

UNITED STATES COURT OF APPEALS March 16, 2020
TENTH CIRCUIT
Christopher M. Wolpert
Clerk of Court

RODNEY A. SMITH,

Plaintiff - Appellant,

v.

SUSAN BARKER; JERRY ROARK;
NANETTE THOMAS; SHAWNA
GONZALES; DIANNA MILENSKI;
STEVEN SALAZAR; MARSHALL
GRIFFITH; PPMU MR. COOK;
SANDRA BROWN; ANTHONY A.
DECESARO,

Defendants - Appellees.

No. 19-1469
(D.C. No. 1:19-CV-02340-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **PHILLIPS, MURPHY, and McHUGH**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination

*This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Appendix A

of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Rodney A. Smith appeals from an order of the United States District Court for the District of Colorado. The district court dismissed Smith's civil rights complaint as legally frivolous pursuant to the provisions of 28 U.S.C. § 1915(e). Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms**.

Smith filed a 42 U.S.C. §§ 1981 and 1983 civil rights complaint in the District of Colorado, which named as defendants various officials and employees of the Colorado Department of Corrections. The complaint alleged the defendants (1) violated his constitutional right of access to the court by denying him copies of certain Louisiana statutes he wished to attach to state-court pleadings; and (2) interfered with his "contractual right" to receive copies of those same statutes. In response, the district court filed an "Order Directing Plaintiff to File Amended Complaint." The district court's order identified, *inter alia*, the following deficiency in Smith's complaint: the failure of the complaint to allege specific facts that demonstrated an actual injury to his ability to pursue a nonfrivolous legal claim. *See Lewis v. Casey*, 518 U.S. 343, 349-55 (1996). After Smith filed an amended complaint, the matter was referred to a magistrate judge for initial screening and preparation of a report and recommendation. 28 U.S.C. § 636(b)(1)(B). The magistrate judge recommended that Smith's complaint be

dismissed as legally frivolous pursuant to the provisions of § 1915(e)(2)(B)(i). In that regard, the magistrate judge noted as follows with regard to Smith's access-to-the-courts claim:

Despite the specific instructions provided to Mr. Smith, he fails to allege facts that demonstrate he suffered any actual injury as a result of being denied copies of the Louisiana statutes he sought to include as exhibits with his opening brief. More specifically, Mr. Smith fails to describe the underlying cause of action that allegedly was lost in order to demonstrate the claim is not frivolous. His vague and conclusory assertions that his current Colorado sentence was enhanced by prior State of Louisiana convictions and that he wanted to submit copies of the Louisiana statutes with his opening brief are not sufficient to demonstrate actual injury. Even if the Court assumes Mr. Smith needed copies of the statutes to formulate a claim in his opening brief, the access to the courts claim still lacks merit because he does not allege facts describing a nonfrivolous claim. *See Gee v. Pacheco*, 627 F.3d 1178, 1191 (10th Cir. 2010) (prisoner's allegations that he was unable to research and prepare initial pleadings were too conclusory to present a plausible claim for denial of access to the courts). As a result, the Court finds that the access to the courts claim is legally frivolous.

Report & Recommendation at 5 (citation omitted). As to the § 1981 claim, the magistrate judge recognized Smith failed to identify any support for the conclusory assertion that he had a contractual right to obtain copies of the Louisiana statutes. Upon de novo review, the district court adopted the magistrate judge's report and recommendation and dismissed Smith's complaint with prejudice.

This court reviews de novo the district court dismissal of Smith's complaint as legally frivolous. *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006).

Upon de novo review, we affirm the district court for substantially those reasons set out in the magistrate judge's report and recommendation, dated June 7, 2016, and the district court's order, dated November 4, 2019. In addition, this court notes that Smith's reliance on *Petrick v. Maynard*, 11 F.3d 991 (10th Cir. 1993), is misplaced. In *Petrick*, the prisoner complaint at issue contained enough information to discern the possibility of a nonfrivolous attack on out-of-state sentences used to enhance the prisoner's Oklahoma sentence. Smith's amended complaint, on the other hand, contains absolutely no information about the nature, or potential timeliness, of the anticipated collateral attack on his Louisiana convictions. There is nothing in *Petrick* indicating that the mere assertion a prisoner wants to collaterally attack an out-of-state sentence used to enhance a current sentence is sufficient, standing alone, to satisfy the requirements of *Lewis*, 518 U.S. at 349-55. Accordingly, the order of the district court dismissing Smith's complaint as legally frivolous is hereby **AFFIRMED**. Furthermore, because Smith has not shown "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised" in this appeal, we **DENY** his

request to proceed in forma pauperis and order him to immediately remit the entire unpaid balance of the appellate filing fee. *Lister v. Dep't of Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005).

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Gordon P. Gallagher, United States Magistrate Judge

Civil Action No. 19-cv-02340-LTB-GPG

RODNEY A. SMITH,

Plaintiff,

v.

SUSAN BARKER,
JERRY ROARK,
NANETTE THOMAS,
SHAWNA GONZALES,
DIANNA MILENSKI,
STEVEN SALAZAR,
MARSHALL GRIFFITH,
PPMU MR. COOK,
SANDRA BROWN, and
ANTHONY A. DECESARO, et al.

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the amended Prisoner Complaint (ECF No. 9)¹ filed *pro se* by Plaintiff, Rodney A. Smith, on September 16, 2019. The matter has been referred to this Magistrate Judge for recommendation (ECF No. 12.)²

¹ "(ECF No. 9)" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

² Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or

Appendix B

The Court must construe the amended Prisoner Complaint and other papers filed by Mr. Smith liberally because he is not represented by an attorney. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. See *Hall*, 935 F.2d at 1110. *See* _____

The Court has reviewed the filings to date. The Court has considered the entire case file, the applicable law, and is sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the amended Prisoner Complaint be dismissed.

I. DISCUSSION

Mr. Smith has been granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. Therefore, the Court must dismiss any claims in the amended Prisoner Complaint that are frivolous. See 28 U.S.C. § 1915(e)(2)(B)(i). A legally frivolous claim is one in which the plaintiff asserts the violation of a legal interest that clearly does not exist or asserts facts that do not support an arguable claim. See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989).

Mr. Smith is a prisoner in the custody of the Colorado Department of Corrections ("DOC"). He initiated this action by filing *pro se* a Prisoner Complaint (ECF No. 1)

general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

pursuant to 42 U.S.C. § 1983 complaining about access to legal materials. On August 19, 2019, the Court ordered Mr. Smith to file an amended complaint because it was not clear who Mr. Smith is asserting his claims against and he failed to allege specific facts in support of his claims showing he is entitled to relief. As noted above, the amended Prisoner Complaint was filed on September 16, 2019. Mr. Smith asserts two claims for relief.

Access to the Courts

Mr. Smith first claims Defendants have violated his constitutional right of access to the courts by denying him copies of Louisiana statutes. According to Mr. Smith, he ① seeks to challenge the validity of prior State of Louisiana convictions used to enhance his current Colorado sentence and he needs copies of the Louisiana statutes to submit to the state court as exhibits in support of his opening brief. Mr. Smith specifically alleges that Defendant Susan Barker denied his requests for copies of the Louisiana statutes on October 28, 2018, and again on November 19, 2018; Defendant Nanette Thomas refused to assist him in obtaining copies of the Louisiana statutes on November 13, 2018; Defendant Shawna Gonzales refused to assist him in obtaining copies of the Louisiana statutes on November 16, 2018; Defendant Jerry Roark failed to respond to a written request for copies of the Louisiana statutes Mr. Smith handed to him on November 20, 2018; Defendant PPMU Mr. Cook failed to investigate his complaints that prison officials were refusing to provide him with copies of the Louisiana statutes in March 2019; Defendant Dianna Milenski denied his step 1 grievance regarding the failure to provide him with copies of the Louisiana statutes on May 28,

2019; Defendant Steven Salazar denied his step 2 grievance regarding the failure to provide him with copies of the Louisiana statutes on June 19, 2019; and Defendants Marshall Griffith, Sandra Brown, and Anthony A. DeCesaro are responsible for denying his step 3 grievance regarding the failure to provide him with copies of the Louisiana statutes in June and July 2019.

It is well-established that inmates have a constitutional right of access to the courts. See *Bounds v. Smith*, 430 U.S. 817, 828 (1977). Thus, "states are required to provide affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration." *Simkins v. Bruce*, 406 F.3d 1239, 1242 (10th Cir. 2005) (internal quotation marks omitted). The affirmative assistance necessary for this type of access to the courts claim is limited to the preparation and filing of initial pleadings. *See Carper v. DeLand*, 54 F.3d 613, 617 (10th Cir. 1995); *see also Vreeland v. Schwartz*, 613 F. App'x 679, 683 (10th Cir. 2015) (distinguishing between two types of constitutional access to the courts claims). In other circumstances that do not implicate the obligation to provide affirmative assistance, the Constitution requires only that states "not erect barriers that impede the right of access of incarcerated persons." *Simkins*, 406 F.3d at 1242.

Both types of access to the courts claims "require a showing of actual injury - that is, that the defendant's actions hindered the prisoner's ability to proceed with an actual, nonfrivolous claim." *Vreeland*, 613 F. App'x at 683 (citing *Lewis v. Casey*, 518 U.S. 343, 351-52 (1996)). Furthermore, as Mr. Smith was advised in the order directing him to file an amended complaint, the underlying cause of action that allegedly was lost is an

element of an arguable access to the courts claim that must "be described well enough to apply the 'nonfrivolous' test and to show that the 'arguable' nature of the underlying claim is more than hope." Christopher v. Harbury, 536 U.S. 403, 416 (2002).

Despite the specific instructions provided to Mr. Smith, ⁽⁸⁾ he fails to allege facts that demonstrate he suffered any actual injury as a result of being denied copies of the Louisiana statutes he sought to include as exhibits with his opening brief. More specifically, ⁽⁴⁾ Mr. Smith fails to describe the underlying cause of action that allegedly was lost in order to demonstrate the claim is not frivolous. ⁽⁵⁾ See id. His vague and conclusory assertions that his current Colorado sentence was enhanced by prior State of Louisiana convictions and that he wanted to submit copies of the Louisiana statutes with his opening brief are not sufficient to demonstrate actual injury. Even if the Court assumes Mr. Smith needed copies of the statutes to formulate a claim in his opening brief, the access to the courts claim still lacks merit because he does not allege facts describing a nonfrivolous claim. *See Gee v. Pacheco*, 627 F.3d 1178, 1191 (10th Cir. 2010) (prisoner's allegations that he was unable to research and prepare initial pleadings were too conclusory to present a plausible claim for denial of access to the courts). As a result, the Court finds that the access to the courts claim is legally frivolous.

42 U.S.C. § 1981

Mr. Smith's second claim is asserted against Ms. Barker pursuant to 42 U.S.C. § 1981. Mr. Smith contends in claim two that Ms. Barker interfered with his contractual right to the Louisiana statutes because of his race and he specifically identifies two comments by Ms. Barker as evidence of the alleged racial animus. The first comment

was the following response to Mr. Smith's October 28, 2018 request for the Louisiana statutes: "Look, I don't have any kind of access to the information you want, so I guess you just need to write your 'PEOPLE' for it." (ECF No. 9 at p.17.) The second comment, which was overheard by Mr. Smith after his second request for copies of the Louisiana statutes was denied on November 19, 2018, was made by Ms. Barker to another employee: "I hate when those black guys come in here with a piece of paper and think I'm obligated to give them something for it like that Mr. Smith guy just did." (ECF No. 18 at p.18.)

"Section 1981 prohibits racial discrimination in 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Reynolds v. School Dist. No. 1, Denver, Colo.*, 69 F.3d 1523, 1532 (10th Cir. 1995) (quoting 42 U.S.C. § 1981). To assert a claim under § 1981, Mr. Smith must allege facts demonstrating: "(1) that [he] is a member of a protected class; (2) that the defendants had the intent to discriminate on the basis of race; and (3) that the discrimination interfered with a protected activity as defined in § 1981." *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1102 (10th Cir. 2001).

The § 1981 claim lacks merit because Mr. Smith fails to allege facts that demonstrate the alleged discrimination interfered with a protected activity under § 1981. Mr. Smith contends he has a contractual right to copies of the Louisiana statutes based on a DOC memorandum dated September 11, 2014, a copy of which is attached to the amended Prisoner Complaint. (See ECF No. 9-1.) The attached memorandum indicates

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that Mr. Smith was provided with legal materials while he was housed at the Buena Vista Correctional Facility on September 11, 2014; that the materials would be provided one time only; and that the DOC is not obligated to replace or copy the materials provided for any reason. (See *id.*) Nothing in the memorandum establishes a contractual right to obtain copies of the Louisiana statutes Mr. Smith sought from prison officials at the Bent County Correctional Facility in 2018. Therefore, the Court finds that the § 1981 claim also is legally frivolous.

II. RECOMMENDATION

For the reasons set forth herein, this Magistrate Judge respectfully
RECOMMENDS that the amended Prisoner Complaint (ECF No. 9) and the
action be dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

DATED this 4th day of November, 2019.

BY THE COURT:



Gordon P. Gallagher
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02340-LTB-GPG

RODNEY A. SMITH,

Plaintiff,

v.

SUSAN BARKER,
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MARSHALL GRIFFITH,
PPMU MR. COOK,
SANDRA BROWN, and
ANTHONY A. DECESARO, et al.

Defendants.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge filed November 4, 2019 (ECF No. 13). Plaintiff has filed timely written objections to the Recommendation (ECF No. 14). The Court has therefore reviewed the Recommendation *de novo* in light of the file and record in this case. On *de novo* review the Court concludes that the Recommendation is correct. Accordingly, it is

ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 13) is accepted and adopted. It is

FURTHER ORDERED that the amended Prisoner Complaint (ECF No. 9) and the action are dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith.

DATED: November 27, 2019

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

CHAPTER	SUBJECT	AR #	Page 5
Offender Legal Services	Legal Access	750-01	EFFECTIVE 11/15/17

3. Legal assistants will not transport material by any means on behalf of any offender to another offender or to any other facility. Legal material will be transported out of the facility only when legal work is being formally assigned or copied within the Legal Access Program.
4. Check out and/or removal of all Legal Access Program property is strictly forbidden. All property is to remain within the confines of the law library and will be marked as DOC property.
5. Offenders are not allowed to write in, highlight, mark, or in any other way damage or destroy material(s) loaned to them by the Legal Access Program. This is considered destruction of state property.
6. Offenders are not allowed to use program computers except to conduct legal research and prepare documents related to legal matters. Legal Access Program computers are not for use compiling and preparing notes or references. Citations, references and relevant text may be incorporated in legal documents.
7. Program DVD/CD players, computers, and laptop computers may be used for the purpose of listening to recordings, viewing video of court and DOC administrative proceedings, or reviewing discovery.
 - a. DVDs, or CDs will be permitted in the law library only for general population offenders when they have been sent directly from the court, hearing body, or attorney (see below and AR 750-03, *Litigation Management*).
 - b. The legal assistant will coordinate with facility DOC employees to ensure offenders housed in restrictive housing have access to materials maintained in an electronic format.
 - c. Legal assistants will maintain the electronic formatted material and ensure their safety. The offender will be provided reasonable access to the materials pursuant to AR 750-03, *Litigation Management* and its disposition, pursuant to AR 300-06, *Searches and Contraband Control*.

G. Offender Access to Legal Materials Contained on DVD, CD, or Any Other Type of Device upon Which Materials May Be Stored (Electronic/Audio Media)

1. The legal assistant will make a cursory review of all electronic/audio media to ensure that they are of a legal nature; do not contain personal communications; personal pictures; maps; victim information; phone numbers, addresses, dates of birth, social security, SID, or FBI numbers of victims, witnesses or employees; do not divulge personal information regarding other incarcerated individuals or any other person. Attorneys are responsible to ensure that they redact the prohibited information from documents intended for their offender client prior to scanning or recording;
2. Audio and video tape are not permitted.
3. CD's and DVD's containing files and/or documents protected with passwords are not permitted.
4. See AR 750-03, *Litigation Management* for further information.

H. Offender participation in telephonic/video hearings shall be in accordance with AR 750-03, *Litigation Management*.

V. RESPONSIBILITY

- A. The associate director of the Office of Legal Services or designee shall be responsible for implementing, monitoring compliance with, reviewing annually, and updating this AR as needed.
- B. Each facility administrative head shall:
 1. Be responsible for maintaining consistency between offender legal access and this AR.

Appendix D