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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
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| ERIC D. SMITH, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | No. 48A02-0902-CV-124 |
| | ) | |
| STANLEY KNIGHT, *et al*., | ) | |
| | ) | |
| Appellees. | ) | |

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0709-PL-1315

**June 17, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Eric D. Smith, an inmate in the Indiana Department of Correction ("DOC"), appeals the dismissal of his complaint pursuant to Indiana Code section 34-58-1-2.

We affirm.

## ISSUE

Whether the trial court erred when it dismissed Smith's complaint.

## FACTS

On September 18, 2007, Smith, pro se, filed a complaint in Madison Superior Court against Stanley Knight and other unknown employees of the DOC, asserting a 42 U.S.C. § 1983 claim based on the Eighth and Fourteenth Amendments to the United States Constitution. Specifically, Smith alleged that on March 9, 2007, while he was incarcerated at Pendleton Correctional Facility, other inmates started a fire in the segregation unit where he was housed. In response, DOC employees deployed tear gas in "the segregation unit where the fire was started," causing him pain and suffering. (App. 8).

According to Smith, "Knight and his officers purposely provoked these prisoners to set fires, and Knight and the defendants used this as an excuse to harm all of [the inmates]." (App. 10). He asserted that "[t]he defendants wanted to see [the inmates] suffer because the use of tear gas was totally unnecessary, and other measures could have been used to protect security and safety interests." (App. 11). As a result, Smith sought "$10,000 in compensatory damages"; "$75,000 in punitive damages"; a declaration that

"tear gas may not be used on prisoners who are locked in their cell"; and "an injunction that will create a procedure that will help protect prisoners in times like what happened here[.]" (App. 10).

On October 10, 2007, the State filed a motion to dismiss pursuant to Indiana Code section 34-58-2-1, which the trial court granted on November 28, 2007. However, on April 9, 2008, the Indiana Supreme Court held that Indiana Code section 34-58-2-1 violates the Open Courts Clause of the Indiana Constitution.[1] *See Smith v. Indiana Dep't of Correction*, 883 N.E.2d 802 (Ind. 2008). Thus, on November 3, 2008, the trial court vacated its judgment of dismissal. Subsequently, on December 11, 2008, the trial court dismissed Smith's complaint pursuant to Indiana Code section 35-58-1-2(a)(1) and (2).[2]

DECISION

Smith contends that the trial court erred in dismissing his complaint pursuant to Indiana Code section 34-58-1-2.

> In reviewing the dismissal of an offender's claim, complaint, or dismissal pursuant to Indiana Code § 34-58-1-2, we employ a de novo standard of review. Like the trial court, we look only to the well-pleaded facts contained in the complaint or petition. Further, we determine whether the

[1] Referred to as the Three Strikes Law, Indiana Code section 34-58-2-1 provided:

> [i]f an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under IC 34-58-1-2, the offender may not file a new complaint or petition unless a court determines that the offender is in immediate danger of serious bodily injury . . . .

[2] Generally, there is no respondent, and therefore, no appellee where a complaint is dismissed pursuant to Indiana Code section 34-58-1-2. Thus, the Indiana Attorney General usually files a notice of non-involvement in these matters. In this case, however, the defendants received a summons prior to the dismissal of Smith's complaint. The Attorney General therefore appeared and filed a motion to dismiss on their behalf. The Attorney General continues to represent the defendants on appeal.

> complaint or petition contains allegations concerning all of the material elements necessary to sustain a recovery under some viable legal theory.

*Smith v. Carrasco*, 850 N.E.2d 468, 470 (Ind. Ct. App. 2006) (internal citations omitted).

Indiana Code section 34-58-1-1 provides that "[u]pon receipt of a complaint of petition filed by an offender, the court shall docket the case and take no further action until the court has conducted the review required by section 2 of this chapter." Section 2 provides, in pertinent part, as follows:

> (a) A court shall review a complaint or petition filed by an offender and shall determine if the claim may proceed. A claim may not proceed if the court determines that the claim:
>
> (1) is frivolous;
> (2) is not a claim upon which relief may be granted; or
> (3) seeks monetary relief from a defendant who is immune from liability for such relief.
>
> (b) A claim is frivolous under subsection (a)(1) if the claim:
>
> (1) is made primarily to harass a person; or
> (2) lacks an arguable basis either in:
> (A) law; or
> (B) fact.

Ind. Code § 34-58-1-2.

In this case, Smith asserted a 42 U.S.C. § 1983 claim. "'To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) the defendant deprived the plaintiff of a right secured by the Constitution and the laws of the United States, and (2) the defendant acted under color of state law.'" *Severson v. Bd. of Trustees of Purdue Univ.*, 777 N.E.2d 1181, 1196 (Ind. Ct. App. 2002) (quoting *Reed v. City of Chicago*, 77 F.3d 1049, 1051

(7th Cir. 1996), *reh'g denied*), *trans. denied*. "The obvious starting point for a § 1983 analysis is to identify the specific constitutional right that was allegedly violated." *City of Hammond v. Cipich ex rel. Skowronek*, 788 N.E.2d 1273, 1279 (Ind. Ct. App. 2003), *trans. denied*.

Here, Smith contends that "the unnecessary use of tear gas violates the Eighth Amendment."[3] (App. 9).

> The Eighth Amendment, which applies to the states through the Fourteenth Amendment, prohibits the infliction of cruel and unusual punishment and manifests an intention to limit the power of those entrusted with the government's criminal-law function. However, not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny. "After incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment."
>
> Prison administrators are charged with the responsibility of ensuring the safety of the prison staff, administrative personnel, and visitors, as well as the inmates themselves. "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." "The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense." The test as to whether the measure taken inflicted unnecessary and wanton pain and suffering is whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

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[3] In his complaint, Smith also alleges that the defendants violated his Fourteenth Amendment rights. Smith, however, fails to address this issue in his Appellant's Brief and raises it for the first time in his Reply Brief. His failure to raise this issue in his Appellant's Brief waives the issue for purposes of appellate review. Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief."); *Thompson v. Thompson*, 811 N.E.2d 888, 920 (Ind. Ct. App. 2004), *trans. denied*. We therefore only address the Eighth Amendment.

*Smith v. Indiana Dep't of Correction*, 871 N.E.2d 975, 987-88 (Ind. Ct. App. 2007) (internal citations omitted), *trans. denied*, *cert. denied*, 128 S. Ct. 1493 (2008).

Looking only to the well-pleaded facts contained in Smith's complaint, we find that he has failed to set forth sufficient factual allegations that either Knight or other DOC employees maliciously and sadistically inflicted unnecessary and wanton pain and suffering for the very purpose of causing harm. *See id.* at 988. Rather, his complaint contains allegations that DOC employees used tear gas as a security measure, in an effort to restore discipline. As to Smith's claim that Knight and other DOC employees provoked inmates, this is a baseless allegation, which, even if it were true, does not support his Eighth Amendment violation claim. As Smith's complaint has no arguable basis in law or fact, we find that the trial court properly dismissed it pursuant to Indiana Code section 34-58-1-2.

Affirmed.

BAILEY, J., and ROBB, J., concur.