NOT DESIGNATED FOR PUBLICATION

No. 125,792

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CALEB KANATZAR,
Appellant,

v.

DAN SCHNURR, WARDEN
Appellee.

MEMORANDUM OPINION

Appeal from Butler District Court; JOHN E. SANDERS, judge. Opinion filed August 25, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

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

Before COBLE, P.J., GARDNER and CLINE, JJ.

PER CURIAM: Caleb J. Kanatzar, an inmate at Hutchinson Correctional Facility (HCF), filed a K.S.A. 60-1501 petition against the facility's Warden, Dan Schnurr. Kanatzar's petition alleged an improper censorship of his mail by HCF. The district court summarily dismissed his petition, finding Kanatzar failed to state a claim because courts will not interfere with criminal investigations by prison authorities and nothing in Kanatzar's claim "arises to a constitutional level." Kanatzar appeals.

On review, we find that even if Kanatzar's petition was timely filed, his claim fails on the merits. We therefore affirm the district court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

In 2021, HCF censored a piece of mail addressed to Kanatzar because it contained an "unknown substance on [the] pages." HCF notified Kanatzar of this censorship on September 21, 2021, and told him the censored mail was being held by Enforcement, Apprehension and Investigations (EAI) "as evidence in a pending disciplinary and/or criminal prosecution and disposition and/or protest instructions."

Kanatzar filed a protest of mail censorship with the Kansas Department of Corrections (KDOC) the next day, requesting the mail be sent to his mother at his home address and arguing the notice was too vague. The Secretary of Corrections (Secretary) denied the protest about one week later.

Kanatzar then filed a grievance seeking to have the censored mail returned to his home. In response, KDOC staff denied the grievance on November 22, 2021, telling Kanatzar that EAI was in possession of the censored letter. In a November 30, 2021 letter to Kanatzar, the Warden agreed and informed Kanatzar that EAI would not return the censored letter.

About 10 days later, Kanatzar appealed the Warden's decision to the Secretary. The Secretary ultimately found on December 21, 2021, that "[t]he response rendered to the inmate by staff at [HCF was] appropriate" after noting Kanatzar did not present any evidence or argument to suggest the staff's response was incorrect. Kanatzar claims he did not receive the Secretary's response until more than one month later, on January 28, 2022, although he provides no evidence of his receipt on this date.

Following the Secretary's decision, Kanatzar filed a petition for writ of habeas corpus under K.S.A. 60-1501 in the Reno County District Court, which he mailed on January 30, 2022, and the district court file-stamped on February 8, 2022. Kanatzar's petition argued HCF did not specify what "unknown substance" was on the censored mail and contended the Warden "[could] not hold it indefinitely as he is attempting to do" because "[t]he mail is [Kanatzar's] personal property." Kanatzar requested that the district court order the Warden to release the censored mail.

A few months later, this case was transferred to the Butler County District Court after Kanatzar was moved from HCF to the El Dorado Correctional Facility. In October 2022, the Butler County District Court summarily dismissed Kanatzar's petition, finding Kanatzar failed to state a claim because courts will not interfere with criminal investigations by prison authorities into possible illegal activity by inmates, and nothing in Kanatzar's claim "arises to a constitutional level." The district court further found that these "matters directly threaten the legitimate safety, security and management of correctional facilities."

Kanatzar appeals.

THE DISTRICT COURT DID NOT ERR IN SUMMARILY DISMISSING KANATZAR'S K.S.A. 60-1501 PETITION

On appeal, Kantazar argues the district court erred in dismissing his K.S.A. 60-1501 petition because he met his burden of presenting a plausible claim for relief. He also presents fleeting allegations related to the district court's slow disposition of his claim. In response, the KDOC contends dismissal was proper on both procedural and substantive grounds.

Applicable Legal Standards

K.S.A. 60-1501 allows "'any person'" confined in Kansas to prosecute a writ of habeas corpus in the county in which they are being restrained. *Johnson v. State*, 289 Kan. 642, 648, 215 P.3d 575 (2009). 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." 289 Kan. at 648. "[I]f, on the face of the petition, it can be established that petitioner is not entitled to relief, or if, from undisputed facts, or from [incontrovertible] facts, such as those recited in a court record, it appears, as a matter of law, no cause for granting a writ exists," then summary dismissal is proper. 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.

Under K.S.A. 75-52,138, an inmate is required to exhaust administrative remedies before filing a civil claim against state actors and prison facilities. See *Sperry v. McKune*, 305 Kan. 469, 482-83, 384 P.3d 1003 (2016). This same statute also requires inmates to file proof of exhaustion with the petition initiating suit against any KDOC defendant. 305 Kan. at 480; K.S.A. 75-52,138. Whether a petitioner for habeas corpus relief has exhausted administrative remedies is a question of law over which the appellate court has unlimited review. *Boyd v. Werholtz*, 41 Kan. App. 2d 15, 16-17, 203 P.3d 1 (2008).

In addition to the exhaustion requirement, K.S.A. 2022 Supp. 60-1501(b) requires an inmate to file a petition under the statute "within 30 days from the date the action was final." Kansas appellate courts have viewed K.S.A. 60-1501(b) as a statute of limitations for habeas corpus petitions. See *Battrick v. State*, 267 Kan. 389, 401, 985 P.2d 707 (1999) (characterizing 30-day period in K.S.A. 60-1501 as statute of limitations); *Taylor v. McKune*, 25 Kan. App. 2d 283, 286, 962 P.2d 566 (1998).

Application of the Appropriate Standards

Here, the record shows the Secretary made a final decision denying Kanatzar's grievance claim on December 21, 2021. Kanatzar's K.S.A. 60-1501 petition states that he exhausted his administrative remedies by filing an appeal of his grievance, which resulted in the December 21 denial. In the same petition, Kanatzar states he did not receive notice of the final agency action until January 28, 2022.

Exhaustion and Timeliness

Before addressing the merits of Kanatzar's appeal, we must first examine two questions surrounding Kanatzar's filing of his petition. First, did Kanatzar appropriately exhaust his administrative remedies before filing his petition? And second, was his petition timely?

Kanatzar's burden under K.S.A. 75-52,138 was to file proof of his exhaustion of administrative remedies with his petition initiating this lawsuit against the KDOC. He pursued his grievance as required with HCF, and with his petition he included copies of his original grievance and copies of each denial throughout the process, culminating in the December 21, 2021 denial by the Secretary. Kanatzar arguably complied, then, with the requirements of K.S.A. 75-52,138—but this is not the end of our necessary inquiry.

Under K.S.A. 2022 Supp. 60-1501(b), Kanatzar was required to file his petition within 30 days of the Secretary's final decision on December 21, 2021. Kanatzar's petition was filed with the district court on February 8, 2022, but the substance of the petition indicates he placed it in the prison mail on January 30, 2022, which would establish the filing date. See *Taylor*, 25 Kan. App. 2d at 288 (holding the date an inmate places his or her petition in the mail constitutes the date of filing within the meaning of 60-1501). Accordingly, 40 days passed from the date of the final agency action

(December 21, 2021) until the petition was filed by Kanatzar placing it in the mail (January 30, 2022).

But was Kanatzar's filing truly untimely? Panels of our court have found that an inmate's efforts to exhaust administrative remedies do not end until the inmate receives actual notice of the final administrative decision. Only at that point does the 30-day clock for filing an action under K.S.A. 60-1501 begin to run. *Terning v. Baker*, No. 122,429, 2021 WL 301580, at *2 (Kan. App.) (citing *Jamerson v. Schnurr*, 57 Kan. App. 2d 491, 491-92, 453 P.3d 1196 [2019]), *rev. denied* 313 Kan. 1046 (2021).

Schnurr argues that, on the face of the petition, it is untimely. And Kanatzar provides no evidence of the date of his receipt, aside from his statement that he was given the Secretary's decision over a month after it was signed.

In fact, Kanatzar's appeal simply ignores the timing concern, and although the KDOC squarely argues the issue in its appellate response brief, Kanatzar filed no appellate reply brief to address the problem. The burden lies with Kanatzar to proffer an evidentiary basis to support his claim that he received the Secretary's denial a month after the decision. *State v. Meggerson*, 312 Kan. 238, 249, 474 P.3d 761 (2020) (holding the party claiming an error has the burden of designating a record sufficient to establish the claim).

But we must determine whether we have jurisdiction to hear his appeal. Although courts are not in the business of creating arguments for the parties, the law is on Kanatzar's side. His petition may be viewed as an affidavit and is therefore evidence of the date he received the Secretary's final decision. See *Sperry*, 305 Kan. at 488. Kanatzar filed a verified petition, which Schnurr does not refute, so we accept Kanatzar's claim that he received notice of the final agency action on January 28, 2022. Because Kanatzar filed

his petition within 30 days of receipt of the notice, his action was timely filed, and we do have jurisdiction to decide the merits of his claim. See *Jamerson*, 57 Kan. App. 2d at 499.

Kanatzar's Claim Was Properly Dismissed.

Even though we have jurisdiction to consider Kanatzar's appeal, he cannot show the district court erred in summarily dismissing his K.S.A. 60-1501 petition.

As stated, to avoid summary dismissal of his petition, Kanatzar's allegations must be of "shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Johnson*, 289 Kan. at 648. To decide whether this standard is met, we "must accept all well-pled factual allegations as true." *Denney v. Norwood*, 315 Kan. 163, 173, 505 P.3d 730 (2022).

The district court may summarily dismiss a habeas corpus petition if it plainly appears from the face of the petition and any exhibits attached that the petitioner is not entitled to relief. K.S.A. 2022 Supp. 60-1503(a); *Denney*, 315 Kan. at 173. When a court summarily dismisses a petition without issuing a writ under K.S.A. 2022 Supp. 60-1503(a), the appellate court is in just as good a position as the district court to determine whether relief is warranted. 315 Kan. at 175. Thus, we review de novo the district court's summary dismissal of Kanatzar's K.S.A. 60-1501 petition. See *Johnson*, 289 Kan. at 649.

In his petition for writ of habeas corpus, Kanatzar alleged that Schnurr, acting as Warden at HCF, unlawfully deprived him of his property based on the illegal censorship and seizure of his incoming mail.

Under the Kansas Administrative Regulations, inmates' incoming mail may be censored if there is a reason to believe that "[t]here is a threat to institutional safety, order, or security," or if "[t]he mail is being used in furtherance of illegal activities."

K.A.R. 44-12-601(d)(1)(A) and (C). When mail is censored, the inmate must be given a written notice and has 15 days to protest the decision. K.A.R. 44-12-601(d)(2)(A) and (C). The Secretary of Corrections or the Secretary's designee reviews the protest and issues a final disposition. K.A.R. 44-12-601(d)(2)(D).

The record shows HCF provided a censorship notice to Kanatzar upon the seizure of his mail. The notice indicated the censored mail posed a threat to institutional safety, order, or security under K.A.R. 44-12-601(d)(1)(A), because the mail contained contraband as defined in K.A.R. 44-12-902.

The definition of "[c]ontraband" under K.A.R. 44-12-902(a) encompasses:

> "(1) Any item, or any ingredient or part of or instructions for the creation of the item, that is not issued by the department of corrections, sold through the facility canteen, or specifically authorized or permitted by order of the secretary of corrections or warden for use or possession in designated areas of the facility; or
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> "(2) any item that, although authorized, is misused in a way that causes some danger or injury to persons or property."

And under K.A.R. 44-12-902(b): "All contraband shall be confiscated and shall be ordered forfeited by the inmate." In this vein, K.A.R. 44-12-601(b)(2) states that "[i]tems illegal under Kansas or U.S. federal law shall be seized and held as evidence for other law enforcement officers."

Here, the censorship notice told Kanatzar as much—stating his mail was being held "as evidence in a pending disciplinary and/or criminal prosecution and disposition and/or protest instructions."

Kanatzar did not challenge the constitutionality or applicability of these regulations at the district court or on appeal. And notably, Kanatzar raises an additional

claim for the first time on appeal. He argues that in addition to the deprivation of his property, the censorship of his mail "implicates the right to freedom of speech which is a qualified liberty interest that is protected from governmental suppression and is designated as a fundamental constitutional right."

This argument is improperly raised for the first time on appeal and unsupported by the record. See *Gannon v. State*, 303 Kan. 682, 733, 368 P.3d 1024 (2016) (holding issues not raised below cannot be raised on appeal). Kanatzar's K.S.A. 60-1501 petition specifically alleged an unlawful deprivation of his liberty through the seizure of his mail. Unlike his argument on appeal, Kanatzar's K.S.A. 60-1501 petition did not claim his free speech rights were violated. And though he suggests on appeal that a photocopy of the censored mail would be sufficient to cure any violation, Kanatzar did not seek such relief during his grievance or district court petition.

Kanatzar's claim contending an unconstitutional deprivation of property is not persuasive. Even accepting all his factual allegations as true, the face of the petition establishes that Kanatzar is not entitled to relief. As a matter of law, based on the applicable prison regulations that Kantazar does not challenge on appeal, no cause for granting a writ exists. HCF had the legal authority to censor and retain Kanatzar's mail because the facility believed his mail contained contraband. Kanatzar's K.S.A. 60-1501 petition complains the notice did not identify the "unknown substance" and "it is not even alleged to be an illegal or controlled substance . . . ." But as noted, the definition of contraband does not require such factors under K.A.R. 44-12-902(a).

"Prison regulations are given great deference on review. Prison officials are charged with the control and administration of the penal institutions of the state and as such are vested with wide discretion in the discharge of their duties." *Adkerson v. Nelson*, 25 Kan. App. 2d 655, 657, 967 P.2d 357 (1998).

Kanatzar has not shown the district court erred in summarily dismissing his K.S.A. 60-1501 petition. To avoid summary dismissal of his K.S.A. 60-1501 petition, his allegations must be of "shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Johnson*, 289 Kan. at 648. The censorship of Kanatzar's mail was neither shocking nor intolerable conduct because it was permitted by prison regulations that Kantazar makes no attempt to challenge as unconstitutional. For the same reason, Kantazar cannot show the censorship was a continuing violation of his freedom of speech or property rights.

Affirmed.