

<input checked="" type="checkbox"/> FILED	<input type="checkbox"/> LODGED
<input type="checkbox"/> RECEIVED	<input type="checkbox"/> COPY
DEC 17 2001	
CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
BY _____	DEPUTY

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

MARK A. KOCH,

Plaintiff,

vs.

SAMUEL LEWIS, et al.,

Defendants.

)
)
)
)
)
)
)
)
)
)
)

No. CIV. 90-1872 PHX-JBM

MEMORANDUM AND ORDER

On August 30, 2001, we issued a Memorandum Opinion and Order. The last sentence read, "We order that Koch be released from SMU II." As a consequence, plaintiff was transferred to the Florence Complex, Central Unit. That led to a Notice of Non-compliance by Defendants, and on October 25, 2001, (the actual date of orders is a few days after the order was signed in Chicago, Illinois, due to a lag before entry in Phoenix, Arizona, and we use the date of signing) we asked that defendants respond.

Defendants did so. They raised concerns if plaintiff were housed where he had physical access to inmates on the "Do Not House With" (DNHW) list, or they had physical access to him. They also claim that their protective segregation file evidences that plaintiff is a predator and threat to other inmates and that, although there is no information of recent predatory behavior by plaintiff, this is due to his being housed at SMU-II since 1996. They also note that plaintiff's public risk score and institutional risk score are both "5" (P/I score), the highest classification -- a classification "confirmed by the information that has come to light during this litigation" (which has been going on since 1990). They contend that if plaintiff's claim was based on the Eighth Amendment, he might have a colorable claim on the ground that Central

334

No. Civ. 90-1872

Page 2

Unit conditions of confinement are similar to SMU-II conditions, but it is not, and plaintiff has no due process right not to be housed at Central Unit.

Following a response by the plaintiff we issued another Memorandum Order and Opinion, that one on November 19, 2001, in which we described what we believed to be plaintiff's present circumstances, expressed concern that those circumstances did not conform with the court's prior decision, and directed that defendants further respond. In the meantime, in a supplemental response filed November 20, 2001, defendants contend that the court is without authority to lower the plaintiff's P/I score, and the plaintiff has no due process right to housing at a specific facility (we do not assert otherwise).

By their response on November 28, 2001, to the court's November 19, 2001 direction, the defendants amplified their position. They largely agreed with the court's description of plaintiff's present circumstances, with some modifications. We therefore restate those circumstances. Plaintiff is housed in a cell by himself and he eats all his meals there. The cell has a window from which he can view the outside. He is permitted outdoor recreation three hours a week, during which he is placed in a separate mesh recreation cubicle that allows him to have verbal and visual, but not physical, contact with approximately twenty other inmates. He has no other congregate activity. He is allowed to be out of his cell for ten minutes three times a week for a shower. He is able to purchase food items from the commissary. He may possibly be eligible for some correspondence courses. The noise level is substantially lower than it was at SMU-II. According to the plaintiff he is in some ways worse off than he was before: his cell and the recreation area are half the size of those at SMU-II, he no longer has access to hot food and hot water for showers, and no longer is he able to receive basic

No. Civ. 90-1872

Page 3

materials, like inmate letters, health request forms and cleaning supplies. We do not know if those complaints are accurate.

According to defendants they have conformed to the earlier order by transferring plaintiff from SMU-II. They reargue their legal position, rejected by this court in that order. They seek to introduce new evidence purporting to identify specific safety issues respecting plaintiff and indicating that certain inmates are getting ready for a "war" because they expect to return to the "yard" as a result, presumably, of this action. Defendants appear to agree that only in Arizona are gang members held in SMU-II facilities without prospect of returning to the general population, but they contend that is a policy choice the state is free to make.

This case is on appeal. The record is what was before this court unless the Court of Appeals grants leave to amplify it. We are without jurisdiction to reconsider our prior decision, although we see no infirmity in providing clarification or in implementing that prior decision. What the record does disclose is that plaintiff had P/I scores of 3/1 for much of the time in the years immediately preceding his validation. An institutional score of "1" is the best score an inmate can attain — an assessment that the inmate poses little risk of institutional disruption. Accordingly, he was housed largely in medium security facilities without any disciplinary proceedings being initiated against him. During much of that period he was believed to be a member of the Aryan Brotherhood. His P/I score of 5/5 is based solely upon his validation.

The safety issues defendants now seek to interject into these proceedings apparently are a collection of negative information, which may or may not be valid, garnered over many years. Some indicate that plaintiff was a member of the Aryan Brotherhood; some that he was

No. Civ. 90-1872

Page 4

a target of that gang. None resulted in a disciplinary charge. If there had been such a charge, any resulting discipline would have to be based upon the rather minimal evidentiary threshold and procedural due process required by Wolff v. McDonnell, 418 U.S. 539 (1974). We do not understand how unverified hearsay can justify a lifetime of virtual isolation in the absence of any due process procedures whatsoever. If the state had some credible evidence of serious misconduct and, after an appropriate hearing, concluded that those charges of overt conduct had been sustained, we would have an entirely different legal landscape. But we do not. Further, this case involves solely the plaintiff's constitutional rights, and they are neither expanded nor contracted by what other inmates think might happen to them and how they might conduct themselves.

Arizona apparently has a greater percentage of its prisoners housed in segregation than any other state in the union, with the exception of Mississippi. See Supermax Housing: A Survey of Current Practice, U.S. Department of Justice (1997), Table 1 (Plaintiff's Post-trial Brief and Request for Injunctive Relief, Appendix II, Exh. 1) (hereinafter "Plaintiff's Appendix II"). Its policy is zero tolerance for gangs. Its restrictions upon the return of inactive gang members is apparently unique. California, for example, whose Pelican Bay SHU is modeled after Arizona's SMU-I and II, releases inactive gang members after a time to maximum security institutions, where they are in general population and allowed to be in congregate groups (testimony of defendants' expert, Brian Perry, Plaintiff's Appendix II, pp. 18 and 19). There are those who believe that isolation of gang members who have not engaged in serious misconduct is counterproductive (*see, e.g.*, affidavit of William H. Dallman, Plaintiff's Appendix II. p.15). It is not, however, the province of a court to rule on the basis

No. Civ. 90-1872

Page 5

of the persuasiveness of a policy preference. But as the Supreme Court made clear in Wolff v. McDonnell, *supra*, at 555, a policy preference is not without constitutional limitations. It would certainly ease the burdens of a correctional system if all prisoners were executed or perpetually chained to a wall, but no one, we believe, would suggest that such a system would pass constitutional muster.

Defendants insist that we ordered only that plaintiff be transferred from SMU-II. If that were so, then a transfer to SMU-I would have sufficed. Defendants did not do that, however, as they obviously realized that there was more to the order than that. We made it clear that an inmate, even though properly validated as a gang member, cannot be held indefinitely in virtual isolation because of his status and not because of any overt conduct. The reasons for that conclusion are explained in the August 30, 2001 order. The conclusion is based upon due process because the issue relates to what must be shown to punish status, although we do not believe that the analysis would substantially differ if the issue were cruel and unusual punishment. We purposely did not rule on how the state should alter plaintiff's custody so as to end his virtual isolation, because that "how" should be a matter determined by the state. It is clear, however, that plaintiff's virtual isolation has not been ended.

It is true, in a sense, that plaintiff's custody conditions are now not atypical because the other inmate at the Central Unit, with few exceptions, are burdened with the same conditions. We are not told why. Presumably they are not gang members because gang members go to SMU-II. What may be recognized as cruel and unusual or as atypical may shift because the conditions of confinement generally have become far more rigorous, as has been noted. See Haney and Lynch, Regulating Prisoners of the Future: A Psychological Analysis of Supermax

No. Civ. 90-1872

Page 6

and Solitary Confinement, 23 N.Y.U. Rev. L. & Soc. Change 477 (1977) at 552-554. Nevertheless, indefinite solitary confinement is far from the norm in American correctional systems.

We conclude that plaintiff must be permitted to be out of his cell in congregate settings a minimum of three hours a day. That means an opportunity for physical interaction with other inmates. It does not necessarily mean inclusion in the general population with access to a wholly open ward. This requirement could be satisfied by permitting access to an open yard with a limited number of inmates, or meals, recreation, jobs, educational programs or access to a law library with at least a reasonable number of other inmates, or any combination of those or like activities. Where and how that requirement may be satisfied remains within the discretion of the defendants. We direct the defendants to advise the court and plaintiff's counsel within seven days from the docketing of this order of how they have complied with this order. Plaintiff is otherwise subject to the rules and regulations generally applicable of the facility where he is housed and is, of course, subject to disciplinary sanctions for future conduct on the same basis as other inmates.


JAMES B. MORAN
Senior Judge, U. S. District Court

Dec. 13, 2001.

Copies to all parties of record.