STATE OF MICHIGAN

COURT OF APPEALS

LEON PERCIVAL, SR., Plaintiff-Appellant,	UNPUBLISHED May 20, 2014
v	No. 313033 Alger Circuit Court
SHERRIE ANDREWS, Defendant-Appellee.	LC No. 2008-004824-CZ

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that granted defendant's motion for summary disposition. For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a state prisoner and serial litigant who, by his own estimation, has filed at least 40 suits against the state. This latest claim involves a piece of mail, supposedly from plaintiff's attorney,[1] which defendant, an employee in the prison mail room, opened and identified as non-legal mail outside of plaintiff's presence. After he learned of defendant's actions, plaintiff sued her in Alger Circuit Court under 42 USC § 1983, and sought $1,500 in damages for: (1) her alleged violation of his First and Fourteenth Amendment rights; and (2) conversion.

After a convoluted procedural process that involved numerous motions, plaintiff's request for sanctions against defendant, a trial court decision, and a remand from this Court,[2] defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Again, defendant noted that her affidavit alleged that the mailing label only stated "P.C.," not

[1] Plaintiff asserts that the envelope possessed a clearly marked return address that read: "Cohl, Stoker, Toskey & McGlinchey, P.C.; Attorneys and Counselors . . ." Defendant disputed that the mailing label was this detailed, and instead only read: "Cohl, Stoker, Toskey & McGlinchey, P.C." and did not include the words "Attorneys and Counselors."

[2] *Percival v Andrews*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2011 (Docket No. 298454).

"Attorneys and Counselors," making the letter's legal nature much harder for a lay observer to ascertain. Further, defendant argued that plaintiff failed to state a claim because: (1) he did not actually suffer any damages; (2) his mail was not delayed or destroyed; and (3) he has no privacy right in the content of his mail. Defendant concluded by stating that she was also entitled to qualified immunity.

Plaintiff responded with his own motion for summary disposition. He asserted that defendant frequently obstructed and manipulated prisoner mail, and claimed that another prisoner received damages from defendant for opening the prisoner's legal mail.[3]

The trial court rejected plaintiff's arguments and granted defendant's motion for summary disposition.[4] It held that defendant did not violate plaintiff's constitutional rights by mistakenly opening the legal mail and processing it consistent with prison procedures for ordinary mail. Specifically, the court held that a single instance of erroneous letter opening did not amount to a constitutional violation. The court also noted that plaintiff suffered no harm from defendant's actions, as he received the mail the same day the prison received it, providing further reason to dismiss plaintiff's constitutional claim. Further, it ruled that defendant did not violate plaintiff's privacy rights because she followed the appropriate policy for ordinary mail, that attorney-client privilege is not a legal "right," and that no conversion occurred because the legal mail was simply delayed for a brief period. And because no constitutional violation took place, the trial court held that defendant possessed immunity from plaintiff's suit.

Plaintiff appealed the decision to our Court in October 2012, and makes the same arguments on appeal as he did at trial. We address each in turn.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 286; 818 NW2d 460 (2012). "A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Id*. at 286-287. "Summary disposition is proper under MCR 2.116(C)(10) if 'there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.'" *Michigan Pipe & Valve-Lansing, Inc v Hebeler Enterprises, Inc*, 292 Mich App 479, 483; 808 NW2d 323 (2011), quoting MCR 2.116(C)(10).

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[3] In *Kelley v Hinsa*, 2007 WL 1040362 (WDMI, 2007), the federal court denied defendant Andrews's motion to dismiss plaintiff Opelton Kelley's claim that she violated his First Amendment rights in opening and processing his legal mail.

[4] The trial court did not identify the specific rule under which it granted summary disposition, but it held that "the plaintiff has failed to state any valid claim," which suggests that it did so under MCR 2.116(C)(8).

II. ANALYSIS[5]

A. PRISONER MAIL AND THE CONSTITUTION

"Any person who, under color of state law, deprives another of rights protected by the constitution or laws of the United States, is liable under 42 USC 1983." *Morden v Grand Traverse Co*, 275 Mich App 325, 332; 738 NW2d 278 (2007). "A prisoner's right to receive mail is protected by the First Amendment, but prison officials may impose restrictions that are reasonably related to security or other legitimate penological objectives." *Sallier v Brooks*, 343 F3d 868, 873 (CA 6, 2003). When the mail is legal in nature, courts "have heightened concern with allowing prison officials unfettered discretion to open and read an inmate's mail . . . ." *Id.* at 874.

However, prison officials do not violate the First Amendment simply by opening legal mail. A violation only occurs when a prison official opens or reads *multiple pieces* of legal mail outside a prisoner's presence in an *arbitrary or capricious manner*.[6] See *Merriweather v Zamora*, 569 F3d 307, 317 (CA 6, 2009) ("[t]wo or three pieces of [legal] mail opened in an arbitrary or capricious way suffice to state a claim"). Specifically, "[t]he law has not established that reading properly marked legal mail in inmates' presence violates constitutional rights in and of itself. There must be some allegation that the prison official's conduct amounted to denial of access to the courts or some form of censorship of speech." *Stanley v Vining*, 602 F3d 767, 770 (CA 6, 2010) (citations omitted). This is because the prison is permitted to balance the competing objectives of prison security and constitutional rights through a policy that allows prison officials to open legal mail addressed to a prisoner in the prisoner's presence. See *Wolff v McDonnell*, 418 US 539, 576-577; 94 S Ct 2963; 41 L Ed 2d 935 (1974). The prison officials

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[5] Though the issue is not raised by defendant, we note that it is possible plaintiff's suit should be dismissed outright because he failed to comply with the Prisoner Litigation Reform Act (PLRA), MCL 600.5501, *et seq*. Among other things, the PLRA requires a plaintiff bringing a "civil action concerning prison conditions" (the type of action plaintiff brings here) to "disclose the number of civil actions and appeals [plaintiff] has previously initiated." MCL 600.5507(2). Here, plaintiff essentially guesses as to how many suits he has brought, stating: "[p]laintiff does not know exactly how many civil actions he has filed. The best estimate he can offer is over 40, but no more than 50. . . . For the record, Plaintiff will state 50." His failure to provide an exact number of "civil actions and appeals" contradicts the clear mandate of MCL 600.5507(2), and, standing alone, would merit affirmance of the trial court's award of summary disposition to defendant. See *Tomzek v Dep't of Corrections*, 258 Mich App 222, 224–225; 672 NW2d 511 (2003). We do not resolve the case on these grounds, however, as plaintiff's claim fails for other reasons discussed below.

[6] See also *Lavado v Keohane*, 992 F2d 601, 603 (CA 6, 1993) (allowing prisoner's suit over opening of legal mail to proceed to trial when prison officials opened prisoner's legal mail on nine separate occasions); and *Sims v Landrum*, 170 Fed Appx 954, 957 (CA 6, 2006) (holding that prison officials who negligently failed to deliver a single piece of mail to prisoner which involved appeal and was time sensitive did not violate prisoner's constitutional rights).

may inspect for the presence of contraband without reading the content of the legal mail. See *id;* and *People v Oliver*, 63 Mich App 509, 515 n 2; 234 NW2d 679 (1975).

Here, defendant opened a single piece of legal mail on one occasion. Plaintiff suffered no real injury from defendant's actions, in that he received the mail on the same day as the prison, and defendant did not cause plaintiff to miss an important procedural deadline. Plaintiff has therefore failed to state a valid constitutional claim. As noted, to successfully show a violation of constitutional rights, a plaintiff must demonstrate that prison officials opened multiple pieces of his legal mail in an arbitrary and capricious manner. A single opening of legal mail by a prison official—especially where plaintiff received the communication on the same day, and where the prison official's actions did not cause defendant real injury—does not violate a prisoner's constitutional rights.

Accordingly, the trial court properly granted defendant's motion for summary disposition, as plaintiff failed to state a valid constitutional claim under 42 USC § 1983 on which relief could be granted.[7]

B. CONVERSION

"Conversion is defined as 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233, quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Conversion may occur when the deprivation of personal property is only temporary. *Pamar Enterprises, Inc v Huntington Banks of Mich*, 228 Mich App 727, 734; 580 NW2d 11 (1998).

Plaintiff's complaint does not include factual allegations that support a claim of conversion. Nor did he initially allege that defendant delayed his receipt of the letter at issue, which is his argument on appeal. Thus, the trial court properly awarded summary disposition to defendant under MCR 2.116(C)(8) because plaintiff's factual allegations at pleading were legally insufficient to support his claim of conversion. See *Greenville Lafayette*, 296 Mich App at 286–287.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad

[7] Because no constitutional violation occurred, defendant is entitled to immunity against plaintiff's suit. See *Manuel v Gill*, 270 Mich App 355, 367–368; 716 NW2d 291 (2006), aff'd in part, rev'd in part on other grounds 481 Mich 637 (2008).

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WHITBECK, J. (*concurring*).

I write separately to indicate that, even if plaintiff Leon Percival, Sr. stated a valid § 1983 claim against defendant Sherrie Andrews, the trial court properly dismissed the claim because Andrews was entitled to qualified immunity. I would affirm on this basis alone.

In a § 1983 action, a defendant "may invoke the defense of qualified immunity to avoid the burden of standing trial."[1] To determine whether qualified immunity applies, "a court must first determine whether a constitutional violation occurred."[2] If so, a court must then determine whether the constitutional violation involved "clearly established statutory or constitutional rights of which a reasonable person would have known."[3] For a right to be clearly established, there must be binding precedent *directly* on point.[4]

Therefore, even if a constitutional violation occurred, Andrews was entitled to qualified immunity because the alleged unlawfulness of her conduct was not "apparent in light of

[1] *Walsh v Taylor*, 263 Mich App 618, 635; 689 NW2d 506 (2004).

[2] *Manuel v Gill*, 270 Mich App 355, 367; 716 NW2d 291 (2006), aff'd in part, rev'd in part on other grounds 481 Mich 637 (2008).

[3] *In re Morden*, 275 Mich App 325, 340; 738 NW2d 278 (2007), quoting *Harlow v Fitzgerald*, 457 US 800, 818; 102 S Ct 2727; 73 L Ed 2d 396 (1982) (quotation marks omitted)

[4] *Morden*, 275 Mich App at 340.

preexisting law."[5] Under cases regarding prisoner mail (for example, *Merriweather v Zamora*) "[t]wo or three pieces of mail opened in an arbitrary or capricious way suffice to state a claim."[6]

Here, even if Andrews's alleged opening of the legal mail despite the label "Attorneys and Counselors" violated Percival's First Amendment rights, it was not clearly established or apparent that a single instance of opening legal mail without authorization could violate a prisoner's First Amendment rights. The incident here occurred in July 2007. *Merriweather* (issued in 2009) cited *Sallier*[7] (issued in 2003) and *Lavado*[8] (issued in 1993) for the proposition that "[t]wo or three pieces of mail opened in an arbitrary or capricious way suffice to state a claim."[9] And federal courts have frequently held, in unpublished decisions, that a defendant's opening of a *single* piece of legal mail does not establish a constitutional violation.[10]

Accordingly, the proposition that opening a *single* piece of a prisoner's mail could violate the prisoner's constitutional rights was not "preexisting law" when the incident here occurred. Rather, existing case law only clearly established that at least two unauthorized openings of legal mail may violate a prisoner's First Amendment rights. Percival's complaint only identified one instance of unauthorized opening of legal mail by Andrews. Percival did not contend that Andrews opened his legal mail without authorization on multiple occasions. Because Andrews's alleged conduct was not unlawful in light of clearly established preexisting law, I conclude that Andrews was entitled to qualified immunity.[11]

I would affirm on this basis.

/s/ William C. Whitbeck

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[5] *Manuel*, 270 Mich App at 374.

[6] *Merriweather v Zamora*, 569 F3d 307, 317 (CA 6, 2009). See *Stanley v Vining*, 602 F3d 767, 774 (COLE, J., concurring in part and dissenting in part) (quoting the same).

[7] *Sallier v Brooks*, 343 F3d 868, 873 (CA 6, 2003); *Sallier v Ramsey*, 142 Fed Appx 906 (CA 6, 2005) (the same case, after remand).

[8] *Lavado v Keohane*, 992 F2d 601, 609-610 (CA 6, 1993).

[9] *Merriweather v Zamora*, 569 F3d 307, 317 (CA 6, 2009).

[10] See, e.g. *Barker v Sowders*, 187 F3d 634, 634 (CA 6, 1999); *Sims v Landrum*, 170 Fed Appx 954, 957 (CA 6, 2006); *Velthuysen v Bolton*, unpublished opinion of the Western District of Michigan, issued August 23, 2011 (2011 WL 4074254); *Terrell v Hodges*, unpublished opinion of the Western District of Michigan, issued October 31, 2012 (2012 WL 5377969).

[11] See *Manuel*, 270 Mich App at 374.