FILED
United States Court of Appeals
Tenth Circuit

July 3, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DELANO MEDINA,

Plaintiff - Appellant,

v.

JENNIFER MURPHY; REBEKAH RYAN; JR HALL,

Defendants - Appellees.

No. 24-1029
(D.C. No. 1:23-CV-02241-LTB-SBP)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **MATHESON**, and **McHUGH**, Circuit Judges.

Delano Medina appeals the district court's dismissal of his pro se complaint filed under 42 U.S.C. § 1983 as frivolous or for failure to state a claim. Exercising jurisdiction under 28 U.S.C. § 1291, we hold that Mr. Medina improperly brought his

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination 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. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

claim under § 1983 when it was cognizable only in a habeas corpus action. We remand to the district court to vacate its judgment and dismiss without prejudice.

I. BACKGROUND

Mr. Medina is a prisoner in the custody of the Colorado Department of Corrections ("CDOC"). His amended complaint against three Colorado state officials asserted a procedural due process violation under § 1983. He alleged that CDOC inaccurately computed his parole eligibility date ("PED") and therefore denied him timely consideration for parole. He further alleged that a Colorado statute creates a presumption that parole would be granted in his case.

A magistrate judge dismissed Mr. Medina's complaint as frivolous or for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(i) or (ii), holding that Mr. Medina failed to plead deprivation of a due process liberty or property interest. The magistrate judge said Mr. Medina had no liberty interest in a specific PED because parole is discretionary under Colorado law. She also noted that, to the extent Mr. Medina's claim could be construed as seeking immediate or speedier release, it must be brought in a habeas corpus action rather than under § 1983.

Mr. Medina objected to the magistrate judge's Recommendation, contending he had pled a due process liberty interest in an accurate PED and consideration for parole. He argued that, although parole is discretionary in Colorado, consideration for parole is not. He further contended that, with the correct PED, Colorado law affords him both parole consideration and a statutory presumption of parole, and thus the granting of parole in his case is not discretionary. Finally, Mr. Medina argued he

could sue under § 1983 because he was seeking declaratory and injunctive relief to invalidate state procedures used to deny parole eligibility.

The district court summarily overruled Mr. Medina's objections, accepted and adopted the Recommendation, and entered judgment dismissing his complaint.

II. DISCUSSION

We generally review the dismissal of a complaint as frivolous under § 1915(e)(2)(B)(i) for an abuse of discretion. *Milligan v. Archuleta*, 659 F.3d 1294, 1296 (10th Cir. 2011). "However, where the frivolousness determination turns on an issue of law, we review the determination *de novo*." *Id.* (quotations omitted). We review de novo the dismissal of a complaint for failure to state a claim under § 1915(e)(2)(B)(ii). *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). Because Mr. Medina proceeds pro se, we construe his filings liberally but we do not act as his advocate. *See James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

We need not decide whether Mr. Medina sufficiently pled a due process liberty interest because we construe his complaint as seeking immediate or speedier release from confinement. His claim is therefore cognizable only in a habeas corpus action, as the district court alternatively held.[1]

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[1] We note, however, that this court has rejected in unpublished decisions Colorado prisoners' assertions of a protectible liberty interest in a correctly calculated PED. *See Fetzer v. Raemisch*, 803 F. App'x 181, 185 (10th Cir. 2020) (unpublished) ("[A]bsent an overarching right to parole, the mere fact that the process used to determine a PED is (allegedly) nondiscretionary is insufficient to create a liberty interest that the Due Process clause protects."); *Baars v. Raemisch*, 814 F. App'x 376, 377-78 (10th Cir. 2020)

(continued)

A state prisoner may challenge the conditions of his confinement in a § 1983 civil rights action. *See Boutwell v. Keating*, 399 F.3d 1203, 1209 (10th Cir. 2005). A prisoner may challenge the execution of his sentence in a habeas corpus petition under 28 U.S.C. § 2241. *See Brace v. United States*, 634 F.3d 1167, 1169 (10th Cir. 2011); *Boutwell*, 399 F.3d at 1210 n.2. A state prisoner's "sole federal remedy is a writ of habeas corpus" when he "is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment." *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973); *see McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 812 (10th Cir. 1997).

Thus, courts must "ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody." *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005). A prisoner may not bring a § 1983 claim that seeks "'core' habeas corpus relief, *i.e.*, where a state prisoner requests present or future release." *Id.* He must instead seek habeas relief after fully exhausting state remedies. *See id.* at 79 ("[H]abeas corpus actions require a petitioner fully to exhaust state remedies, which § 1983 does not.").

(unpublished) (same). *See* 10th Cir. R. 32.1(A) ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *see also* Fed. R. App. P. 32.1.

In *Duncan v. Gunter*, 15 F.3d 989, 990 (10th Cir. 1994), for example, the plaintiffs brought a § 1983 action claiming that they were wrongfully denied earned-time credits that would have entitled them to release. Although the plaintiffs did not seek an injunction explicitly ordering their release, we held their request "for an injunction requiring the Colorado Attorney General to inform DOC of the changes in the state law, and advise DOC to conform to the statutes which govern" could be brought only in a habeas action because "the requested order would be tantamount to a decision on the plaintiffs' entitlement to a speedier release." *Id.* at 991 (brackets and quotations omitted).

In contrast, the Supreme Court held that the plaintiffs' parole-related claims in *Wilkinson* were cognizable under § 1983 because they "*would not necessarily* spell immediate or speedier release." 544 U.S. at 81. These plaintiffs sought to "render invalid the state procedures used to deny parole eligibility . . . and parole suitability." *Id.* at 82. But success on their claims would mean, at most, either speedier consideration for parole or a new parole hearing where release remained discretionary. *See id.* Thus, these prisoners could pursue § 1983 claims because the connection between the constitutionality of their parole proceedings and their release from confinement was "too tenuous" for habeas to be their sole avenue of relief. *Id.* at 78.

In this case, the connection between Mr. Medina's constitutional claim regarding calculation of his PED and his release from confinement is not so tenuous. In his amended complaint, he sought a corrected PED and an order to schedule a

parole hearing. ROA at 53. Although he acknowledged that parole is discretionary under Colorado law, *id.*, he also alleged that a Colorado statute created a presumption of parole in his case, *id.* at 56, 61. Based on this statutory presumption, his parole will not be discretionary. *See* ROA at 81 (arguing in objections to Recommendation that parole is not discretionary in his case due to the statutory presumption of parole); Aplt. Br. at 10 (referencing "a statutory right to release from prison"); *id.* at 12 (arguing there is mandatory statutory language and an absence of parole discretion in his case); *id.* at 14 (arguing he has "a legitimate expectation of parole"); *id.* at 16 (asserting that "defendants[] are now wrongfully detaining him"); *id.* at 17 (arguing that, if his PED had been corrected, he "would have been paroled").

Thus, according to Mr. Medina's description of his claim, he attacks not only "wrong procedures" but also "the wrong result"—the denial of parole. *Wilkinson*, 544 U.S. at 80 (quotations omitted). As in *Duncan*, granting his requested relief "would be tantamount to a decision on [his] entitlement to a speedier release." 15 F.3d at 991 (quotations omitted). As such, Mr. Medina must use habeas corpus rather than § 1983, where, as here, he "seek[s] to invalidate the duration of [his] confinement . . . *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody." *Wilkinson*, 544 U.S. at 81. The district court should have dismissed Mr. Medina's complaint without prejudice rather than reaching the merits. *Cf. Boyce v. Ashcroft*, 251 F.3d 911, 913, 918 (10th Cir.) (affirming dismissal without prejudice of prisoner's § 2241 petition challenging a

condition of confinement that could not be raised in a habeas petition), *vacated as moot*, 268 F.3d 953 (10th Cir. 2001).

III. CONCLUSION

We remand to the district court to vacate its judgment and dismiss, without prejudice, Mr. Medina's complaint as incorrectly filed under § 1983. We grant Mr. Medina's motion to proceed on appeal without prepayment of costs and fees.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Susan Prose, United States Magistrate Judge

Civil Action No. 23-cv-02241-LTB-SBP

DELANO MEDINA,

Plaintiff,

v.

JENNIFER MURPHY,
REBEKAH RYAN, and
JR HALL,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the amended Prisoner Complaint (ECF No. 7) filed *pro se* by Plaintiff Delano Medina. Because Mr. Medina proceeds *pro se*, the Court liberally construes his filings, but will not act as an advocate. *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013). The matter has been referred to this Court for recommendation (ECF No. 9).[1]

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1 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 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 and legal conclusions 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

The Court has reviewed the filings to date, considered the entire case file, analyzed the applicable law, and is advised in the premises. For the reasons that follow, it is respectfully recommended that the amended Prisoner Complaint be dismissed.

I. BACKGROUND

Mr. Medina is a convicted and sentenced state prisoner in the custody of the Colorado Department of Corrections ("CDOC"). He is incarcerated at the Colorado Territorial Correctional Facility in Cañon City, Colorado. He brings this action under 42 U.S.C. § 1983 against several Colorado state officials, suing each in an individual and official capacity. (ECF No. 7 at 1-3). The complaint presents a single procedural due process claim under the Fourteenth Amendment. (*Id.* at 4). The claim is subtitled as follows: "The CDOC's failure to execute and accurately compute sentences under Colo. Rev. Stat. § 17-22.5-101 is wrongfully denying Medina the correct parole eligibility date. This denies parole consideration in violation of procedural due process; there also is a deprivation of an adequate state judicial process to correct the problem." (*Id.* at 4). In essence, Mr. Medina claims that the erroneous calculation of his parole eligibility date ("PED") by the CDOC violates due process.

Specifically, Mr. Medina argues that his PED should be calculated by using a sentence effective date ("SED") of November 21, 2005, which corresponds to a 2005 prison sentence. (*Id.* at 4-7). On the 2005 sentence, Mr. Medina was released to a 1-year term of parole on September 28, 2011, with the sentence being fully served and

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F.2d 656, 659 (10th Cir. 1991).

discharged as of August 24, 2012. (*Id.*; *see also* ECF No. 7-1). The CDOC, however, has not used the 2005 sentence in calculating Mr. Medina's current PED because the CDOC considers (incorrectly in Mr. Medina's view) the 2005 sentence to have been fully served and discharged as of August 2012. (ECF No. 7 at 4-7). Yet by Mr. Medina's account, the 2005 sentence was discharged prematurely because (1) the CDOC paroled him too early by failing to apply a consecutive 18-month sentence from an intervening 2010 case, and (2) the CDOC released him to serve a 1-year parole term instead of a 3-year parole term. (*Id.* at 4-8). Had the CDOC applied the consecutive 18-month sentence and the 3-year parole term, Mr. Medina would not have discharged those previous sentences before being sentenced in his most recent cases. (*Id.*). Because he should still have been serving the 2005 and 2010 sentences at the time of his most recent sentencing, and because state law requires the CDOC to compute multiple sentences under the "one continuous sentence" method, his PED should be calculated by using the earliest SED, which is November 21, 2005. (*Id.*). To support his argument, Mr. Medina cites numerous Colorado parole statutes. (*Id.*). He concludes that these erroneous calculations under Colorado's parole statutes, coupled with the defendants' failure to correct the erroneous calculations, amount to a violation of his Fourteenth Amendment due process rights. (*Id.*).

In connection with these allegations, Mr. Medina requests multiple forms of declaratory and injunctive relief:

- "A declaration that the acts and omissions of defendant's have violated

Medina's rights, and stating defendant's duties with respect to those rights;"

- "A declaration that Medina is immediately eligible for a parole hearing under Colo. Rev. Stat. § 17-22.5-403, with 50% of his sentence served;"
- "An order directing Murphy to recalculate all of Medina's state sentences under the one-continuous-sentence statute-Colo. Rev. Stat. § 17-22.5-101-by calculating the 18-month consecutive sentence in Boulder 10CR141, to be followed by the three-year parole term in Douglas 05CR435, in accordance with Colo. Rev. Stat.§ 18-1.3-401 (l)(a)(V)(E);"
- "An order directing Murphy to recalculate and add all earned time from the dates of November 21, 2005, to December 5, 2014;"
- "An order directing Hall to set a parole hearing date for parole consideration; although the question of release to parole remains within the discretion of the Parole Board[.]"

(*Id.* at 13). Mr. Medina further requests attorney's fees and costs. (*Id.*).

As will now be discussed, Mr. Medina's complaint should be dismissed.

II. DISCUSSION

The Court reviews a prisoner's complaint to determine whether any claims are appropriate for summary dismissal as frivolous or seek relief against a defendant immune from such relief. 28 U.S.C. § 1915(e)(2)(B); 28 U.S.C. § 1915A; D.C.COLO.LCivR 8.1(b). "[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in

fact." *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989). A claim that is legally frivolous is one based on an indisputably meritless legal theory, such as infringement of a legal interest that clearly does not exist. *Id.* at 327. "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or wholly incredible." *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). There is considerable overlap between the standards for frivolousness and failure to state a claim and a claim that lacks an arguable basis in law is dismissible under both standards. *Neitzke*, 490 at 326, 328.

Mr. Medina's complaint is subject to summary dismissal. "The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). A liberty interest may arise from the Constitution itself or it may arise from an expectation or interest created by state laws or policies. *Id.* The United States Constitution does not afford prisoners a right to be released on parole before the expiration of a valid sentence. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979). Absent a state-created liberty interest, "there simply is no constitutional guarantee that [determinations of parole eligibility] must comply with standards that assure error-free determinations." *Id.* Mr. Medina therefore must show that Colorado law creates a liberty interest in the PED he seeks.

Colorado law does not afford Mr. Medina a liberty interest in a specific PED.

Colorado state prisoners lack a liberty interest in parole because parole is discretionary under state law. *Fetzer v. Raemisch*, 803 F. App'x 181, 184 (10th Cir. 2020) (unpublished) (citing *Greenholtz*); *see also Nowak v. Suthers*, 320 P.3d 340, 348 (Colo. 2014) (explaining that under Colorado law, "[t]he grant of parole is a privilege, not a right," and even after a "PED is calculated, the parole board has the ultimate discretion to grant or deny parole based on the totality of the circumstances"). Because Colorado does not create a liberty interest in parole itself, Mr. Medina "has no subsidiary liberty interest in the process used to determine his PED, even if that process involves a nondiscretionary calculation." *Fetzer*, 803 F. App'x at 184. "Put differently, absent an overarching right to parole, the mere fact that the process used to determine a PED is (allegedly) nondiscretionary is insufficient to create a liberty interest that the Due Process clause protects." *Id.* at 185; *see also Baars v. Raemisch*, 814 F. App'x 376 (10th Cir. 2020) (unpublished) (affirming summary dismissal of *pro se* prisoner's § 1983 action against the CDOC that alleged failure to calculate a statutorily correct PED in violation of prisoner's Fourteenth Amendment due process rights). Mr. Medina's due process claim therefore lacks an arguable basis in law. Consequently, it should be dismissed under 28 U.S.C. § 1915(e)(2)(B)(i), or, in the alternative, (ii).[2]

2 To the extent any of Mr. Medina's allegations or arguments could be construed as requesting immediate or speedier release from custody, such a claim must be brought in a habeas corpus action. *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). And insofar as Mr. Medina asserts the lack of "an adequate state judicial process to correct the problem," the assertion is merely tacked on to the end of his due process claim and lacks sufficient factual allegations to comply with Rule 8 of the Federal Rules of Civil Procedure.

III. RECOMMENDATION

For these reasons, it is respectfully recommended that the amended Prisoner Complaint (ECF No. 7) and this action be **dismissed** pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) or, in the alternative, (ii).

DATED December 11, 2023.

BY THE COURT:

Susan Prose
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-02241-LTB-SBP

DELANO MEDINA,

Plaintiff,

v.

JENNIFER MURPHY,
REBEKAH RYAN, and
JR HALL,

Defendants.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge dated December 11, 2023. (ECF No. 10). Plaintiff has filed timely written objections to the Recommendation. (ECF No. 11). 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 for the reasons stated therein.

Accordingly, it is

ORDERED that Plaintiff's written objections (ECF No. 11) are OVERRULED. It is

FURTHER ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 10) is ACCEPTED AND ADOPTED. It is

FURTHER ORDERED that the amended Prisoner Complaint (ECF No. 7) be

DISMISSED for the reasons stated in the Recommendation. 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 at Denver, Colorado, this 10th day of January, 2024.

BY THE COURT:

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

FILED
United States Court of Appeals
Tenth Circuit

July 29, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DELANO MEDINA,

Plaintiff - Appellant,

v.

JENNIFER MURPHY, et al.,

Defendants - Appellees.

No. 24-1029
(D.C. No. 1:23-CV-02241-LTB-SBP)
(D. Colo.)

ORDER

Before **TYMKOVICH**, **MATHESON**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk