

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-3784

KENNETH FORTUNE,
Appellant

v.

R. MARSHALL; R. NORRIS; W. COUCH;
FREDERICK K. FRANK

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 99-cv-00831)
District Judge: Honorable Richard P. Conaboy

Submitted For Possible Dismissal Under 28 U.S.C. § 1915(e)(2)(B)
or Summary Action Under Third Circuit LAR 27.4 and I.O.P. 10.6
February 28, 2002

BEFORE: MANSMANN* ALITO and McKEE, CIRCUIT JUDGES

Received and Filed *gf*

JUDGMENT

Marcia M. Waldron,
Clerk

This case came to be heard on the record from the United States District Court for

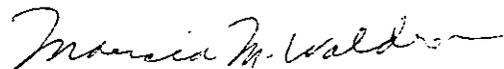
*The Honorable Carol Los Mansmann, who was originally a member of the motions panel, died prior to submitting her decision on this case. This motion is being decided by a quorum of the panel. See 28 U.S.C. § 46(d).

the Middle District of Pennsylvania and was submitted for possible dismissal under 28 U.S.C. § 1915(e)(2)(B) or summary action under Third Circuit LAR 27.4 and I.O.P. 10.6.

On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered October 31, 2000 be and the same is hereby summarily affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:



Clerk

DATED: April 4, 2002

UNREPORTED-NOT PRECEDENTIAL

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February 28, 2002

BEFORE: MANSMANN,* ALITO and McKEE, CIRCUIT JUDGES

(Filed April 4, 2002)

Received and Filed *es*

4-4-02

Marcia M. Waldron,
Clerk

OPINION

*The Honorable Carol Los Mansmann, who was originally a member of the motions panel, died prior to submitting her decision on this case. This motion is being decided by a quorum of the panel. See 28 U.S.C. § 46(d).

PER CURIAM

Kenneth Fortune, a former inmate at the State Correctional Institution at Huntingdon, Pennsylvania, appeals from the District Court's order dismissing this 28 U.S.C. § 1983 action against various Department of Corrections ("DOC") officials and employees.² For the reasons that follow, we affirm.

In his May 1999 complaint seeking damages and injunctive relief, Fortune alleged that he was issued a misconduct on April 27, 1999 for yelling, in violation of his First Amendment rights and in retaliation for providing legal advice to another inmate. He further alleged that the exclusion of his written statement from the record of the subsequent misconduct hearing violated his constitutional rights, and that his legal materials were confiscated on February 10, 1999 as part of a conspiracy to restrict his access to the courts. Fortune contended these events, as well as the disciplinary action, occurred as part of a long-standing conspiracy of racial discrimination against him. Fortune stated that he had not filed a grievance related to the facts alleged in his complaint because misconduct incidents were barred from the grievance procedure.

In response to the Magistrate Judge's recommendation that the complaint be dismissed for failure to exhaust, Fortune declared that he had exhausted his administrative remedies on the misconduct charge but was unable to prove exhaustion on this claim due

² Fortune is presently incarcerated in the State Correctional Institution at Camp Hill, Pennsylvania.

to an alleged May 22, 1999 confiscation and destruction of his property by authorities. Fortune also asked for the return of property relating to a separate legal proceeding that was allegedly confiscated on December 3, 1999. The District Court declined to adopt the Magistrate Judge's Report and Recommendation and remanded the matter, while expressing the hope that prison officials could supply further information regarding Fortune's claim that he had met exhaustion requirements.

The Department of Corrections moved to dismiss for failure to state a claim, arguing that Fortune had not finally exhausted his administrative remedies with regard to his misconduct charge and providing the declaration of the Chief Hearing Examiner to that effect. After noting that he was now claiming his property was confiscated on three separate occasions, DOC contended that Fortune had failed to establish that he had exhausted his institutional grievances as well.

On April 10, 2000, Fortune sought leave to amend in order to add unspecified claims and parties to this action. Attached to the motion were documents indicating that Fortune had fully exhausted his remedies with regard to the confiscation of his property on December 3, 1999. Other documents suggested that he had partially exhausted the administrative process for yet another alleged confiscation of his property on December 28, 1999.³ After further briefing, the Magistrate Judge again recommended that the

³ The Magistrate Judge construed the motion to amend as a motion to file a supplemental complaint, and subsequently denied the motion based on Fortune's failure to file a memorandum in support, as required under the local rules. This action is of no

complaint be dismissed for lack of exhaustion.

Over Fortune's objection, the District Court dismissed the action as to all claims, save one, on exhaustion grounds. The District Court further found the fully exhausted claim to be without merit. This timely appeal followed. Fortune filed a motion to proceed in forma pauperis on appeal, which was granted. The appeal is now before the Court for determination pursuant to 28 U.S.C. § 1915(e)(2)(B) or for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6.

The District Court's judgment will be summarily affirmed. Section 1997e(a), as amended by the Prison Litigation Reform Act of 1996, expressly provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Moreover, even though the administrative process cannot provide monetary relief, both the Supreme Court and this Court have held that all actions concerning prison conditions, including those seeking only monetary damages, meet the mandatory exhaustion requirement. Booth v. Churner, 121 S. Ct. 1819, 1821 (2001); see also Nyhuis v. Reno, 204 F.3d 65, 71 (3d Cir. 2000) (no futility exception to mandatory exhaustion requirement).

consequence, however, as the District Court expressly considered Fortune's entire submission in rendering its decision.

Pennsylvania Department of Corrections Administrative Directive ("DC-ADM")
801 governs the administrative review process for prison misconduct proceedings. After
an inmate has been found guilty of a misconduct charge, he may file a written appeal to
the institution's Program Review Committee ("PRC") for an initial review. DC-ADM
801, Section VI (I)(1). If dissatisfied with the PRC's decision, the inmate may pursue a
second-level of appeal to the Superintendent. *Id.*, Section VI (I)(2). A final appeal may
then be taken to the Chief Hearing Examiner. *Id.*, Section VI (I)(3). At the conclusion of
the administrative review process, the inmate is notified of the Hearing Examiner's final
decision.

Similarly, DC-ADM 804 provides for administrative review of institutional
grievances. Inmates must first submit a written grievance to the institution's Grievance
Coordinator. DC-ADM 804, Section VI (A). An inmate wishing to appeal the result of
this initial review must file a written appeal to the prison superintendent; thereafter, a
final appeal may be presented to the Chief Hearing Examiner. *Id.*, Sections VI (C), (D).

Our review of the record confirms that Fortune has not fully exhausted the
administrative remedies available for the challenge to his misconduct proceedings. Not
only is this undisputed, but DOC has provided an affidavit confirming Fortune's failure to
file a final appeal to the Chief Hearing Examiner, as required by the provisions of
DC-ADM 801. Further, with one exception, the record indicates that Fortune did not
fully exhaust his remedies as related to his claims arising from alleged incidents of

property confiscation. There is no evidence that he ever initiated the administrative review process for the February 1999 incident charged in his complaint, and the record reflects that he only partially exhausted the process for the claims stemming from the alleged December 28, 1999 incident.

We also agree with the District Court that the one fully exhausted claim is devoid of merit. According to the record of the administrative review process, as well as the institutional rules governing custody, inmates are entitled to keep a limited amount of legal material inside their cells. Because Fortune's legal materials in his cell were determined to be excessive, some property was removed on December 3, 1999 and placed in his stored property. That property was less readily available, but not inaccessible; thus, on this record, the removal does not suggest that Fortune's constitutional rights were violated.

Accordingly, the judgment of the District Court, entered October 31, will be summarily affirmed.

TO THE CLERK:

Please file the foregoing opinion.

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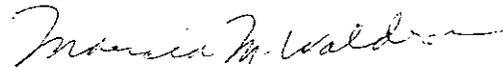
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