STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1123

Raymond L. Semler,
Appellant,

vs.

Cal Ludeman, Commissioner of Department of Human Services, et al.,
Respondents.

Filed July 7, 2009
Affirmed
Toussaint, Chief Judge

Ramsey County District Court
File No. 62-CV-07-376

Raymond L. Semler, OID #206261, M.L.-Annex, 1111 Highway 73, Moose Lake, MN 55767-9452 (pro se appellant)

Lori Swanson, Attorney General, Barbara Berg Windels, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2127 (for respondents)

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Halbrooks, Judge.

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Chief Judge

Appellant Raymond L. Semler challenges the district court's orders denying his motion for a temporary restraining order to enjoin actions taken by staff of the Minnesota

Sex Offender Program (MSOP), granting summary judgment in favor of respondents Cal Ludeman, Commissioner of Human Services, and other state officials, and dismissing his complaint. Because the facts and law on which appellant relies do not support his claims, we affirm.

D E C I S I O N

Appellant was civilly committed as a sexually dangerous person and has been housed in MSOP's Moose Lake treatment facility since January of 2007. He brought an action against respondents raising constitutional and statutory challenges to actions taken by MSOP staff and moved for a temporary restraining order. The district court denied his motion, granted summary judgment, and dismissed his complaint.

I.

We first address the denial of appellant's motion for a temporary restraining order, which sought to enjoin a written mailroom policy that MSOP instituted in August 2007.[1] The policy outlined the handling of legal and non-legal mail, both incoming and outgoing, to address safety inside and outside MSOP's secure facilities. The district court denied the motion. We review the district court's denial for an abuse of discretion. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993).

Five factors are to be considered when deciding whether to grant a temporary restraining order: (1) the relationship between the parties before the dispute arose; (2) the

[1] The commissioner of human services is authorized to promulgate rules to govern the operation of secure treatment facilities operated by MSOP. Minn. Stat. § 246B.04, subd. 1 (2008).

harm plaintiff may suffer if the temporary restraining order is denied as compared to that inflicted on defendant if the temporary restraining order is granted; (3) the likelihood that the party will prevail on the merits; (4) public policy considerations; and (5) administrative burdens imposed on the court if the temporary restraining order issues. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). The only factors in dispute here were harm to appellant and his likelihood of success on the merits. The court found that appellant had shown "inconveniences or frustrations" with the policy, but not irreparable harm. It further stated that appellant "fails to indicate how the new policy violates any statutory or constitutional rights." These conclusions are supported in the record. Appellant acknowledged that the policy did not deprive him of any mail delivery, chill his speech, or prevent him from accessing the courts. The district court's denial of a temporary restraining order was not abuse of discretion.

II.

Next, we turn to the numerous claims in appellant's suit for damages and other relief. On appeal from summary judgment, we review de novo for errors of law and for the existence of fact issues on which summary judgment should not have been granted. *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 77 (Minn. 2002). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *Id.* at 77-78.

A. Alleged Violation of Right to Free Speech

Appellant's first claim addresses the handling of his non-legal mail. His complaint states that all of his mail was being "opened, searched, scanned, read, and copied." He elsewhere refers to his mail being "censored," and at the summary-judgment hearing he referred to the potential "chilling effect" caused by staff requiring him to submit outgoing mail unopened.

A plaintiff must provide more than mere assertions to survive summary judgment. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn.1997). Here, appellant has not offered any proof that MSOP staff ever read or failed to deliver any of his mail. He showed that staff at certain prison facilities removed contents of mail that he sent there, but he offers no proof that MSOP staff deleted or altered any content from his correspondence. Appellant admitted that he had not suffered any chilling effect when corresponding with outside parties.

As for appellant's incoming, non-legal mail, his proof at most shows incidents in two categories: delay in delivery and opening mail after detecting metal inside. Delay was minor in all cases, and appellant has not shown that MSOP staff opened any mail that did not contain something metal, e.g., a staple or paper clip. The delay was long with one outgoing item, which contained a computer disk appellant was sending out for repair. Outgoing mail was also subject to being marked as mail sent from a secure treatment facility.

Courts that have addressed the rights of civilly-committed sex offenders typically acknowledge that generally patients' liberty interests are greater than those of inmates in prison. *See, e.g., Senty-Haugen v. Goodno*, 462 F.3d 876, 8986 (8th Cir. 2006). But the liberty interests of a person civilly committed as dangerous are "considerably less than those held by members of free society." *Id.* Institutional restrictions on the constitutional rights of committed persons "will generally be upheld if they are reasonably related to the therapeutic interests of the patients." *Martyr v. Mazur-Hart*, 789 F. Supp. 1081, 1085 (D. Or. 1992) (citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261 (1987) (rejecting heightened judicial scrutiny of state action in prison context and deferring to prison administrators)).

Turner examines four factors in determining the validity of actions said to impinge on prisoner's liberty interests, and the factors have been summarized by this court as:

> First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it. Second the court must consider whether there are alternative means of exercising the right that remain open to prison inmates, giving deference to the judgment of correction officials. Third, the court must evaluate how accommodation of the right will impact guards, inmates, and resources at the prison, again giving deference to correction officials. Finally, the court must determine whether ready alternatives exist or whether the regulation is instead an exaggerated response to prison concerns.

Kristian v. State, 541 N.W.2d 623, 629 (Minn. App. 1996) (quotations and citations omitted), *review denied* (Minn. Mar. 19, 1996). Deference to prison administrators is at its height when security and safety are at issue. *Id.* For the purpose of examining appellant's claims regarding incoming non-legal mail, we adapt the *Turner* test to the

MSOP context.

The MSOP mail-screening process is reasonably connected to MSOP's interest in a safe and secure facility. Appellant's incoming mail was opened when metal was detected inside, and minor delay is reasonably incident to these measures. Appellant also has the reasonable alternative of encouraging those sending him mail not to use staples or paper clips. The impact on staff of invalidating the policy could be severe, as the record shows that even small pieces of metal can be fashioned into dangerous implements. Lastly, appellant has not suggested a reasonable alternative to the MSOP practices.

Actions taken with appellant's non-legal outgoing mail deserve slightly more scrutiny than that provided by the *Turner* factors. In *Procunier v. Martinez*, the Supreme Court applied heightened scrutiny to restraints on outgoing mail because of the diminished impact on internal security. *See Thornburgh v. Abbott*, 490 U.S. 401, 413-14, 109 S. Ct. 1874, 1881-82 (1989) (discussing *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800 (1974)). *Martinez* states that the restrictions on outgoing mail must "further an important or substantial governmental interest . . . [in] security, order, and rehabilitation . . . [and] must be no greater than is necessary or essential to the protection of the particular governmental interest involved." 416 U.S. at 413, 94 S. Ct. at 1811, *overruled in part as recognized by Thornburgh*, 490 U.S. at 413-14, 109 S. Ct. at 1881-82 (limiting analysis of *Martinez* to outgoing correspondence).

MSOP's actions regarding appellant's outgoing mail do not amount to a constitutional violation. Appellant was required to submit non-legal mail unopened so

that it could be inspected, and his mail was marked as coming from a secure treatment facility. Appellant has not offered any proof that any MSOP staff read, censored, or confiscated any of his outgoing mail or otherwise altered its content. The mark on his outgoing mail reasonably effects some protection for the general public. The restrictions imposed on outgoing, non-legal mail further a substantial interest in security and rehabilitation and are no greater than necessary.

B. Alleged Improper Opening of Legal Mail

Appellant claims that several items of his legal mail were opened outside of his presence. In the prison setting, mail passing between an inmate and his attorney may not be read but may be opened in the presence of the inmate. *Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S. Ct. 2963, 2985 (1974). There is likely no need to provide any greater protection in the patient context; the fact that the mail is not read is sufficient to retain the attorney-client privilege. *Id.* (noting that opening mail in presence of inmate ensures that it is not read by staff). Here, appellant has not offered any proof that the contents of the opened items were privileged. None were correspondence with an attorney representing appellant nor were they marked with the name and address of any particular attorney. One item was outgoing, but appellant did not mark it as "Legal Mail," as required by MSOP. MSOP may reasonably require legal mail to be sufficiently identified as such. *See id.* at 576, 94 S. Ct. at 2985 (stating that it is "entirely appropriate that the State require any such communications to be specially marked."). No violation has been shown.

C. Alleged Violation of Right to Access Courts

Appellant claims that actions taken by MSOP staff denied him access to the courts. This claim involves a particular item of mail from the Court of Appeals, which failed to include appellant's full name the first time it was sent to him. Delay resulted, but appellant received the item after the court included his full name. Although this was understandably frustrating for appellant, it is not a constitutional violation.

D. Alleged Violation of Right to Due Process

Appellant frequently invoked the due-process clause in his complaint, other pleadings, and appellate brief but does not elaborate. The Supreme Court in *Martinez* recognized a liberty interest in prisoner correspondence, and some courts have continued to require some degree of procedural protection in mailroom policies. 416 U.S. at 418, 94 S. Ct. at 1814; *see, e.g.*, *Bonner v. Outlaw*, 552 F.3d 673, 676 (8th Cir. 2009). The court in *Martinez* found procedures sufficient if the institution gave notice when mail was rejected, gave the inmate a reasonable opportunity to protest, and referred complaints to a prison official "other than the person who originally disapproved the correspondence." 416 U.S. at 418-19, 94 S. Ct. at 1814.

The requirements of due process are met here. The record shows that appellant was always informed of any interference with his mail. He also utilized MSOP's internal grievance procedure, in which his complaints were heard by a patient representative and could be reviewed by an administrator.

E. Alleged Overcharging for Postage

Appellant argues that he was overcharged for postage for some of his outgoing mail. The record of grievances he filed suggests that he and MSOP staff were continuing to investigate how and why the mailroom arrived at the given charges. He has not shown that he followed through with seeking reimbursement or that it would have been futile to do so. *See City of Richfield v. Local No. 1215*, 276 N.W.2d 42, 51 (1979) (requiring exhaustion of administrative remedies unless futile). Judicial resolution of this claim is premature. *See id.* ("It is fundamental that before judicial review of administrative proceedings will be permitted, the appropriate channels of administrative appeal must be followed.").

F. *Alleged Violation of Statutory Bill of Patient Rights*

Appellant contends that MSOP's actions violate his rights under the patients' bill of rights. He is correct that patients have the right to send and receive correspondence. Minn. Stat. § 144.651, subd. 21 (2008). But the commitment statute makes an explicit exception, allowing limitation of those rights for patients who are committed as sexually dangerous persons. Minn. Stat. § 253B.185, subd. 7 (2008). Appellant therefore does not possess the same statutory rights as other patients in Minnesota, and no violation under the patients' bill of rights can be shown.

G. Alleged Identity Theft and Censorship via Check Policy

Appellant's complaint alleges that MSOP's check policy amounts to censorship and identity theft. He claims that the policy allows staff to inspect the contents of

outgoing mail that includes payments. As discussed previously, appellant has shown no censorship. As for identity-theft, he provided no evidence that anyone at MSOP misused personal information provided in making payments. Appellant has not created an issue of fact on the question of identity theft.

For each category of claims discussed above, the district court correctly concluded that no issues of material fact existed and that the law required summary judgment in respondents' favor. Because the district court properly dismissed appellant's complaint in its entirety, we do not reach the issue of whether his claims for damages were barred based on the immunity of the officials named in the action.

Affirmed.