Jarvis did not claim, as he does now, that the defendants directed the second attack in retaliation for his filing a § 1983 lawsuit. Jarvis has failed to present a nonfrivolous issue for appeal with respect to the denial of his motion to supplement his complaint.

Jarvis argues that the magistrate judge erred in determining that his claims were unexhausted, and he persists with his argument that because prison officials failed to respond to his grievance, "exhaustion is deemed satisfied." As the magistrate judge explained, "[w]here a prison fails to respond to the prisoner's grievance at some preliminary step in the grievance process," the prisoner is simply entitled "to move on to the next step in the process." *See Wilson v. Epps*, 776 F.3d 296, 301 (5th Cir. 2015). Jarvis, then, "cannot maintain a suit founded on any claim that he presented to the prison in only a step-one [Administrative Review Procedure], irrespective of whether the prison responded within the time allotted for rendering step-one responses." *Id.* As such, he has failed to raise a nonfrivolous issue for appeal based on his failure to exhaust administrative remedies.

Finally, Jarvis claims that he is not subject to the Prison Litigation Reform Act (PLRA) because, at the time he filed his lawsuit, he was a pretrial detainee and not "a prisoner convicted of a crime." Jarvis is incorrect. A pretrial detainee is a "prisoner" for purposes of the PLRA and is subject to the PLRA's exhaustion requirement. *See* 42 U.S.C. § 1997e(h).

Because Jarvis has failed to raise a nonfrivolous issue for appeal, his IFP motion is DENIED. *See Howard*, 707 F.2d at 220. Additionally, because Jarvis has failed to show that he will raise a nonfrivolous issue, the appeal is DISMISSED. *See Baugh*, 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2. Jarvis's motion for the appointment of counsel is DENIED.

The dismissal of this appeal as frivolous counts as a strike for purposes of 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996). Jarvis is WARNED that if he accumulates three strikes, he will not be able to proceed IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he "is under imminent danger of serious physical injury." *See* § 1915(g).

IFP DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**
**SOUTHERN DIVISION**

**VIRGIL LAMONT JARVIS** **PLAINTIFF**

**v.** **CIVIL ACTION NO. 1:17-cv-85-JCG**

**SHERIFF DAVID ALLISON et al.** **DEFENDANTS**

**MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

BEFORE THE COURT is the Complaint filed by Plaintiff Virgil Lamont Jarvis, a postconviction inmate in the custody of the Mississippi Department of Corrections. Plaintiff is proceeding *pro se* and *in forma pauperis*. An omnibus hearing that also operated as a *Spears* hearing,[1] was held on February 28, 2018. Defendants Sheriff David Allison, Major Julie Flowers, Lt. Lisa Wayne, C.O. Johnny Bellamy, C.O. Jim Phares, and Chris Penton, have filed a Motion for Summary Judgment (ECF No. 26), asserting that Plaintiff's suit must be dismissed because he failed to exhaust administrative remedies. Plaintiff responded to the Motion by filing a Motion to Show Cause (ECF No. 41), Motion to Oppose (ECF No. 45), and Motion to Correct or Clarify (ECF No. 50). Defendants filed a Motion to Strike (ECF No. 46) Plaintiff's Motion to Oppose.

Having considered the submissions of the parties, the record, Plaintiff's testimony at the omnibus hearing, and applicable law, the Court finds that Plaintiff's Complaint is barred and must be dismissed because Plaintiff did not

[1] *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

complete the administrative remedy process before filing this lawsuit. Defendants' Motion for Summary Judgment must be GRANTED. Plaintiff's Motion to Show Cause, Motion to Oppose, and Motion to Correct or Clarify should be DENIED. Defendant's Motion to Strike will be DENIED because the Court has considered Plaintiff's Motion to Oppose, and it does not change the outcome.

BACKGROUND

Plaintiff's suit concerns events occurring at Lenoir-Rowell Criminal Justice Center (LRCJC) in Pearl River, County, Mississippi, where Plaintiff was detained prior to being convicted. On February 23, 2017, Plaintiff was involved in an altercation with two white inmates. Officers responded and placed Plaintiff in a restraint chair. The two white inmates were not placed in a restraint chair.

Plaintiff alleges that he was bleeding for hours while in the restraint chair but provided no medical care. Plaintiff was placed in lockdown for over twenty-one days. The two white inmates were not punished. Plaintiff lost his prescription eyeglasses during the altercation. He maintains that they were worth $700, and correctional officers are responsible for replacing the glasses because they would not let him retrieve them after the altercation.

Plaintiff filed his Complaint on March 27, 2017 – thirty-two days after the altercation. Defendants assert that Plaintiff's suit must be dismissed because Plaintiff did not exhaust LRCJC's administrative grievance process before filing suit. Defendants have offered two Inmate Request Forms and two commissary requests, which Defendants submit were the only documents submitted by Plaintiff.

Plaintiff acknowledges that these documents are not grievances. He contends that he submitted a grievance on the proper form while he was in lockdown after the altercation. Plaintiff maintains that LRCJC's security camera system will show him passing the grievance through his cell bars to a correctional officer. Plaintiff alleges that, when Defendants did not respond within five days to his grievance, he filed suit. Defendants submit that the security camera footage was recorded over after forty-five days and no longer exists.

DISCUSSION

A. Summary Judgment Standard

A motion for summary judgment shall be granted "if the movant shows that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In evaluating a motion for summary judgment, the Court must construe "all facts and inferences in the light most favorable to the non-moving party." *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012).

B. The Prison Litigation Reform Act's exhaustion requirement

Under the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321, H.R. 3019 (codified as amended in scattered titles and sections of the U.S.C.), prisoners are required to exhaust available administrative remedies before filing a conditions-of-confinement lawsuit:

> No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional

*Dillon,* 596 F.3d at 266. "[J]udges may resolve factual disputes concerning exhaustion without the participation of a jury." *Id.* at 272.

C. Lenoir-Rowell Criminal Justice Center's Administrative Remedy Program

LRCJC has adopted an administrative review procedure (ARP) as allowed by Miss. Code Ann. § 47-5-801. LRCJC's ARP is a formal three-step process that is detailed in the Inmate Handbook. When Plaintiff arrived at LRCJC, he signed an Acknowledgment, affirming that he received the Inmate Handbook. (ECF No. 26-1, at 20). LRCJC's ARP guidelines provide:

> 1. A grievance is a complaint. It must concern a rule or procedure, complaint or expression, or misconduct by a Correctional Officer in administering such rules or operation of LRCJC. A personal dispute between an inmate and an employee is not considered grounds for a grievance.
>
> 2. If you have a grievance, you must follow these procedures:
>
> A. Attempt to solve the grievance with the Correctional Officer.
>
> B. If unsuccessful submit a grievance form to the Shift supervisor within 72 hours of the incident.
>
> C. The grievance form will be turned over to the department head in which the grievance is addressed for investigation. You will receive a written reply within (5) working days.
>
> D. If you are dissatisfied with the results of the investigation you may appeal the decision to the grievance committee. The grievance committee will reply within five (5) working days.
>
> E. If you are dissatisfied with the results of the grievance committee you may appeal to the Captain. The Captain will reply within five (5) working days.

> G. This procedure has been instituted so that all grievances can be received in a timely and orderly fashion.

(ECF No. 26-1, at 15-16).

D. Analysis

Even taking Plaintiff's version of events as true, Plaintiff's suit must be dismissed because Plaintiff did not complete LRCJC's three-step ARP process. Assuming that Plaintiff completed a first-step grievance while he was on lockdown and passed it through his cell bars, and assuming that Defendants did not respond to the first-step grievance within five days, Plaintiff was not, at that point, permitted to abandon the administrative process and file suit. Section 1997e's exhaustion requirement is satisfied only if the prisoner "pursue[s] the grievance remedy to conclusion." *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001).

Where a prison fails to respond to the prisoner's grievance at some preliminary step in the grievance process,

> the prison's failure to timely respond simply entitles the prisoner to move on to the next step in the process. Thus, it is only if the prison fails to respond at the *last* step of the grievance process that the prisoner becomes entitled to sue, because then there is no next step (save filing a lawsuit) to which the prisoner can advance. This is true both under the terms of the [ARP] and as a matter of the law of this circuit.

*Wilson v. Epps*, 776 F.3d 296, 301 (2015) (citations omitted).

Plaintiff "cannot maintain a suit founded on any claim that he presented to the prison in only a step-one ARP, irrespective of whether the prison responded within the time allotted for rendering step-one responses." *Id.* Plaintiff's suit is

barred by 42 U.S.C. § 1997e(a) and must be dismissed because Plaintiff failed to complete the second and third steps of LRCJC's ARP before filing suit.

Nothing contained in Plaintiff's Motion to Show Cause (ECF No. 41), Motion to Oppose (ECF No. 45), or Motion to Correct or Clarify (ECF No. 50) changes this outcome. A copy of the security camera surveillance, which no longer exists, would not change this outcome. The fact that Plaintiff sought relief in his grievance that LRCJC could not provide does not change this outcome. *See Ross,* 136 S.Ct. at 1857 (finding § 1997(e) makes no distinction based on particular "forms of relief sought").

Plaintiff asks the Court to reconsider not allowing him to amend his Complaint to pursue claims surrounding a separate altercation between him and other inmates on June 30, 2017. Plaintiff has submitted no valid reasons warranting reconsideration. Justice does not require that Plaintiff be allowed to use one lawsuit as a vehicle to bring claims regarding altercations that were months apart and involved different inmates. "A party seeking reconsideration must show more than disagreement with the court's decision and recapitulation of the same cases and arguments already considered by the court." *Lashley v. Pfizer, Inc.,* 877 F.Supp.2d 466, 478 (S.D. Miss. 2012) (citations and internal quotations omitted). Adding claims regarding the June 30, 2017, altercation is furthermore futile because Plaintiff admitted at the omnibus hearing that he did not file a grievance regarding the June 30, 2017, altercation. (ECF No. 44, at 48).

**IT IS, THEREFORE, ORDERED** that Defendants' Motion for Summary Judgment (ECF No. 26) is **GRANTED.**

**IT IS, FURTHER, ORDERED** that Plaintiff's Motion to Show Cause (ECF No. 41) is **DENIED.**

**IT IS, FURTHER, ORDERED** that Plaintiff's Motion to Oppose (ECF No. 45) is **DENIED.**

**IT IS, FURTHER, ORDERED** that Defendants' Motion to Strike (ECF No. 46) is **DENIED.**

**IT IS, FURTHER, ORDERED** that Plaintiff's Motion to Correct or Clarify (ECF No. 50) is **DENIED.**

**SO ORDERED**, this 14th day of September, 2018.

*s/, John C. Gargiulo*
JOHN C. GARGIULO
UNITED STATES MAGISTRATE JUDGE