No. 75-44 - Burrell v. McCray

This case comes to us from a divided vote of the CA 4.

There are four separate suits by Maryland prisoners involved here. McCray brought two of them against guards. He claimed that he was placed naked in isolation for 48 hours and thus was deprived of liberty without due process and was subjected to cruel and unusual punishment. In one suit he sought damages. In the other, the CA 4 construed his complaint to ask for injunctive relief as well as damages. Stokes similarly sued claiming violation of his First and Fourteenth Amendment rights by denying him access to political newspapers. He sought both damages and declaratory and injunctive relief. Washington sued for an alleged failure of a prison doctor to provide him with necessary medical care. He sought declaratory relief and damages.

The District Court dismissed these suits for failure to exhaust state administrative remedies. This involves filing a complaint with an inmate grievance condition consisting of two lawyers, two persons with experience in the fields of prisons or public safety and one member of the public. It submits a recommendation to the Secretary of Public Safety who may accept or reject it. His order is judicially reviewable. There is no provision for award of damages.

The suits are under § 1983 and, as I indicated above, were dismissed by the District Court. The district judge in the alternative ruled as to the McCray suits that he could not recover on the merits. The CA 4 unanimously ruled that exhaustion was not required and thus reversed all four cases on that ground. It also reversed the McCray suits on the Eighth Amendment ground

but did so by a vote of 4 to 3. The reversal in the McCray suits was for a determination whether recovery was barred by official immunity. The other cases were remanded for trial.

It seems to be fairly settled in this Court that under § 1983 the exhaustion of state administrative remedies is not needed. Monroe v. Pape held as much. Yet there are implications in other cases that exhaustion may be required. These are set forth in some detail in the flimsy.

The facts on the Eighth Amendment McCray point are important. He evidently was a difficult prisoner and was making a disturbance. A guard put him in isolation to prevent him from creating a greater disturbance. When he was being moved he shouted insults and threatened to hurt himself. The guard took this as an indication of mental instability and thus placed him in isolation without clothes or bedding. He was given a mattress for the night, but he dug into this in order to use it for a blanket. During the night he smeared feces over himself and the cell wall. The prison psychologist was notified. After another day he settled down apparently and was returned to his cell. The record does not disclose whether he was ever seen by the psychologist. The CA 4 on this issue noted that medical help was not immediately forthcoming and wanted the District Court to pass on immunity in the light of a possible good faith belief by the guard that he was acting legally.

In the second McCray suit a fire occurred in his cell. McCray was treated for burns. He was placed in a mental observation cell. He was not seen by a physician, however, for three days. He was not given articles of personal hygiene. The CA 4 held that these conditions violated the Eighth

Amendment and that the failure to provide medical help was also a violation. The dissent was on the ground that the District Court's findings on the Eighth Amendment point were not clearly erroneous, that the guards had acted properly and had not treated McCray in an inhuman manner. The reason for the isolation was protection of the other prisoners from possible fires during the period over the New Year Holiday when most of the staff were on leave.

Bill in his comments on the flimsy initially indicated that the idea of exhaustion of prisoner complaints is enticing but that the Court has said clearly that no exhaustion is required in 1983 claims.

The State in its brief emphasizes the vast increase in 1983 prisoners' cases. It says that the District Court here found the inmate grievance commission route effective and adequate and more capable of prompt relief than federal court litigation. Despite the lack of power to award damages, it was an effective and adequate remedy. The Court's prior cases are to the net effect that state court remedies need not be exhausted prior to the filing of a § 1983 action and that this was not necessary where the administrative remedies were inadequate. The cases on their face establish the general principle that exhaustion would never be required in a 1983 action. Nevertheless, various exceptions have been engrafted upon that rule. Where a plaintiff is subjected only to prospective injury he must exhaust. So, also, when the suit could have been brought under another statute. Maryland is sensitive to the rights of its citizens and has taken positive steps to provide a remedy. So it is with the grievance commission. Section 1983 is being abused by prisoners. Traditionally, exhaustion

has been favored. Numerous proposals have been made regarding alternatives to litigation under § 1983. Policy considerations require exhaustion when there is an adequate and effective state administrative remedy. Prisoners are special classes of citizens who might be required to pursue adequate and effective state administrative remedies. The CA 4 here erred when it disregarded the District Court's findings.

The respondents concede that the heavy federal court case loads are a matter of national concern. They do not agree that the Maryland grievance commission provides an answer to these problems. The proposition that prisoners may be treated differently from other § 1983 complainants cannot be maintained. This history of the statute, both legislative and judicial, clearly supports the CA 4 here. If the statute is to be altered it should be done by Congress and not by judicial decree. An exhaustion requirement will not bring about any real benefit to the federal courts. There is a variety of alternative means for the courts to manage the prisoner problem. In any event, the Maryland grievance commission procedure does not satisfy minimum standards of due process.

The respondents further argue that the District Court here held full evidentiary hearings in the McCray cases. The CA 4 rejected the rationale advanced by the petitioners. The conditions and length of confinement in the solitary cells and the process by which the confinement was imposed did not bear any reasonable relationship to the purpose of the confinement. My opinion in Jackson v. Indiana is cited. The conditions in the solitary cells are not consistent with minimal concepts of human dignity. [Of course this is always said of any solitary confinement.] When

McCray was placed in isolation there was a Maryland isolation governing the use of solitary confinement but it was not followed by the guards. There should be proper deference to what prison officials prescribe in the inadministration of state prisons.

There is a brief amicus by the Center for Correctional Justice urging affirmance. The imposition of an exhaustion requirement would endanger one of the most innovative and positive developments in corrections in recent times. Correctional officials are experimenting with a wide variety of models for the administrative remedy of prisoners' grievances. Some represent an advance for corrections. To impose an exhaustion requirement would result in the lowest common denominator among grievance mechanisms. But if one is imposed, then the Court should articulate specific standards for adequacy and timeliness. These must include written responses with reasons, tight time limits, hearings, and some form of independent outside review. The Maryland grievance commission fails to measure up to the standards the Center identifies. Thus it would be inappropriate to require exhaustion.

There is a brief amicus filed by the ACLU and the National Legal Aid and Defender Association. It would be inappropriate to alter the settled statutory construction of 1983 in the light of congressional acquiescence in the practice of not requiring exhaustion under that statute. A requirement also would impose an unacceptable delay upon persons seeking to vindicate constitutional rights.

Thirteen states have filed a brief amicus urging reversal. Twenty-three states have instituted grievance procedures, and, indeed, in three states inmate unions have gained recognition as bargaining agents. These

are realities. Exhaustion should not be required where there are in existence adequate state administrative remedies. The doctrine of non-exhaustion under § 1983 has been eroded, and public policy requires that an exception be made under the circumstances of this case.

Bill points out that some of the impetus behind requiring exhaustion is the burden on the federal courts and the desire to avoid wherever possible unnecessary interference with state prison systems. The states should be allowed to clean their own house. One of the troubles with this is that the Maryland system does not empower the commission to impose damages. Also, there is no collateral estoppel effect, and the prisoners will still come into federal court. The Maryland process, says Bill, is not conducive to a feeling on the part of state prisoners in getting a fair deal. [Will they ever feel that way?] Much can be said for the exhaustion principle where the proposed action does not go into effect until the administrative review is completed. So, too, where a state is empowered to grant a prisoner all the relief he seeks and has an efficient procedure for doing that. This is not the case, however, in the Maryland situation. Bill points out that the opinion, if it affirms, can be written in such a way as to prod Congress into action and to outline the kind of system that might be appropriate for a requirement of exhaustion. He notes that the Court could draw a distinction between prisoner cases and other kinds but wonders whether it could be a principle distinction. That kind of thing is for the Congress to do.

Bill points out that he is on dead center on the Eighth Amendment issue. He wishes the issue could be ducked. Of course, if exhaustion is

required, then the issue need not be reached. If exhaustion is not required, perhaps the Eighth Amendment aspect could be the subject of a remand after the death cases come down with their discussion of the meaning of the Eighth Amendment.

Finally, Bill points out that in February a bill was introduced that would require exhaustion of state remedies in prisoners' 1983 suits. Thus, it indicates that Congress is working toward a solution.

Bill then turns to the exhaustion requirement if the Court should decide that one is necessary. Bill says that he sees no way in which this Court sua sponte can create a collateral estoppel rule for § 1983. Thus, every case that gets to federal court after exhaustion must essentially be relitigated. Thus, the way to assure a lessening of federal court burden is to see that the prisoners actually obtain relief elsewhere or are content with other procedures. The first legal inadequacy of the Maryland system is the inability of the commission to award damages. Thus, the remedy is fully inadequate. A second legal inadequacy in the Maryland scheme is the power of the executive director of the commission to dismiss the complaints as frivolous without a statement of reasons. The director is not a neutral as are the regular members of the commission. A third problem is that the secretary normally requests and receives communications ex parte from prison officials before deciding on how to rule on the commission's recommendation. The prisoner is not given the opportunity to rebut. A fourth problem is the time limits. The commission acts without any statutory time limit. Bill does not go along with certain other suggestions on the part

of the respondents about the commission's order being only a recommendation, the infrequency of hearings, the absence of counsel and restrictions on witnesses and the like. Much of this is in line with Wolff v. McDonnell.

In sum, he encounters difficulty in the Maryland system with the inability of any principle of collateral estoppel; with the inability on the part of the commission to award damages; with the ability by the executive director to dismiss as frivolous; with the ultimate decision resting with the secretary who is not a neutral; with the secretary not being bound by any standard and not having to give any reasons; and with the absence of any fixed time limit for decisions by the commission. All of these can be corrected except the collateral estoppel point.

I voted to deny cert. in this case, and I think I am still on that side of the controversy. Now that it is here, however, I am rather inclined to disagree with the CA 4 on the Eighth Amendment aspect. I know that many people are inherently jarred and shocked by the concept of isolation. On the other hand, I have seen many prisoners in isolation cells and have come away convinced that that is exactly where they belong. Some of them are little more than animals, and it would be a distressing situation to place them in general population. The distress would affect other prisoners even more than administration officials, and I think other prisoners deserve some protection, too. Stripped cells are, for me, not entirely reprehensible. Some of these prisoners will destroy absolutely anything that's in a cell, including a porcelain lavatory fixture. They also can damage themselves severely. Thus, a floor routine does not shock me. It will shock most of the Brethren, I anticipate.

On the exhaustion requirement, it seems to me that the CA 4 was about right. The Maryland system can be largely improved by changes in it except, of course, for the collateral estoppel argument. That can be changed by congressional action, and that is exactly where I would place the burden. What I would like to do, therefore, would be to give all the encouragement we can to the states to fix up their systems and then to have Congress act on collateral estoppel if that is what in effect it chooses to do. I could go along with that.

Thus, for the moment, I am content to sit on what I regard as established doctrine of nonexhaustion for § 1983. Certainly my writings in the past have been in that direction. While it would be possible to draw distinctions on the nature of past cases, I think I am not inclined to do so now. I fully anticipate, however, that LP and WHR and perhaps BRW and the CJ will do exactly that. Thus I would affirm on the exhaustion feature. I might well express disagreement with the CA 4 on the Eighth Amendment point. This, I suppose, means affirm in part and reverse in part.

H. A. B.

4/23/76