NOT DESIGNATED FOR PUBLICATION

No. 126,771

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DASHAWN M. HUGHES,
Appellant,

v.

GLORIA GEITHER, WARDEN,
Appellee.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; CLINTON LEE, judge. Submitted without oral argument. Opinion filed March 22, 2024. Affirmed.

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

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

Before GARDNER, P.J., MALONE, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Dashawn Hughes appeals the district court's order summarily dismissing his K.S.A. 60-1501 petition. Hughes' petition alleged the warden at Lansing Correctional Facility (LCF) failed to place him in protective custody to protect him from other inmates at the facility in violation of the Eighth Amendment to the United States Constitution. The district court summarily dismissed the petition, finding that Hughes failed to show that he exhausted administrative remedies and that, even if he had done so, his petition failed to sufficiently set forth an Eighth Amendment violation. Although we disagree that Hughes needed to show that he exhausted administrative remedies, we

affirm the district court's judgment that Hughes' K.S.A. 60-1501 petition failed to sufficiently state a claim for relief under the Eighth Amendment.

FACTS

On May 1, 2023, Hughes petitioned for habeas corpus under K.S.A. 60-1501, alleging that the mode and conditions of his confinement at LCF violated his rights under the Eighth Amendment against cruel and unusual punishment. The petition was brief. Hughes claimed the warden (Respondent) failed to protect him from violence at the hands of other inmates by denying his request to be placed in protective custody. The petition explained that when Hughes was transferred to LCF on February 21, 2023, he advised staff that he would be in "imminent danger" if placed in general population, that he was placed in general population "pending investigation," and that on April 8, 2023, he was "attacked and battered by an inmate with a fan motor." Hughes' petition did not request any relief and included no attachments documenting his efforts to exhaust administrative remedies before proceeding in district court.

On July 11, 2023, the district court summarily dismissed Hughes' petition, finding that (1) it failed to show that he exhausted administrative remedies and (2) it failed to provide sufficient facts to support his claim under the Eighth Amendment. Hughes timely appealed the district court's judgment and received appointed counsel for the appeal.

ANALYSIS

Hughes claims the district court erred in summarily dismissing his K.S.A. 60-1501 petition. He contends (1) that there was no administrative remedy available for him to pursue after the denial of his request to be placed in protective custody and (2) that his petition sufficiently stated a claim under the Eighth Amendment for deliberate indifference to his safety. The Respondent asserts that the district court properly

dismissed Hughes' petition because it failed to show that he exhausted administrative remedies and because it failed to sufficiently state an Eighth Amendment violation. The Respondent also asserts that Hughes' case is moot because the actual controversy has ended. Hughes has filed no reply brief addressing the mootness claim.

Whether a district court erred by summarily dismissing a K.S.A. 60-1501 petition is a question of law subject to unlimited review. *Denny v. Norwood*, 315 Kan. 163, 175, 505 P.3d 730 (2022). The determination of whether a case is moot is subject to de novo review on appeal. *State v. Roat*, 311 Kan. 581, Syl. ¶ 3, 466 P.3d 439 (2020).

We begin by addressing the Respondent's mootness claim. The Respondent asserts that Hughes' petition described a discrete incident resulting in a single battery "and because no remedy could be retroactively provided now that the singular incident has already occurred, the claim is moot." Our Supreme Court has explained:

> "A case is moot when a court determines it is clearly and convincingly shown that the actual controversy has ended, that the only judgment that could be entered would be ineffectual for any purpose, and that it would not have an impact on any of the parties' rights." *Roat*, 311 Kan. 581, Syl. ¶ 1.

We disagree with the Respondent's characterization that Hughes' petition only described a discrete incident resulting in a single battery. The petition also claimed that Hughes was in imminent danger from other inmates at LCF unless he was placed in protective custody. Hughes' petition alleged that the prison officials were deliberately indifferent to his safety. As long as Hughes remains an inmate at LCF—and our record does not reflect that he has been transferred to another facility—his case or controversy has not ended. Hughes' case is not moot for the reasons alleged by the Respondent.

We now turn to Hughes' claims that the district court erred in finding that Hughes' petition failed to show that he exhausted administrative remedies and because it failed to state a claim under the Eighth Amendment for deliberate indifference to his safety.

Exhaustion of administrative remedies

Before an inmate may file a civil action against the Secretary of Corrections, a political subdivision of the Secretary of Corrections, or a public official, the inmate must exhaust any available administrative remedies. Proof of exhaustion must generally accompany the filing of the original petition. K.S.A. 75-52,138; see K.S.A. 2022 Supp. 60-1501(b). Before conditions of confinement may be reviewed in a habeas corpus proceeding, available administrative remedies must be exhausted. *In re Pierpoint*, 271 Kan. 620, 622, 24 P.3d 128 (2001). Our court has stated that the exhaustion requirement set forth in K.S.A. 75-52,138 is a mandatory condition that plaintiffs ordinarily must satisfy before filing a civil action against the State. *Chelf v. State*, 46 Kan. App. 2d 522, 533, 263 P.3d 852 (2011). But a party need not seek or exhaust administrative remedies if the available remedies are inadequate or would serve no purpose. *Pierpoint*, 271 Kan. at 623.

Hughes contends that he was not required to prove that he exhausted his available remedies because there was no effectual remedy for him to pursue after the denial of his request for protective custody. The Respondent asserts that the face of Hughes' petition failed to show he exhausted administrative remedies and Hughes' argument to circumvent this reality fails because it "relies on policies and procedures that are not part of this record." Whether a party is required to or has failed to exhaust administrative remedies is a question of law over which the appellate court's review is unlimited. *Consumer Law Associates v. Stork*, 47 Kan. App. 2d 208, 213, 276 P.3d 226 (2012).

Hughes asserts he had no available administrative remedy because the decision on whether to place a prisoner in protective custody is a classification decision, which is excluded from the ordinary grievance procedure. K.A.R. 44-15-101a(d)(2) states: "The grievance procedure shall not be used in any way as a substitute for, or as part of, . . . the classification decision-making process[.]" Hughes also relies on policies and procedures allegedly included in the Kansas Department of Corrections (KDOC) Internal Management Policy & Procedure (IMPP) Manual to support his claim that filing a grievance would have served no purpose, but Hughes has not included these materials in the record on appeal. See *State v. Walters*, 284 Kan. 1, 15, 159 P.3d 174 (2007) (litigant claiming district court erred has duty to designate record on appeal that supports finding of error).

But even without reviewing the KDOC's IMPP Manual, Kansas courts have found that prison administrators are granted broad discretion in housing and classification decisions—including protective custody classifications. See *Foster v. Maynard*, 222 Kan. 506, 510, 565 P.2d 285 (1977) (citing *Crowe v. Leeke*, 540 F.2d 740 [4th Cir. 1976]). Because the decision to classify an inmate into protective custody is within the broad discretion of prison staffs and is insulated from the ordinary grievance procedure in K.A.R. 44-15-101a(d)(2), Hughes is correct that filing a grievance would have served no purpose. As such, he was not required to exhaust administrative remedies, and the district court erred in summarily dismissing the petition on those grounds.

Sufficient facts to state a claim under the Eighth Amendment

Although the district court erroneously found that Hughes failed to exhaust administrative remedies, it correctly found that the petition failed to sufficiently state a claim under the Eighth Amendment for deliberate indifference to Hughes' safety. 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.'" *Denney*, 315 Kan. at 173. "But if it is apparent from the petition and attached exhibits that the petitioner is entitled to no relief, then no cause for granting a writ exists and the court must dismiss the petition." 315 Kan. at 173.

Here, Hughes' petition was based on an alleged Eighth Amendment violation. "The deliberate indifference of a prison official 'to a substantial risk of serious harm to an inmate violates the Eighth Amendment.'" *Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003) (quoting *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S. Ct. 1970, 128 L. Ed. 2d 811 [1994]). To establish a cognizable Eighth Amendment claim for failure to protect, Hughes would have needed to show "'that he is incarcerated under conditions posing a substantial risk of serious harm' the objective component, and that the prison official was deliberately indifferent to his safety, the subjective component." 327 F.3d at 1175.

But Hughes' petition contained minimal facts to support his claim. Hughes' petition simply stated that he asked to be put into protective custody when he was transferred to LCF based on the conclusory allegation that he would be in "imminent danger" in the general population. The petition did not explain why Hughes would be in imminent danger, nor did it allege that he gave the staff the name of any other inmate who posed such a danger. These facts fall short of showing that he was incarcerated under conditions posing substantial risk of serious harm, the objective component of a cognizable Eighth Amendment claim. See *Verdecia*, 327 F.3d at 1175. Moreover, the prison staff did not show deliberate indifference to Hughes' safety, as Hughes admitted he was told he would be placed in general population "pending investigation." Even if the allegations in Hughes' petition are accepted as true, the petition failed to allege facts to support a claim of "'shocking and intolerable conduct or continuing mistreatment of a constitutional stature.'" *Denney*, 315 Kan. at 173. As a result, the district court did not err when it summarily dismissed Hughes' K.S.A. 60-1501 petition.

Affirmed.