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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ERINEO CANO, Plaintiff/Appellant, v. M. IOVINO, Defendant/Appellee.	2 CA-CV 2007-0082 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200500474

Honorable Kevin D. White, Judge

AFFIRMED

Erineo Cano
Florence
In Propria Persona

Terry Goddard, Arizona Attorney General
By Wanda E. Hofmann
Tucson
Attorneys for Defendant/Appellee

P E L A N D E R, Chief Judge.

¶1 In this civil rights action, plaintiff/appellant Erineo Cano, a prison inmate, appeals from the trial court's dismissal of his complaint, filed pursuant to 42 U.S.C. § 1983. For the reasons stated below, we affirm.

Background

¶2 Because the trial court dismissed Cano's complaint pursuant to Rule 12(b)(6), Ariz. R. Civ. P., we accept as true the allegations in the complaint. *See Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996). Cano is incarcerated in the Arizona Department of Corrections (ADOC). In April 2004, after a female prison officer observed him masturbating in his cell, seven guards placed leg shackles on him and then moved him for several hours to a dark, outside holding cell "flooded with toilet water." Cano had to kneel down in that water to have the leg shackles removed. Although it was cold and rainy, he was only permitted to wear "a pair of undershorts." When he was returned to his cell, "all of his personal belongings, including clothing, bedding . . . mattress[], hygienic items, [and his] legal and writing materials," had been removed and were not returned to him for eighty-seven hours.

¶3 In his complaint, Cano alleged the foregoing treatment constituted cruel and unusual punishment in violation of the Eighth Amendment. *See* U.S. Const. amend. VIII. He described five ADOC employees as fictitiously named defendants but claimed that he was only able to properly serve defendant M. Iovino, whom Cano later acknowledged he had incorrectly identified as "John Doe York" in the complaint.[1]

[1]The record reflects that a "Christopher Jenkins" was also served with the summons and complaint. But no such person was named as a defendant in Cano's complaint, no answer was filed by Jenkins, and Iovino's counsel stated in his motion to dismiss that, "[t]o the best of [her] knowledge, only Defendant Iovino ha[d] been served."

¶4 Iovino answered the complaint and moved to dismiss it pursuant to Rule 12(b)(6) for failure to state a claim. He maintained that Cano had failed to allege more than de minimis physical injury, as required for recovery of mental or emotional distress under the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e) (1996), and that Cano's allegations did not support an Eighth Amendment claim. The trial court granted the motion to dismiss, and this appeal followed.[2]

Discussion

¶5 "We will uphold the dismissal only if the plaintiff is not entitled to relief 'under any facts susceptible of proof under the claims stated.'" *Linder v. Brown & Herrick*, 189 Ariz. 398, 402, 943 P.2d 758, 762 (App. 1997), *quoting Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 186, 677 P.2d 1292, 1294 (1984). We review de novo a trial court's dismissal for failure to state a claim. *Baker v. Rolnick*, 210 Ariz. 321, ¶ 14, 110 P.3d 1284, 1287 (App. 2005). "Generally, federal laws control the substantive aspects of federal claims adjudicated in state courts, including § 1983 claims." *Id.* ¶ 18. And, contrary to his assertion, Cano is held "to the same standards expected of a lawyer," despite his pro se status. *Kelly v. NationsBanc Mortgage Corp.*, 199 Ariz. 284, ¶ 16, 17 P.3d 790, 793 (App. 2000); *but see Erickson v. Pardus*, ___ U.S. ___, 127 S. Ct. 2197, 2200 (2007) (pro se litigant held to less stringent standards under federal rules).

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[2]Although Cano's notice of appeal preceded the trial court's entry of an appealable order, that does not affect our jurisdiction. *See Barrassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981) (no need to dismiss premature appeal when final judgment entered).

I. Prison Litigation Reform Act

¶6 Cano contends the trial court erred in concluding that he cannot recover for mental or emotional injury because he failed to allege physical injury, as required by the PLRA. In pertinent part, that statute provides: "No Federal civil action may be brought by a prisoner confined in a . . . correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). The "physical injury . . . need not be significant but must be more than *de minimis*." *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002).

¶7 Cano alleged injuries consisting of "emotional distress, indignities, humiliation, outrage, contraction of a cold and mental anguish." Only the cold relates to his physical condition, but he did not allege it was serious enough to require any medication or other medical treatment. Under § 1997e(e), an inmate may not recover damages for alleged mental or emotional injury based on merely having contracted a common cold. *See Canell v. Multnomah County*, 141 F. Supp. 2d 1046, 1053 (D. Or. 2001) (insufficient injury when inmate did not need medical attention for cold acquired after placement in holding cell); *see also Alexander v. Tippah County*, 351 F.3d 626, 631 (5th Cir. 2003) (nausea and vomiting resulting from smell in isolation room insufficient); *see also Oliver*, 289 F.3d at 629 (insufficient injury when no medical treatment needed for back pain); *Siglar v. Hightower*, 112 F.3d 191, 193-94 (5th Cir. 1997) (bruised ear did not permit recovery). Therefore, the

trial court did not err in concluding that Cano failed to state a claim for mental or emotional injury.

II. Eighth Amendment claim

¶8 As Cano points out, § 1997e(e) does not necessarily preclude other forms of relief for a constitutional violation. *See Oliver*, 289 F.3d at 630; *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002). Nonetheless, although he sought unspecified injunctive and declaratory relief as well as compensatory and punitive damages, his complaint fails to adequately state an actionable Eighth Amendment claim.

¶9 Under the Eighth Amendment, punishment cannot involve "the wanton and unnecessary infliction of pain, nor may [it] be grossly disproportionate to the severity of the crime." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). To be deemed cruel and unusual punishment, however, an inmate's treatment or conditions of confinement must be "sufficiently serious" when viewed objectively. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *see also Wallis v. Baldwin*, 70 F.3d 1074, 1076 (9th Cir. 1995). The objective criteria used for assessing Eighth Amendment claims are drawn from "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *see also Roper v. Simmons*, 543 U.S. 551, 561 (2005). "[O]nly those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson*, 501 U.S. at 298, *quoting Rhodes*, 452 U.S. at 347 (citation omitted).

¶10 Although Cano alleged he had been deprived for a few days of "all his personal belongings," the facts set forth in his complaint, when viewed objectively, do not describe a "sufficiently serious" withholding of life's necessities. *Wilson*, 501 U.S. at 298; *see also Rhodes*, 452 U.S. at 347. A prisoner has no Eighth Amendment right to not be placed in a "strip cell," a room without clothing or bedding, for a relatively short time. *Williams v. Delo*, 49 F.3d 442, 444-46 (8th Cir. 1995) (four-day placement in room without clothes, running water, hygiene supplies, mattress, and legal mail not unconstitutional). Nor does the Eighth Amendment "mandate comfortable prisons." *Rhodes*, 452 U.S. at 349.

¶11 Cano correctly asserts a denial of clothing can result in an Eighth Amendment violation. *See Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) (prison must provide "'adequate food, clothing, shelter, sanitation, medical care, and personal safety'"), *quoting Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981). But the cases on which Cano relies are distinguishable. For example, *Walker v. Sumner*, 14 F.3d 1415, 1421 (9th Cir. 1994), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995), did not involve a strip cell, and no Eighth Amendment violation was found.

¶12 Cano also cites *Maxwell v. Mason*, 668 F.2d 361, 363 (8th Cir. 1981), in which the court found that placing a prisoner in solitary confinement for fourteen days in his undershorts and removing all bedding except a mattress violated the Eighth Amendment. But *Maxwell* "represent[s] an earlier era of Eighth Amendment jurisprudence." *See Williams*, 49 F.3d at 446. As the court stated in *Williams*, "[p]rison officials do not violate the Eighth Amendment by placing a prisoner in a strip cell unless they deny the inmate 'the

minimal measure of life's necessities.'" *Id., quoting Farmer v. Brennan*, 511 U.S. 825, 834 (1994). And, as noted above, the facts Cano alleged do not support a claim of unconstitutional deprivation of life's necessities. *See Rhodes*, 452 U.S. at 347.

¶13 We also find distinguishable *Blisset v. Coughlin*, 66 F.3d 531 (2d Cir. 1995), in which the court upheld a jury's award of damages to an inmate who had been physically assaulted and strip-searched twice before being placed naked in a feces-smeared mental observation room for eight days. *Id.* at 534, 537. There, the inmate was isolated for more than a week in an unsanitary room following a severe physical attack by prison officials. *Id*. at 537.

¶14 In contrast, Cano was not physically assaulted, was only "left in the holding cell for several hours," and was deprived of his personal belongings for about three days. The length of confinement is a relevant factor in determining whether an inmate's isolation meets constitutional standards. *See Hutto v. Finney*, 437 U.S. 678, 686 (1978). Conditions "might be tolerable for a few days and intolerably cruel for weeks or months." *Id*. at 687. Cano's short stay in the outside cell and three-day removal of his possessions does not violate the Constitution. *See, e.g., Whitnack v. Douglas County*, 16 F.3d 954, 956, 958 (8th Cir. 1994) (twenty-four hour period in cell with excrement and vomit not unconstitutional); *Harris v. Fleming*, 839 F.2d 1232, 1234-36 (7th Cir. 1988) (five days in "filthy roach-infested cell" without toilet paper and hygiene items not unconstitutional).

¶15 In addition, Cano's complaint refers to a legitimate penological reason for Iovino's actions. *See Gregg v. Georgia*, 428 U.S. 153, 182 (1976) ("[T]he sanction

imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."); *Hoptowit*, 682 F.2d at 1246 (Eighth Amendment only prohibits sanctions without penological justification). Cano acknowledged in his complaint he had been transferred to the holding cell to be taught a lesson for masturbating in front of a female guard. Therefore, we find no error in the trial court's implicit conclusion that, from an objective standpoint, Cano's complaint fails to allege sufficiently serious, cruel and unusual punishment to support a viable constitutional claim. *See Wilson*, 501 U.S. at 298.

¶16 Even assuming the allegations of Cano's complaint adequately meet the objective criteria for an Eighth Amendment claim, however, such a claim also entails a subjective element: whether the defendant acted with "'deliberate indifference' to inmate health or safety." *Farmer*, 511 U.S. at 834, *quoting Wilson*, 501 U.S. at 302-03; *see also Gregg*, 428 U.S. at 173 ("punishment must not involve the unnecessary and wanton infliction of pain"); *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). Cano's complaint lacks any allegation that Iovino acted with deliberate indifference to his basic needs. For that reason alone, the trial court correctly dismissed Cano's complaint. *See Benson v. Cady*, 761 F.2d 335, 342 (7th Cir. 1985) (plaintiff failed to state Eighth Amendment claim when no allegation of defendants' mental state).

III. Deferral of fees

¶17 Last, Cano contends the trial court erred by refusing to defer filing fees and costs under A.R.S. § 12-302(E) because he is indigent. If the issue were debatable, we could deem the state's failure to respond to this argument as a confession of error. *See State*

ex rel. McDougall v. Superior Court, 174 Ariz. 450, 452, 850 P.2d 688, 690 (App. 1993). But we do not find the issue debatable.

¶18 Section 12-302(E) requires an inmate "who initiates a civil action or proceeding . . . [to be] responsible for the full payment of actual court fees and costs." *See also Ford v. State*, 194 Ariz. 197, ¶ 11, 979 P.2d 10, 13 (App. 1999) ("Arizona inmates are now responsible for court fees and costs."). Therefore, the trial court did not err in enforcing that mandate. Without citing authority, Cano also suggests the statute unconstitutionally "violates prisoners' fundamental right of access to the courts." But that assertion is meritless because the statute "does not prohibit an applicant from filing a civil action or proceeding if the applicant is unable to pay the filing fees." § 12-302(E); *see also Beck v. Symington*, 972 F. Supp. 532, 536 (D. Ariz. 1997) (statute does not deny access to courts and is constitutional). Therefore, we find no error.

Disposition

¶19 The trial court's dismissal of Cano's complaint is affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge