

NOT DESIGNATED FOR PUBLICATION

No. 125,650

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BOBBY BRUCE WHITE,  
*Appellant,*

v.

SHANNON MEYER, Warden,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Leavenworth District Court; GERALD R. KUCKELMAN, judge. Opinion filed April 7, 2023. Affirmed.

*Joseph A. Desch*, of Law Office of Joseph A. Desch, of Topeka, for appellant.

*Fred W. Phelps Jr.*, deputy chief legal counsel, of Kansas Department of Corrections, for appellee.

Before GREEN, P.J., GARDNER, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: In November 2020, Bobby Bruce White filed a pro se petition for writ of habeas corpus under K.S.A. 60-1501, alleging: (1) that his due process rights were violated in the prison grievance process; (2) that he was discriminated against because of his age and disability, as well as that his medical restrictions were violated; (3) that he was wrongfully issued a disciplinary report for disobeying orders; and (4) that he was assaulted and battered, then wrongfully issued a disciplinary report for battery. The State moved to dismiss, arguing that White failed to state a claim upon which relief may be granted. The district court summarily dismissed White's K.S.A. 60-1501 petition and

found that his claims were meritless. On appeal, White and the State make these same arguments. We affirm the district court's summary dismissal of White's claims because he either fails to allege a valid claim or fails to show exhaustion of administrative remedies.

## FACTS

### *Grievances*

This case arguably began in April 2020, when White filed an inmate request and stated that prison officials were ignoring his medical restrictions by placing him in a top bunk in a cell on the second floor. White also alleged that he had a history of falling. In May 2020, before the staff's response to White, medical personnel contacted White's Unit Team (UT) to verify he was placed on a bottom bunk and not required to climb stairs. Shortly afterwards, a staff member responded to White and stated that he was currently placed on a bottom bunk and that there were "no stairs on [the] medi[c]al end."

Later that month, White filed grievance No. AA20200264 and alleged that he was discriminated against after being denied employment and that his medical restrictions were violated. The UT responded a few days later, by stating that job placement is not subject to the grievance procedure. As for White's alleged medical restrictions, the UT stated that it was working to move White to a cell "more consistent with [his] medical needs." White indicated on this form that he was dissatisfied with the UT's response and that he received the response later than he should have. Soon after, the warden responded to White's dissatisfaction and concluded that the grievance officer acted appropriately.

In June 2020, White filed grievance No. AA20210002, alleging similar medical restriction violations. The UT responded and indicated that White had no medical restrictions. White was again dissatisfied with this response, and in early July 2020, the warden found that the grievance officer acted appropriately here, as well.

White appealed the warden's decisions in August 2020. Two days later, with respect to both grievances, the Secretary of Corrections found that the responses rendered to White were appropriate. The Secretary of Corrections also noted that White offered no evidence or argument on appeal.

### *Disciplinary actions*

In June 2020, White was issued disciplinary report (DR) No. 5568 for disobeying orders and pleaded no contest. White was placed in administrative segregation as punishment. White did not properly appeal this matter.

In July 2020, White was found guilty of battery in DR No. 0310 for allegedly pushing past an officer to get out of his cell. White was again placed in administrative segregation as punishment. Specifically, White was placed in administrative segregation for 15 days with his privileges restricted for 60 days. When White appealed, both the warden and the Secretary of Corrections affirmed this decision.

### *Property claim*

In August 2020, White filed a property damage/loss claim, requesting the return of a master lock and an alarm clock. In October 2020, White filed an inmate request asking for the return of the same. A staff member responded and indicated the items would be returned.

### *K.S.A. 60-1501 petition*

In November 2020, White filed a pro se K.S.A. 60-1501 petition. In this petition, White argued that he was unlawfully deprived of his liberty, as well as humane treatment while incarcerated at the Lansing Correctional Facility. In general, White alleged age and disability discrimination, retaliation, and reprisal after his use of the prison grievance

procedure. White also alleged he was assaulted and battered by a prison official in July 2020, and that this attack caused "excruciating pain" as a result of a medical condition. Because of White's confrontation with this officer, White was issued the beforementioned DR No. 0310 for battery. The medical condition in question was allegedly an enlarged testicle. In April 2020, White first reported this issue and requested medical assistance. In June 2020, White visited with medical personnel who ordered an ultrasound be performed to reach a diagnosis.

To be specific, however, White made four claims in his K.S.A. 60-1501 petition: (1) White was denied due process with regard to his grievances and appeals; (2) White's medical restrictions were violated, and he was discriminated against as a result of his age and disability; (3) White was wrongfully issued DR No. 5568; and (4) White was assaulted and battered, then wrongfully issued DR No. 0310.

White attached eight exhibits to his petition:

- Exhibit 1 included several inmate requests inquiring into employment, a grievance he filed, and his appeal in DR No. 0310. It also included a July 2020 letter from White to the Secretary of Corrections regarding employment discrimination, medical restrictions, and lengthy grievance responses.
- Exhibit 2 included grievance Nos. AA20210002 and AA20200264. It also included the warden's decisions in both matters. Exhibit 2 further included White's appeals to the Secretary of Corrections in both actions. Similar to Exhibit 1, Exhibit 2 also included inmate requests regarding employment discrimination and medical restrictions. Exhibit 2 lastly included White's medical restrictions.
- Exhibit 3 included documents from DR No. 5568.
- Exhibit 4 included White's motion to vacate in a separate K.S.A. 60-1507 action.
- Exhibit 5 included various inquiries into health services regarding White's medical condition.

- Exhibit 6 included documents from DR No. 0310, as well as the disposition of his appeal in the matter with the Secretary of Corrections.
- Exhibit 7 included an inventory of White's personal property, an inmate request regarding this property, as well as White's property damage/loss claim.
- Exhibit 8 included the outcomes of his appeals with the Secretary of Corrections for grievance Nos. AA20210002 and AA20200264. It also included White's various inmate requests regarding the same.

The district court issued a writ of habeas corpus in April 2021, and it was served to the State in June. In July 2021, the State answered White's K.S.A. 60-1501 petition and argued that White failed to state a claim upon which relief could be granted. The State argued that White (1) had no protected liberty interest in the prison grievance procedure; (2) had no protected liberty interest in employment and housing, and that he failed to properly argue shocking or intolerable conduct; (3) failed to exhaust administrative remedies in DR No. 5568; and (4) suffered no loss of liberty or property as a result of his convictions in DR Nos. 5568 and 0310.

The district court agreed with the State and summarily dismissed White's K.S.A. 60-1501 petition in January 2022. White timely appeals.

#### ANALYSIS

*Did the district court err in summarily dismissing White's claim that his due process rights were violated?*

White first alleges that his administrative rights to a timely prison grievance process were ignored, and thus that his due process rights were violated. The State, on the other hand, argues that the prison grievance process fails to confer a protected liberty interest and merely confers a procedural right.

In this case, the district court issued a writ, the State answered, and the district court conducted summary proceedings under K.S.A. 2022 Supp. 60-1505(a), which states that "[t]he judge shall proceed in a summary way." After a review of the petition and the parties' arguments, the district court granted the State's motion to dismiss. White argues that the district court erred in summarily dismissing his petition because he raised substantial issues of fact and law. The State, on the other hand, argues that the district court's dismissal was consistent with existing law. So, we must ask this question: Was summary dismissal appropriate in this matter?

### *Standard of review*

To state a claim for relief under K.S.A. 60-1501 and avoid summary dismissal, a petition must allege "shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Johnson v. State*, 289 Kan. 642, 648, 215 P.3d 575 (2009). Summary dismissal is proper "if, on the face of the petition, it can be established that petitioner is not entitled to relief, or if, from undisputed facts, or from uncontrovertible facts, such as those recited in a court record, it appears, as a matter of law, no cause for granting a writ exists." 289 Kan. at 648-49; see K.S.A. 2022 Supp. 60-1503(a). An appellate court exercises de novo review of a summary dismissal. 289 Kan. at 649.

Apart from this, because White filed his K.S.A. 60-1501 petition pro se, his pleadings must be liberally construed, and its content must be given effect rather than the labels and forms used. *State v. Gilbert*, 299 Kan. 797, 798, 326 P.3d 1060 (2014).

### *Analysis*

As background, White alleged below that several parties denied him due process because they disregarded the time limitations set out by the Kansas Administrative Regulations regarding the prison grievance procedure. Also, White asserted that they

failed to give proper findings of fact, conclusions of law, or sound reasoning. As a result, White argued that there was no administrative remedy for his grievances.

As correctly noted by the State, to establish a cognizable claim for a due process violation, White must establish a valid liberty or property interest in his incarceration status which has been infringed by the State without due process of law. *Laubach v. Roberts*, 32 Kan. App. 2d 863, Syl. ¶ 8, 90 P.3d 961 (2004). Protected liberty interests arise from the Due Process Clause and the laws of the states. *Shepherd v. Davies*, 14 Kan. App. 2d 333, 335, 789 P.2d 1190 (1990).

"A State creates a protected liberty interest by placing substantive limitations on official discretion." *Williams v. DesLauriers*, 38 Kan. App. 2d 629, 637, 172 P.3d 42 (2007). Indeed, a State-created liberty interest is usually "limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. [Citations omitted.]" *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995); see also *Schuyler v. Roberts*, 285 Kan. 677, 682, 175 P.3d 259 (2008) ("A protected liberty interest may arise when prison authorities impose a restraint on a prisoner's already quite-limited freedom, and the restraint is atypical and a significant hardship on the inmate in relation to the ordinary incidents of prison life.").

"The threshold test to determine a violation of due process is whether the state laws and regulations structuring the authority of prison officials contain language of an unmistakably mandatory character requiring that certain procedures must be employed and that punishment will not occur absent specified substantive predicates. If this threshold test is met, we examine whether the discipline imposed represents a significant and atypical hardship on the prisoner which was not contemplated within the realm of conditions of the original sentence. If it does not, there is no due process violation. [Citation omitted.]" *Amos v. Nelson*, 260 Kan. 652, 666, 923 P.2d 1014 (1996).

Although there is little Kansas caselaw on the matter, other state courts have concluded that the prison grievance process does not confer a protected liberty interest. See *M.S. v. People*, 303 P.3d 102, 105 (Colo. 2013) (unless a state statutory scheme guarantees a particular substantive outcome, it does not confer a constitutionally protected liberty interest); *Green v. Nadeau*, 70 P.3d 574, 576 (Colo. Ct. App. 2003) (finding that prison grievances do not confer a protected liberty interest).

Federal courts have drawn the same conclusion. The Tenth Circuit Court of Appeals has found that the prison grievance procedure is a procedural right and does not confer a substantive right upon inmates. As a result, it does not confer a protected liberty interest requiring Fourteenth Amendment protections. See *Burnett v. Allbaugh*, 715 Fed. Appx. 848, 852 (10th Cir. 2017) (unpublished opinion); *Von Halley v. Clements*, 519 Fed. Appx. 521, 523-24 (10th Cir. 2013) (unpublished opinion); *Boyd v. Werholtz*, 443 Fed. Appx. 331, 332 (10th Cir. 2011) (unpublished opinion). The Tenth Circuit is not alone in its reasoning. See *Massey v. Helman*, 259 F.3d 641, 647 (7th Cir. 2001) (a state-created prison grievance procedure does not confer a substantive right upon an inmate and only provides a procedural right); *Burnside v. Moser*, 138 Fed. Appx. 414, 416 (3d Cir. 2005) (unpublished opinion) (inmates do not have a constitutionally protected right to a grievance procedure).

On appeal, White contends that the district court erred in finding that no liberty interest was involved as it "was his right to file, and have timely processed, a grievance regarding legal copies." In essence, White asserts that his fundamental right to access the court system was violated and that the prison failed to follow its own rules. But based on the caselaw detailed above, the prison grievance process does not confer a protected liberty interest onto him.

With respect to shocking or intolerable conduct, White did not allege conduct "of such character or consequence as to shock the general conscience, or to be intolerable to

fundamental fairness." *Davis v. McKune*, 30 Kan. App. 2d 822, Syl. ¶ 4, 48 P.3d 1287 (2002). Untimeliness in the prison grievance system does not shock the conscience or prove to be fundamentally unfair. It does not generally alter the outcome of the process, or at the very least, it did not do so in the current instance. But see *Hogue v. Bruce*, 279 Kan. 848, Syl. ¶ 4, 113 P.3d 234 (2005) ("A prison official's justification for denying an inmate some aspect of procedural due process cannot be arbitrary . . ."). More importantly, White fails to make such an argument on appeal, thus abandoning it. See *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018) (issues not adequately briefed are deemed waived or abandoned).

After a review of the caselaw, the prison grievance process does not confer a protected liberty interest. So, White fails to establish a valid claim under K.S.A. 60-1501, and we affirm the district court's summary dismissal of this issue.

*Did the district court err in summarily dismissing White's claim that he was discriminated against and that his medical restrictions were violated?*

White next alleges that Kansas Department of Corrections (KDOC) personnel violated his medical restrictions and did so in deliberate indifference to his well-being, implicating the Eighth Amendment to the United States Constitution. The State argues instead that inmates do not have a constitutionally protected right to employment, nor to housing or classification.

To begin, an inmate must file "proof that the administrative remedies have been exhausted" with a habeas corpus petition. K.S.A. 75-52,138. This requirement is strictly enforced. *Corter v. Cline*, 42 Kan. App. 2d 721, 723, 217 P.3d 991 (2009). White included proof of exhaustion of administrative remedies for both grievances mentioned in his K.S.A. 60-1501 petition.

In grievance No. AA20200264, which primarily detailed the alleged employment discrimination, White appealed first to the warden and then to the Secretary of Corrections, both of whom decided against him. In grievance No. AA20210002, which detailed the alleged medical restriction violations, White also appealed to both the warden and to the Secretary of Corrections before this appeal. Furthermore, proof of this exhaustion of administrative remedies is attached to White's petition. Thus, White has satisfied K.S.A. 75-52,138, and our analysis turns next to whether White's claims survive summary dismissal.

The State is correct in asserting that inmates generally do not have a constitutionally protected liberty interest in housing, classifications, or employment. *Moody v. Daggett*, 429 U.S. 78, 88 n.9, 97 S. Ct. 274, 50 L. Ed. 2d 236 (1976) (inmates do not necessarily have a right in classification); *Meachum v. Fano*, 427 U.S. 215, 224, 228-29, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976) (inmates do not have a liberty interest in which facility they are placed in); *Templeman v. Gunter*, 16 F.3d 367, 370 (10th Cir. 1994) (absent statutory authorization, inmates do not have a right to employment).

Regarding medical care, however, inmates retain the right to adequate medical care and treatment. *Darnell v. Simmons*, 30 Kan. App. 2d 778, 780, 48 P.3d 1278 (2002).

"Deliberate indifference to the serious medical needs of a prisoner is the measure by which violations of the Eighth Amendment are examined. Deliberate indifference to the serious medical needs of prisoners occurs by the unnecessary and wanton infliction of pain. 'Deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment.'

"Deliberate indifference involves both an objective and a subjective component. The objective component is met if the deprivation is 'sufficiently serious.' A medical need is sufficiently serious 'if it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the

necessity for a doctor's attention.'" The subjective component is met if a prison official 'knows of and disregards an excessive risk to inmate health or safety.'

"A Kansas federal district court used the phrases 'callous inattention,' 'reckless disregard,' and 'gross negligence' to describe deliberate indifference. The Kansas Court of Appeals discussed the meaning of deliberate indifference in *Cupples v. State*, 18 Kan. App. 2d 864, 861 P.2d 1360 (1993). The court defined deliberate indifference as more than ordinary negligence but less than express intent to harm or maliciousness. [Citations omitted.]" 30 Kan. App. 2d at 780-81.

White alleged below that he was denied employment because of his age and disability, as well as that his medical restrictions were violated. Nevertheless, White fails to argue discrimination on appeal. Instead, White's argument on appeal focuses on only his medical restrictions. See *Arnett*, 307 Kan. at 650 (issues not adequately briefed are deemed waived or abandoned). But even so, as discussed earlier, White has no protected liberty interest in employment, housing, or classification.

So, our analysis will turn to White's claim that his medical restrictions were violated. We must accept White's allegations as true for review purposes. See *Schuyler*, 285 Kan. at 679. But mere accusations of unconstitutional conduct do not entitle White to relief under K.S.A. 60-1501.

White argues that he was not to climb stairs or sleep in a top bunk due to his age and disability. Yet, he allegedly was ordered to sleep in a top bunk and climb stairs. In his brief, White alleges that these medical restrictions were a medical need and that prison officials showed deliberate indifference by ignoring those restrictions. Thus, White asserts that he endured an unnecessary and wanton infliction of pain. As explained earlier, to survive summary dismissal, White must demonstrate both components of deliberate indifference in relation to his medical restrictions. See *Darnell*, 30 Kan. App. 2d at 780-81.

Turning first to the objective component of deliberate indifference, we note that White argues that he has a sufficiently serious medical need. For this component of deliberate indifference, we "must consider whether the claim involves an essential human need." *Stolte v. Cummings*, 31 Kan. App. 2d 639, 641, 70 P.3d 695 (2003). The evidence is contradictory on whether White has a sufficiently essential medical need. According to the record, White was classified in August 2019 as having certain medical restrictions, such as needing a bottom bunk, being unable to climb stairs, and requiring a cane for ambulation. But in February 2020, White was classified as able to climb stairs, despite perhaps needing a cane or bottom bunk. Interestingly, in May 2020, medical personnel contacted White's UT to confirm whether White was assigned a bottom bunk and was not required to climb stairs. Roughly one week later, White's UT confirmed that White had been assigned to a bottom bunk and was not required to climb stairs.

Moving to the subjective component of deliberate indifference, we observe that White argues that prison officials knew and disregarded his serious medical needs. To reiterate, the subjective component requires us to determine "whether prison officials were aware of the inmate's needs yet failed to meet a need in disregard of an excessive risk to the inmate's health or safety." *Stolte*, 31 Kan. App. 2d at 641. White asserted below that sleeping on a top bunk and being required to climb stairs posed a serious risk to his safety. White even alleged to have fallen several times.

It seems obvious that prison officials were aware of White's medical restrictions due to his numerous inmate requests and grievances. Also, based on White's assertion that he has fallen many times, it also seems clear that the situation posed a serious risk to his safety. That said, it is less clear that prison officials disregarded this risk.

In this case, we assume that White's medical restrictions in August 2019, such as needing a bottom bunk, being unable to climb stairs, and requiring a cane for ambulation presented a serious medical need. Nevertheless, we find no support in the record for

finding any deliberate indifference in the treatment of White's medical conditions. For example, in February 2020, White received a medical evaluation and was classified as able to climb stairs, despite perhaps needing a cane or a bottom bunk. Further, in May 2020, medical personnel contacted White's UT to confirm whether White had been assigned a bottom bunk and whether UT had imposed the no-stairs restrictions for White. Almost one week later, White's UT confirmed that White had been assigned to a bottom bunk and was not required to climb stairs. Thus, the record indicates that prison officials ensured White's safety and recognized his medical restrictions. Also, medical personnel coordinated with prison officials to ensure White remained on a bottom bunk and away from stairs.

We know the timeliness and adequacy of the medical care that White received clearly did not satisfy him, but that is not the requirement to be applied in determining whether error of constitutional magnitude occurred. We recognize that a simple difference of opinion between an inmate and medical staff regarding treatment or diagnosis does not itself state a constitutional violation. *Ledoux v. Davies*, 961 F.2d 1536, 1537 (10th Cir. 1992); see also *Swisher v. Hamilton*, 12 Kan. App. 2d 183, 187, 740 P.2d 95 (1987) ("[P]etitioner quarrels with the manner of treatment available to him and does not allege circumstances suggesting a reckless indifference to a need for treatment."). Thus, we affirm the district court's summary dismissal of this claim.

*Did the district court err in summarily dismissing White's claim that he was wrongly issued DR No. 5568?*

White thirdly asserts that he was wrongly issued DR No. 5568, which denied him a protected liberty interest in his right to be free from cruel and unusual punishment, again implicating the Eighth Amendment to the United States Constitution. The State argues on appeal that White failed to exhaust administrative remedies and, importantly,

failed to demonstrate that exhaustion by providing attachments to his K.S.A. 60-1501 petition.

As discussed previously, inmates must exhaust administrative remedies before filing a civil claim against state actors and prison facilities. See K.S.A. 75-52,138. And again, K.S.A. 75-52,138 also requires inmates to establish that they have exhausted available administrative remedies in their original petitions.

White pleaded no contest in DR No. 5568 in June 2020 for disobeying orders under K.A.R. 44-12-304. As a result, White was placed in segregation. White, however, failed to exhaust administrative remedies, or at the least, failed to attach evidence of such exhaustion to his petition. According to the record, White failed to appeal the matter to the Secretary of Corrections. Thus, we affirm the district court's summary dismissal of this issue.

*Did the district court err in summarily dismissing White's claim that he was assaulted and battered, as well as wrongfully issued DR No. 0310?*

Lastly, White asserts that he was assaulted and battered by KDOC personnel, and that DR No. 0310 was merely a result of this corporal punishment, once again implicating the Eighth Amendment to the United States Constitution. The State argues that White has failed to exhaust administrative remedies.

Again, inmates must exhaust administrative remedies before filing a civil claim, and they must establish this exhaustion in their original petition. K.S.A. 75-52,138. White attached several documents to his petition demonstrating his appeal to the warden and Secretary of Corrections. Thus, we determine that White exhausted administrative remedies as required by K.S.A. 75-52,138 in DR No. 0310.

Nevertheless, White failed to file a grievance regarding the alleged assault and battery or, in the alternative, failed to attach such proof of exhaustion to his petition. Instead, White has seemingly combined the two issues in error. As a result, while White has properly exhausted his administrative remedies in DR No. 0310, he has failed to do so with his assault and battery claim. We must, therefore, focus on only DR. No. 0310.

White was found guilty of battery in DR No. 0310 in July 2020 under K.A.R. 44-12-324. Below and on appeal, White alleges that he was not the perpetrator. Instead, White argues that KDOC personnel assaulted and battered him. According to testimony at White's hearing on the matter, a "video of the incident was found to be inconclusive" as to who initiated the incident.

Based on White's assertions, he seems to be challenging his guilt and not the penalty imposed against him. But an inmate's claim under K.S.A. 60-1501 must demonstrate either the deprivation of a constitutional right or shocking or intolerable conduct. White fails to make such a claim.

As punishment in DR No. 0310, White was placed in administrative segregation for 15 days with his privileges restricted for 60 days. It is difficult to see how this penalty placed a significant or atypical hardship on him. And although White alleges the penalty in DR No. 0310 was "more severe" than the penalty imposed in DR No. 5568, White makes no further assertion and does not explain why the penalty was severe. As a result, White's due process rights were not implicated. See *Amos*, 260 Kan. 652, Syl. ¶ 4.

White also makes a very brief assertion regarding property loss, and indeed the record indicates White was deprived of two of his possessions after being segregated. But once again, White fails to establish he was permanently deprived of such property. And indeed, in his brief, White merely remarks that he "documented the loss of his property" after he was segregated.

White's claim on appeal seems to incorrectly focus on whether KDOC personnel assaulted and battered him. The focus should have instead been on DR No. 0310 and whether there was a constitutional deprivation or shocking or intolerable conduct in relation to it. Because White fails to make a valid claim, we affirm the district court's summary dismissal of this issue.

Affirmed.