

73 Mass.App.Ct. 1114
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.
Robert FOXWORTH & others¹
v.
COMMISSIONER OF CORRECTION² & others.³
No. 07-P-1894.
|
January 9, 2009.

By the Court (TRAINOR, KATZMANN & VUONO, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE
1:28

*1 Robert Foxworth (plaintiff), an inmate at MCI-Cedar Junction, appeals from a final judgment in the Superior Court pertaining to his and others' conditions of confinement in the MCI-Cedar Junction special management unit (SMU) (also known as "10-Block").⁴ The Superior Court judge granted partial summary judgment in favor of the plaintiff on his claim that the defendants had violated their own regulations as set out in 103 Code Mass. Regs. § 423.09(1)(a), (k), as then in effect, and dismissed the plaintiff's remaining claims asserting violations of due process and G.L. c. 127, § 40, and seeking monetary damages under 42 U.S.C. § 1983. We affirm.

Background. This case initiated with the plaintiff and five other inmates being placed at various times in SMU while awaiting action upon serious disciplinary charges. Placement in SMU is temporary, pending the outcome of disciplinary charges, which may result in assignment of an inmate to the department disciplinary unit, department segregation unit, another institution, or back to the general population. Inmates in SMU are kept apart from the prison population and are generally confined to a cell for twenty-three hours per day.

The Department of Correction (department) has promulgated regulations which state that each inmate in SMU "will be permitted a television or radio," and "may order items from the [prison] canteen." 103 Code Mass. Regs. § 423.09(1)(a), (k).⁵ The department's "MCI-Cedar Junction Ten-Block Inmate Booklet," however, only permits SMU inmates to possess a radio and order only cosmetics, stamps, and legal supplies from the canteen. The plaintiffs brought suit arguing that the department had violated its own regulations by not allowing inmates to have televisions and unrestricted access to the canteen while in SMU. The plaintiffs' suit also raised the following claims: (1) that placement in SMU is tantamount to placement in isolation or segregation and requires a measure of due process not being afforded (this claim was brought by the Massachusetts Correctional Legal Services [MCLS] as amicus, and was never actually asserted by the plaintiffs themselves); (2) that the loss of privileges for over fifteen days while in SMU is tantamount to isolation and violates G.L. c. 127, § 40⁶; (3) that the department is in contempt because other inmates who are currently in SMU still have no televisions or full canteen access (despite none of the plaintiffs remaining in SMU); and (4) that monetary damages are merited under 42 U.S.C. § 1983.

Upon initial motions for summary judgment by the parties, the judge allowed partial summary judgment in favor of the plaintiffs on their claim for declaratory relief, finding the defendants had violated their own regulations by not allowing inmates in SMU to have television sets and unrestricted access to the prison canteen. The judge dismissed the plaintiffs' other claims (enumerated above) in a final judgment on October 25, 2006. As mentioned above, only plaintiff Foxworth now appeals the dismissal.

*2 *Discussion.* The judge properly dismissed the claim asserted by MCLS as amicus that placement in SMU is tantamount to placement in isolation and requires a level of due process not being provided. The plaintiffs did not raise the issue in their original complaint or in any motions they filed. In fact, following the grant of partial summary judgment to the plaintiffs, the judge conducted a status hearing to identify the remaining issues. MCLS did not appear at the hearing, and the plaintiffs specifically identified three issues (see [2]-[4] above), not including the amicus claim, that they wanted resolved. The plaintiff cannot now attempt to resurrect the issue on appeal. We will not consider claims that were not timely raised, and therefore left unresolved, in the trial court. See *Commissioner of Correction v. McCabe*, 410 Mass. 847,

850 n. 7, 576 N.E.2d 654 (1991).

The judge also properly dismissed the claimed violation of G.L. c. 127, § 40. The loss of the privilege of having a television set or unrestricted access to the prison canteen or telephone within SMU does not reach the level of hardship and deprivation tantamount to being in isolation, and thus, does not implicate G.L. c. 127, § 40. The plaintiff appears to argue that loss of certain privileges upon assignment to SMU, like placement in isolation, is a form of sanction that G.L. c. 127, § 40, limits to fifteen days for any single offense; in other words, that certain sanctions, such as the loss of canteen or television privileges, are tantamount to isolation (or a substitute for isolation) and, therefore, may not exceed fifteen days for any single disciplinary infraction.

The loss of privileges attendant upon placement in SMU, however, falls well short of isolation. The loss of privileges and restrictions in SMU does not approach the sort of severity of being placed in isolation as contemplated by G.L. c. 127, § 40. See *O'Malley v. Sheriff of Worcester County*, 415 Mass. 132, 139, 612 N.E.2d 641 (1993) ("Isolation, regardless of location, entails much more than the simple loss of privileges such as television viewing; it involves a significant loss of freedom, opportunity for exercise or earning good time credits, as well as contact with visitors and others"). Not unlike a department disciplinary unit, in which inmates are allowed five hours of outdoor exercise per week, showers three times per week, and access to prison officials and other prisoners, the conditions in SMU "while uncomfortable, [are] a far cry from the 'barbaric' conditions § 40 sought to alleviate." *Torres v. Commissioner of Correction*, 427 Mass. 611, 617, 695 N.E.2d 200 (1998). The judge did not err in dismissing the plaintiff's claim.

The plaintiff, on appeal, advances no argument concerning the dismissal of the claim for contempt against the defendants for continuing to deny other inmates in

SMU televisions and unrestricted canteen access. The plaintiff has no standing or personal stake in pressing claims on behalf of other inmates, and is not an attorney and may not represent others besides himself. See *Langton v. Secretary of Pub. Safety*, 37 Mass.App.Ct. 15, 20–21, 636 N.E.2d 299 (1994). As a result, the judge properly dismissed the claim for contempt.

*3 Concerning the claim for monetary damages under 42 U.S.C. § 1983, the plaintiff argues that he and his fellow inmates were placed into essentially an isolation unit without due process of law, having been not yet found guilty of any disciplinary infractions, and were treated cruelly and unusually, being deprived of adequate rations (i. e., the loss of snack food purchased from the canteen) and television privileges. The judge, however, correctly observed in her final decision that the loss of privileges here does not pose the sort of "atypical and significant hardship ... in relation to the ordinary incidents of prison life," as stated by the United States Supreme Court in *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), required to make out a due process violation. Inmates have no constitutionally protected right to televisions or radios in their cells. Nor does it deprive inmates of "the minimal civilized measure of life's necessities" to restrict those temporarily assigned to SMU, who receive three meals per day, from purchasing extra food from the prison canteen. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), quoting from *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981).⁷

Judgment affirmed.

All Citations

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Footnotes

¹ Craig Hood, Tony Gaskins, Michael Addressa, Dornell Wigfall, and Charles Thore, none of whom has perfected an appeal. The plaintiffs are present or past inmates in the custody of the Department of Correction.

² Michael T. Maloney, who is sued in his official and individual capacities.

³ The superintendent of MCI–Cedar Junction, Peter Allen; the deputy superintendent of MCI–Cedar Junction, John

Luongo; and the policy coordinator at MCI–Cedar Junction, Mellisa Coache. All are sued in their official and individual capacities.

- ⁴ The plaintiff, Robert Foxworth, has alone filed a notice of appeal, which he purported to file on behalf of himself and his coplaintiffs. Foxworth is not a licensed attorney and may not represent others besides himself. Inmate Gaskins moved, without opposition, on January 4, 2007, to file a late notice of appeal; however, the docket sheets do not indicate that he actually filed such notice, though he signs Foxworth’s brief.
 - ⁵ The final judgment on appeal entered on October 25, 2006, and pertained to the version of the regulation dating back to 1995. Although the regulation was amended effective November 10, 2006, to prohibit televisions and restrict canteen access for SMU inmates, that amendment is not relevant to this appeal, and all citations to the regulation in this decision are to the prior version.
 - ⁶ General Laws c. 127, § 40, as appearing in St.1957, c. 777, § 17, states: “For the enforcement of discipline, an inmate in any correctional institution of the commonwealth may, at the discretion of its superintendent, be confined, for a period not to exceed fifteen days for any one offence, to an isolation unit.”
 - ⁷ The plaintiff’s claim of regulatory violations by the defendants as further basis for the § 1983 claim is supported only by the violation of 103 Code Mass. Regs. § 423.09(1)(a), (k), relative to television and canteen access. There appear to be no other violations.
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