

Index of Appendices

APPENDIX A - Case style: Delroy Booth v. R. Allen, et al.
Appeal number: 22-12195-J
United States Court of Appeals for the Eleventh Circuit

APPENDIX B - Delroy T. Booth v. Lt. R. Allen, et al.
United States District Court for Northern District
of Georgia.
District Court Docket No: 4:21-cv-00239-AT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12195-J

DELROY T. BOOTH,

Plaintiff-Appellant,

versus

LIEUTENANT R. ALLEN,
SERGEANT J. SMITH,
in their individual capacity,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

Before: ROSENBAUM, GRANT, and BRASHER, Circuit Judges.

BY THE COURT:

Delroy Booth, in the district court, moved for leave to proceed on appeal *in forma pauperis*.

The district court denied the motion. However, the district court did not assess the \$505.00 appellate filing fee, as is required under the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915.

Because Booth has consented to paying the filing fee, the only remaining issue is whether the appeal is frivolous. *See* 28 U.S.C. § 1915(e)(2)(B). This Court now finds the appeal is frivolous, DENIES leave to proceed, and DISMISSES the appeal. Booth's motion for appointment of counsel is DENIED AS MOOT.

FILED IN CHAMBERS
U.S.D.C ATLANTA

Date: May 20 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

KEVIN P. WEIMER, Clerk
s/Kari Butler
Deputy Clerk

DELROY T. BOOTH, GDC No. 1087139, Plaintiff <u>pro se</u> ,	:	PRISONER CIVIL RIGHTS 42 U.S.C. § 1983
v.	:	
LIEUTENANT R. ALLEN, <u>et al.</u> , Defendants.	:	CIVIL ACTION NO. 4:21-CV-239-AT-WEJ

FINAL REPORT AND RECOMMENDATION

Plaintiff pro se, Delroy T. Booth, confined in Baldwin State Prison in Hardwick, Georgia, submitted a civil rights Complaint pursuant to 42 U.S.C. § 1983 in connection with his previous confinement in Hays State Prison in Trion, Georgia. (Compl. [1].) The Court granted plaintiff's request for leave to proceed in forma pauperis ("IFP") [7]. The matter is now before the Court for an initial screening under 28 U.S.C. § 1915A. For the reasons stated below, the undersigned **RECOMMENDS** that the Complaint be **DISMISSED**.

I. STANDARD OF REVIEW

The Court must screen a prisoner complaint against a governmental entity, officer, or employee and dismiss the complaint or any portion thereof if it (1) "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or

(2) “seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(a), (b)(1)-(2). A claim is frivolous when it “lacks an arguable basis either in law or in fact.” Miller v. Donald, 541 F.3d 1091, 1100 (11th Cir. 2008) (quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989)) (internal quotation marks omitted). A complaint fails to state a claim when the factual allegations, accepted as true, do not “raise a right to relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). A viable claim must be “plausible on its face.” Id. at 570.

In order to satisfy the plausibility standard, the plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556). The Court construes the factual allegations favorably to a pro se plaintiff and holds pro se pleadings to “less stringent standards than formal pleadings drafted by lawyers.” Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

“To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that (1) the defendant deprived him of a right secured under the United States Constitution or federal law and (2) such deprivation occurred under color of state law.” Richardson v. Johnson, 598 F.3d 734, 737 (11th Cir. 2010) (citing U.S. Steel, LLC v. Tieco,

Inc., 261 F.3d 1275, 1288 (11th Cir. 2001); and then Arrington v. Cobb Cnty., 139 F.3d 865, 872 (11th Cir. 1998)).

II. DISCUSSION

Plaintiff brings this action against defendants, Lieutenant R. Allen and Sergeant J. Smith. (Compl. 1.) Plaintiff claims that defendants (1) “spray[ed him] with a chemical agent without provocation and justification,” (2) were deliberately indifferent to his serious medical needs, and (3) “prepar[ed] false disciplinary reports against [him],” all on May 16-17, 2017. (Id. at 1, 4, 6.) Plaintiff seeks declaratory and monetary relief. (Id. at 21.)

Plaintiff raised the same claims in a previous case, which the Court dismissed for failure to exhaust administrative remedies properly. See Order, Booth v. Allen, No. 4:18-cv-69-HLM (N.D. Ga. May 5, 2020) (adopting Final R. & R. of Apr. 8, 2020). The Court determined that (1) administrative remedies were available to plaintiff, (2) he was required to file a grievance no later than May 26, 2017, and (3) he filed a grievance more than seven months late, on January 5, 2018. The United States Court of Appeals for the Eleventh Circuit affirmed. See Booth v. Allen, No. 20-13357, 2021 WL 4978161 (11th Cir. Oct. 26, 2021) (per curiam).

After receiving the Eleventh Circuit’s decision, plaintiff attempted to exhaust his administrative remedies by filing a grievance on November 1, 2021.

(Compl. 7-10, 16-18.) Plaintiff did not receive a response, so he appealed on December 13, 2021, and executed the present Complaint on the same day. (Id. at 11-13, 18-20, 22.)

The Eleventh Circuit has stated the following:

The exhaustion of administrative remedies under the Prison Litigation Reform Act (“PLRA”) is a matter in abatement that should be raised in a motion to dismiss. . . . Under the PLRA, an inmate confined in a [prison] may not bring a § 1983 action until he exhausts the administrative remedies that are available. 42 U.S.C. § 1997e(a). The exhaustion requirement applies to all inmate suits about prison life, . . . and the inmate who alleges harm suffered from prison conditions must file a grievance and exhaust the remedies available under a state’s grievance procedures as a prerequisite to a federal § 1983 action. . . . [A]dministrative remedies are unavailable where prison officials do not respond to an inmate’s grievances

Tilus v. Kelly, 510 F. App’x 864, 865-66 (11th Cir. 2013) (per curiam) (citations omitted). “[C]ourts lack discretion to waive the exhaustion requirement. . . . The only facts pertinent to determining whether a prisoner has satisfied the PLRA’s exhaustion requirement are those that existed when he filed his original complaint.” Smith v. Terry, 491 F. App’x 81, 83 (11th Cir. 2012) (per curiam) (citations omitted).

When an inmate alleges that he did not exhaust his administrative remedies before filing a complaint, a court may dismiss the complaint for failure to state a claim and need not wait for the defendants to file a motion to dismiss on that ground.

See Jones v. Bock, 549 U.S. 199, 215-16 (2007) (noting that “failure to exhaust [can] be a basis for dismissal for failure to state a claim,” just as failure to satisfy statute of limitations can support such dismissal). Furthermore, “[u]nder res judicata, a final judgment bars a subsequent lawsuit relitigating matters that were litigated or could have been litigated in the earlier suit.” Hughes v. Lott, 350 F.3d 1157, 1161 (11th Cir. 2003).

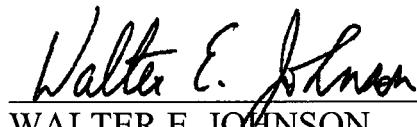
In the present case, plaintiff cannot relitigate the Court’s previous ruling, affirmed by the Eleventh Circuit, that (1) administrative remedies were available to him, (2) he was required to file a grievance no later than May 26, 2017, and (3) he filed a grievance more than seven months late, on January 5, 2018. Plaintiff cannot exhaust his administrative remedies properly because he missed the deadline of May 26, 2017. Plaintiff appears to believe that the Eleventh Circuit’s decision of October 26, 2021, allows him to restart his administrative remedies. Even if that were true, plaintiff executed the present Complaint on the same day when he filed his new grievance appeal. Plaintiff fails to allege that he was not required to wait for a decision on that appeal before filing the present case. Plaintiff thus indicates that he failed to exhaust his administrative remedies. Accordingly, the Complaint should be dismissed.

III. CONCLUSION

For the reasons stated above, the undersigned **RECOMMENDS** that the Complaint [1] be **DISMISSED** pursuant to 28 U.S.C. § 1915A(b)(1).

The Clerk is **DIRECTED** to terminate the referral to the undersigned.

SO RECOMMENDED, this 20th day of May, 2022.


WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DELROY T. BOOTH,

:

Plaintiff,

:

v.

:

LIEUTENANT R. ALLEN, et al,

:

CIVIL ACTION NO.
4:21-cv-0239-AT

Defendants.

ORDER

This matter is before the Court on the Magistrate Judge's Final Report and Recommendation [Doc. 8], recommending that Plaintiff's complaint be dismissed.

A review of the docket reflects that no objections have been filed in response to the Magistrate's Report. In accordance with 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the Court has reviewed the Magistrate's Recommendation for clear error and finds none.

Accordingly, the Court **ADOPTS** the Magistrate Judge's Final Report and Recommendation [Doc. 8] as the opinion of the Court. Plaintiff's Complaint is **DISMISSED** pursuant to 28 U.S.C. § 1915A(b)(1). The Clerk is **DIRECTED** to close this action.

IT IS SO ORDERED this 7th day of June, 2022.


AMY TOTENBERG
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served the Supreme Court of the United States, Office of the Clerk, with the foregoing: Petition for Writ of Certiorari, by Depositing a copy of same in the United States Mail in a properly addressed envelope with sufficient postage affixed to:

Office of The Clerk
Supreme Court of The United States
1 First Street, N.E.
Washington, D.C. 20543

This 3rd Day of April, 2023

Delroy T. Booth