IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANTE HANALEI PATTISON,
Appellant,
vs.
THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS; GREG COX, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY DIRECTOR OF NDOC; JAMES STOGNER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAPLAIN OF ESP; RENEE BAKER, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ASSOCIATE WARDEN OF ESP; E.K. MCDANIEL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS WARDEN OF ESP; AND TASHEENA SANDOVAL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS CORRECTIONAL CASEWORKER OF ESP,
Respondents.

No. 73080-COA

FILED

DEC 17 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Dante Hanalei Pattison appeals from a district court order denying his pro se motions for a new trial, to set aside the judgment, and for a permanent injunction. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.[1]

Pattison, an inmate housed at the Ely State Prison, brought suit against the Nevada Department of Corrections (NDOC) and some of

[1]Pattison is represented by appointed pro bono counsel on appeal.

its employees (collectively, the State) for denying Pattison his approved religious diet. The district court found the State had violated Pattison's First Amendment right to the free exercise of religion and granted Pattison's motion for summary judgment. A one-day bench trial for damages ensued and the court found that Pattison did not prove any compensable injury. He was awarded $1 in nominal damages for the constitutional violation.[2]

On appeal, Pattison contends that the district court abused its discretion by denying his motions for (1) a new trial under NRCP 59(a), (2) relief from the judgment under NRCP 60(b)(1), and (3) permanent injunctive relief. We disagree.

The district court may grant a new trial pursuant to NRCP 59(a) for several reasons, including if there was an abuse of discretion that deprived either party of a fair trial. Additionally, the aggrieved party's substantial rights must have been materially affected to warrant a new trial. *Id.* We review a district court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996).

Pattison argues that the district court's refusal to appoint counsel denied him a fair trial because he was incarcerated, indigent, and mentally ill. However, appointment of counsel is rarely required in civil cases and "the trial court is the proper evaluator of the need for counsel on a case-by-case basis." *See Rodriguez v. Eighth Judicial Dist. Court (Eddowes)*, 120 Nev. 798, 813, 102 P.3d 41, 51 (2004).

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[2]We do not recount the facts except as necessary to our disposition.

The district court's decision to deny Pattison's motion for a new trial was not an abuse of discretion. At the time of the district court's decision, Pattison, acting pro se, had already prevailed on several motions and on his First Amendment claim. These successful outcomes occurred while Pattison was incarcerated, indigent, and suffering from the alleged mental illness—the same infirmities that he argues require assistance of counsel. Therefore, even if the district court could appoint counsel in this situation, it did not abuse its discretion by denying Pattison's motion for appointed counsel. *Cf. id.* at 801, 102 P.3d at 43 (concluding the district court has discretion to appoint counsel in civil contempt cases arising from the nonpayment of child support). Because the district court did not abuse its discretion by denying Pattison's motion for appointed counsel, the district court did not abuse its discretion by denying Pattison's motion for a new trial.

Next, Pattison contends that he should have been granted relief pursuant to NRCP 60(b)(1) because the district court made a mistake by not appointing counsel. Motions for NRCP 60(b) relief are within the sound discretion of the district court and will not be disturbed absent an abuse of discretion. *Heard v. Fisher's & Cobb Sales & Distribs., Inc.*, 88 Nev. 566, 568, 502 P.2d 104, 105 (1972).

NRCP 60(b)(1) permits the court to provide relief from a judgment based on "mistake, inadvertence, surprise, or excusable neglect." The rule was created as a remedial statute to be used by parties for their own unintentional mistakes or those of opposing parties. *See Nev. Indus. Dev. Inc., v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987) (stating that NRCP 60(b) is to "be liberally construed to effectuate" its "salutary purpose" of providing redress for an injustice that has occurred because of

"the wrongs of an opposing party" or "excusable neglect"). The appointment of counsel is a discretionary *judicial* function and, therefore, is not subject to NRCP 60(b)(1) relief. Accordingly, the district court did not abuse its discretion in denying Pattison's motion for relief from judgment under NRCP 60(b)(1).

Finally, Pattison contends that the district court abused its discretion by denying a permanent injunction requiring NDOC to provide him with kosher meals. This court reviews a denial of a permanent injunction for an abuse of discretion. *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 108, 294 P.3d 427, 433 (2013).

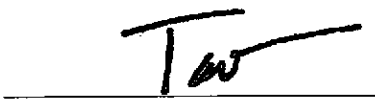
"[I]njunctive relief is appropriate only when irreparable injury is threatened and any injunctive relief awarded must avoid unnecessary disruption to the state agency's normal course of proceeding." *Gomez v. Vernon*, 255 F.3d 1118, 1128 (9th Cir. 2001) (citation and internal quotation marks omitted). Additionally, "a controversy must be present through all stages of the proceeding, and even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (citations omitted).

At the time of the district court's ruling on the request for a permanent injunction, Pattison was receiving kosher meals and the NDOC policy that led to the preliminary injunction and First Amendment claim had been revised. These actions by NDOC rendered Pattison's request for the permanent injunction moot. Therefore, the district court did not abuse

its discretion in denying Pattison's motion for a permanent injunction.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]



_____, J.
Tao

_____, J.
Gibbons

SILVER, C.J., concurring:

It is axiomatic that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Yet, here, the district court's legal conclusion—that prisoners must demonstrate a physical injury to obtain damages for a First Amendment violation—does just that. Thus, although I agree with the ultimate decision to affirm the district court under the particular facts of this case, I write separately to address the district court's legal conclusion regarding the application of section 1997e(e) of the Prison Litigation Reform Act (PLRA) to Pattison's First Amendment claim.

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[3]We have considered Pattison's other NRCP 59(a) arguments and find them unpersuasive, as they are belied by the record. Specifically, because we conclude that Pattison did not have a mental breakdown at trial, there was no surprise warranting a new trial. Additionally, the district court denied Pattison's damages claim because he failed to prove *any* injury, physical or otherwise.

In the underlying case, Pattison prevailed on summary judgment: the district court agreed that his First Amendment rights had been violated, and ordered a damages trial. At that trial, the State argued that the PLRA required Pattison to show a physical injury, citing *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002). The district court agreed, concluding that because Pattison failed to demonstrate any physical injury, he was not entitled to compensatory damages.[4] I believe that in reaching this decision, the district court applied an incorrect rule of law.

As relevant here, section 1997e(e) of the PLRA states that a prisoner may not bring a civil action "for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). Federal circuit courts are split on the question of whether this section applies to First Amendment claims. *See* Jonathan Michael D'Andrea, *The Prison Litigation Reform Act: A Legislatively-Enacted and Judicially-Ratified Barrier Separating Prisoners from the Protections of the First Amendment*, Ohio N.U. L. Rev. 489, 492 (2017) (addressing the circuit split). While the majority of circuits favor a narrow reading that requires a prisoner to show physical injury to support a First Amendment claim, a minority of circuits hold that the PLRA's physical-injury rule does not apply to First Amendment claims. *Id.*

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[4]The record reveals an inconsistency between the judge's oral pronouncement and the written order. Namely, at the hearing the judge found that the violation affected Pattison mentally and emotionally, but in the written findings of fact and conclusions of law, the court found that Pattison did not demonstrate any mental or emotional injury. However, a district court's written order controls over the oral ruling. *See generally Bradley v. State*, 109 Nev. 1090, 1094-95, 864 P.2d 1272, 1274-75 (1993).

In 1998, the Ninth Circuit addressed the application of the PLRA to First Amendment claims and held that First Amendment violations entitle a prisoner to "relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred," and, by extension, that "§ 1997e(e) does not apply to First Amendment Claims regardless of the form of relief sought." *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998). The State argues on appeal, as it did below, that the Ninth Circuit has since changed its position and adopted the majority view. The State points primarily to *Oliver v. Keller*, where in 2002 the Ninth Circuit held that the PLRA "requires a prior showing of physical injury that need not be significant but must be more than *de minimis*." 289 F.3d at 627.

But, the State and the district court's later reliance on *Oliver* in its Conclusion of Law is misplaced. First, *Oliver* is distinguishable as that case dealt with a Fourteenth Amendment violation rather than a First Amendment claim. *See Oliver*, 289 F.3d at 626. More to the point, however, *Oliver* expressly limited its holding to "all claims to which [§ 1997e(e)] applies," and in a footnote clarified that its holding did not overrule *Canell* or apply to First Amendment claims. *Id.* at 626, n.5. Therefore, contrary to the State's assertions at trial and the district court's Conclusion of Law, the Ninth Circuit still follows the minority rule, which does not require prisoners to demonstrate a physical injury to recover for a violation of the prisoner's First Amendment rights.

Nevada's Supreme Court has not addressed whether a prisoner must demonstrate a physical injury to receive compensation for a First Amendment violation. However, I agree with the minority view that the PLRA should not require a prisoner to demonstrate physical injury to

prevail on a First Amendment claim. *Cf.* Jonathan Michael D'Andrea, *The Prison Litigation Reform Act: A Legislatively-Enacted and Judicially-Ratified Barrier Separating Prisoners from the Protections of the First Amendment*, Ohio N.U. L. Rev. 489, 498-99 (2017) (addressing the minority view).

Importantly, First Amendment violations rarely produce a physical injury and instead, generally involve emotional or mental injury. *Cf. Siggers-El v. Barlow*, 433 F.Supp.2d 811, 816 (E. D. Mich. 2006) (addressing the general absence of physical injury in First Amendment violations). Therefore, construing the PLRA to extend the physical-injury rule to First Amendment claims would "effectively immunize officials from liability for severe constitutional violations, so long as no physical injury is established" and enable "prison officials to violate inmate First Amendment rights with impunity." *Id.* (internal quotations omitted). Such a result would be unconscionable and inconsistent, as the purpose of the PLRA is to curb frivolous law suits, not to render meaningless a prisoner's constitutional protections. *See id.*

Moreover, section 1997e(e) does not clearly and unambiguously require a prisoner asserting a First Amendment claim to demonstrate a physical injury. The statute addresses claims "for mental or emotional injury suffered while in custody," but is utterly silent with regard to constitutional injuries. 42 U.S.C. § 1997e(e); *see also King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015) (interpreting § 1997e(e)). Because a First Amendment injury is separate and distinct from a mental or emotional injury, extending the PLRA's physical-injury requirement to First Amendment violations would render the phrase "for mental or emotional injury" superfluous. *See King*, 788 F.3d at 213 (addressing First

Amendment injuries under the PLRA). Thus, while a prisoner seeking redress for a mental or emotional injury must prove at least a *de minimis* physical injury to obtain compensatory relief, *see Oliver*, 289 F.3d at 627, it does not stand to reason that a prisoner must likewise prove a physical injury to prevail on a First Amendment claim. *See Canell*, 143 F.3d at 1213 (holding that "[t]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show").

In the present case, Pattison sought compensation for the violation of his First Amendment rights. Under the minority rule, and Ninth Circuit jurisprudence, he was not required to demonstrate physical injury to recover damages for the violation. The district court's decision was, therefore, premised on an incorrect legal standard. However, because the district court ultimately made findings that Pattison failed to demonstrate *any* mental, emotional, or physical injury and awarded nominal damages for the constitutional violation, even had the court applied the correct standard, Pattison would not have been entitled to damages here.[5] *See, e.g., King*, 788 F.3d at 213-14 (holding that a plaintiff

[5]I further note that the State's multitudinous objections during trial suggest Pattison did not understand the legal intricacies of the rules of evidence and would have benefited from an attorney. Moreover, the record reflects that the State held Pattison to a high legal standard at trial and objected to a majority of Pattison's questions, often on grounds such as that the questions were "compound" or "confusing." Although Pattison was required to follow the same rules and procedure governing other litigants, the State would have done better to extend some measure of leniency during Pattison's examination of witnesses, particularly as this case concerned a constitutional violation. *See, e.g., Pouncil v. Tilton*, 704 F.3d 568, 574-75 (9th Cir. 2012) (noting the importance of access to the court in

alleging the violation of a constitutional right is only entitled to compensatory damages if he proves the violation caused an actual injury, and addressing the difficulties in calculating damages awards).

For the foregoing reasons, I concur with the result.

_____, C.J.
Silver

cc: Hon. Steve L. Dobrescu, District Judge
Lewis Roca Rothgerber Christie LLP/Reno
Attorney General/Carson City
Attorney General/Las Vegas
Legal Aid Center of Southern Nevada, Barbara E. Buckley, Executive Director
Anne R. Traum, Coordinator, Appellate Litigation Section, Pro Bono Committee, State Bar of Nevada
Kelly H. Dove
White Pine County Clerk

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civil rights cases, and reiterating that pro-se litigants are entitled to leniency).