NOT DESIGNATED FOR PUBLICATION

No. 126,143

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CLINTON LEE MCKINNEY,
*Appellant*,

v.

JEFF ZMUDA,
SECRETARY OF CORRECTIONS, et al.,
*Appellees*.

# MEMORANDUM OPINION

Appeal from Leavenworth District Court; GERALD R. KUCKELMAN, judge. Submitted without oral argument. Opinion filed October 6, 2023. Reversed and remanded.

*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 appellees.

Before WARNER, P.J., GARDNER and HURST, JJ.

PER CURIAM: Clinton Lee McKinney, an inmate, appeals the district court's summary dismissal of his K.S.A. 60-1501 petition. Liberally construing McKinney's petition, as we must, we find that McKinney alleges violations of the Free Exercise Clause and Religious Land Use and Institutionalized Persons Act (RLUIPA), and the record does not conclusively show that McKinney is not entitled to relief. We thus reverse the district court's dismissal of his petition and remand for an evidentiary hearing.

*Factual and Procedural Background*

McKinney, an inmate at Lansing Correctional Facility (LCF), filed a pro se K.S.A. 60-1501 petition on November 8, 2019. In this petition, McKinney alleged that LCF violated his right to freely exercise his religion as a member of the Native American Church (NAC). McKinney claimed that the Kansas Department of Corrections (KDOC) failed to provide NAC members from "Federally Recognized Tribes" "time for religious observances" and "their own sweat lodge." McKinney also asked the KDOC to provide these accommodations only to inmates who could prove their heritage was "1/4 Native."

McKinney claimed that he exhausted his administrative remedies by submitting a request for accommodations, completing grievance procedures, and receiving a response from the Secretary of Corrections (Secretary) on June 1, 2019. Although McKinney attached several documents to support this claim, he did not include a copy of the response that he had allegedly received from the Secretary. Still, McKinney provided a copy of his accommodations request and grievance forms, a response letter from Gloria Geither (the director of the KDOC's religious programs), and a memorandum response from Warden Ron Baker. Geither's letter stated that McKinney's request had been denied because the KDOC "does not require any individual to prove their membership, birthrite, [*sic*] lineage, etc. of any religion." Baker's response notified McKinney of his right to appeal Geither's decision to the Secretary.

The district court issued a writ of habeas corpus to the Secretary. In its answer, the Secretary argued that McKinney's petition should be dismissed for a failure to state a claim, noting that KDOC already recognized "the Native American religion" and provided members several religious accommodations:

> "Kansas Department of Corrections (KDOC) Internal Management Policy and Procedure (IMPP) 10-110D addresses religious programming. A copy is attached as

> Exhibit A. It provides that 'offenders shall be permitted to practice a religion to which they sincerely ascribe within the limitations imposed by individual facility physical strictures, other considerations of security, good order and discipline, consistent with consideration of costs and limited resources.'
>
> "Contrary to Petitioner's assertion in his petition, the Native American religion is specifically recognized in IMPP 10-110D and provides that members of this group or call-out may participate in worship, drum ceremony, sweat lodge and pow wow. Inmates are permitted to possess the specified property, may wear a medicine bag, and participate in seasonal dances (pow wows), sweat lodges and smudging. These activities are regularly scheduled and held at Lansing Correctional Facility and would have been available to Petitioner to attend when he was a member of the Native American call-out.
>
> "Petitioner fails to provide any evidence of a constitutional violation. As a result, Petitioner's claims should be denied and the petition dismissed."

In a footnote, the Secretary alleged that after filing his petition, McKinney had "changed his religious preference to Wiccan . . . [and was] no longer a member of the Native American call-out." The Secretary also attached a copy of IMPP 10-110D and other documents.

McKinney's response contended that KDOC's "call-out" for the Native American services failed to satisfy NAC members' needs. First he alleged that "[t]he Native American Church is an internationally and federally recognized religious organization, incorporated for over 100 years, with religious exercises and ceremonies, separate from the established KDOC 'Native American Religion' as defined in I.M.P.P. 10-110." McKinney also explained that he and other inmates had contacted Geither "to explain how and why the existing offered 'Native American Religion'" offered by the KDOC "falls short of meeting the criteria for the nationally recognized Native American Church." He then attached a copy of a proposal that he had submitted to Geither about the accommodations the NAC wanted.

McKinney later filed another responsive pleading, arguing that genuine issues of material fact precluded summary dismissal of his petition. He alleged that the NAC's "prerequisite that a person be a member of a Federally Recognized tribe is tied to Congress' unique obligation towards Indian Religions [and is] thus a political status." McKinney also noted significant differences between the NAC and other Native American religions, including that the NAC "is a Christian church and incorporates its values . . . [but] the [Native American] religious callout does not pray to Jesus and frowns on invoking Jesus during pipe and drum ceremonies." He also referenced the NAC's use of peyote.

The district court held a status hearing and allowed McKinney to explain his claim. McKinney again argued that the NAC is an established religion, that its members hold a particular political status due to its federally Certified Degree of Indian Blood (CDIB) requirements, and that KDOC's accommodations for the Native American call-out did not satisfy NAC members' religious needs. After acknowledging these arguments, the district court granted the Secretary time to respond.

The Secretary's response argued that McKinney's free exercise claim should be dismissed because it failed to show that his "sincerely-held religious beliefs were substantially burdened," citing *Boles v. Neet*, 486 F.3d 1177, 1182 (10th Cir. 2007). The Secretary challenged McKinney's arguments as conclusory and factually unsupported. It also challenged McKinney's requests to use CDIB requirements and peyote as illegal and unworkable.

The district court then held a non-evidentiary hearing, expressed difficulty understanding McKinney's request for relief, and once again allowed McKinney to explain his claim. After hearing McKinney's argument and allowing a response, the district court ruled:

"Mr. McKinney, obviously the prison system has got a lot of interests that they have to try to protect, one of those is your religious rights. But other interests include the necessities of running a prison, the penological concerns that they have. And . . . those two things can at times come into conflict.

"But based upon the filings that the respondents have filed, it appears that they do have a callout for Native American. And it may not be to—to what you want, but it—but it is adequate in providing for your religious rights. Again, I wasn't really sure what you were asking for in your petition.

. . . .

"So the Court at this time is going to grant the request of the respondents. I'm [going to] find that your petition fails to state a claim upon which relief can be granted. I simply can't tell what you're even asking me for. So I'm going to grant their petition and at this time dismiss the matter."

McKinney timely appeals.

*Did the District Court Err in Dismissing McKinney's Habeas Corpus Petition?*

McKinney claims the district court erred by summarily dismissing his K.S.A. 60-1501 motion. McKinney asserts that the district court could not simply dismiss his claim because it did not understand it. McKinney cites *United States v. Boyll*, 774 F. Supp. 1333 (1991), for its description of the NAC. He clarifies that although he alleged that NAC members needed to meet heritage or CDIB requirements, he did so incorrectly, as noted in *Boyll*. McKinney also admits that his allegations about a "political status granted to certain Native Americans and the trust relationship between the . . . [g]overnment and particular members of certain tribes" created confusion regarding his request for relief. But he asserts that political status is not an issue on appeal. He also states that he intended to request only separate services and sweat lodge time for NAC worship. Thus, peyote use is no longer an issue.

McKinney also argues that his petition alleged facts which show a prima facie violation under several legal theories, including the Free Exercise Clause of the First Amendment and RLUIPA. McKinney asserts that the district court applied an incorrect test for addressing his free exercise claim. Although the district court found the current call-out "adequate," McKinney contends that the correct test asks whether KDOC has a compelling state interest in denying his request for accommodations and providing only one Native American call-out.

Because McKinney filed this action under K.S.A. 60-1501, the KDOC argues that federal statutes providing certain civil or religious accommodations, seemingly referring to RLUIPA, do not apply here. The KDOC also asserts that dismissal was warranted because McKinney failed to allege shocking or intolerable treatment because he seeks only additional accommodations to those he had received under KDOC's Native American call-out. The KDOC alternatively suggests that the district court's summary dismissal should be affirmed as right for the wrong reason because McKinney's petition was untimely, he failed to exhaust his administrative remedies, and the issue raised is moot.

We first address the procedural barriers the KDOC asserts on appeal.

*Exhaustion of Administrative Remedies*

The KDOC first contends that McKinney failed to exhaust his administrative remedies. Before an inmate may file a civil action against the Secretary, a political subdivision of the Secretary, or a public official, the inmate must exhaust any administrative remedies. And proof of exhaustion must generally accompany the filing of the original petition. K.S.A. 75-52,138; see K.S.A. 60-1501(b). This court has required strict compliance with the exhaustion requirement. See *Laubach v. Roberts*, 32 Kan. App. 2d 863, 868-69, 90 P.3d 961 (2004). The failure to exhaust administrative remedies is a

jurisdictional barrier to bringing the case. *Limburg v. Spiritual Life Center*, No. 124,473, 2022 WL 3693614, at *2 (Kan. App. 2022) (unpublished opinion) (applying the statute and affirming dismissal of K.S.A. 60-1501 petition, alleging several violations of the inmate's civil religious liberties, for lack of jurisdiction); *Smith v. Bruce*, No. 102,110, 2009 WL 3428823, at *4-5 (Kan. App. 2009) (unpublished opinion) (dismissing habeas corpus petition on jurisdictional grounds for failing to exhaust administrative remedies). 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).

McKinney maintains on appeal that he exhausted his administrative remedies. His verified petition states that he received a response from the Secretary on June 1, 2019, indicating that he exhausted his administrative remedies. We may view that verified petition as an affidavit; it is thus some evidence of the date he received the Secretary's decision. See *Sperry v. McKune*, 305 Kan. 469, 488, 384 P.3d 1003 (2016). Because the KDOC does not refute that evidence, we accept McKinney's claim that he received notice of the final agency action on June 1, 2019.

True, the documents McKinney attached to his petition do not include a copy of the Secretary's response. And K.S.A. 75-52,138 requires an inmate to "file with such petition proof that the administrative remedies have been exhausted." But our Supreme Court has held that only state law claims require an inmate to attach proof of exhaustion in the initial pleading. *Sperry*, 305 Kan. At 483 ("[W]hile Sperry had to file proof that he had exhausted administrative remedies when filing his petition in order to bring state law claims, he did not need to do so to bring his federal claim."). So although both federal and state law require an inmate to exhaust administrative remedies before suing, only a state claim is impacted by K.S.A. 75-52,138's requirement that an inmate file proof with their petition of having exhausted administrative remedies. See *Matson v. State*, No. 123,600, 2021 WL 6068711, at *3 (Kan. App. 2021) (unpublished opinion) (applying

*Sperry* and reversing summary dismissal of claim under 42 U.S.C. § 1983 that was based on inmate's failure to include proof of exhaustion in original pleading). McKinney's petition alleges solely violations of federal law, so it is immaterial that he did not attach proof of the Secretary's decision to his petition. We thus are unpersuaded by the KDOC's late assertion that McKinney failed to exhaust his administrative remedies.

*Timeliness*

We next address the KDOC's argument that McKinney failed to timely file his petition.

Once administrative remedies are exhausted, an inmate must file a K.S.A. 60-1501 petition within 30 days of the date the action becomes final. K.S.A. 60-1501(b); *Johnson v. Zmuda*, 59 Kan. App. 2d 360, 366, 481 P.3d 180 (2021). An action does not become final until the inmate receives actual notice of the final administrative decision. *Jamerson v. Schnurr*, 57 Kan. App. 2d 491, 496, 453 P.3d 1196 (2019). And the 30-day period "is extended during the pendency of the inmate's timely attempts to exhaust such inmate's administrative remedies." K.S.A. 60-1501(b); see *Litzinger v. Bruce*, 41 Kan. App. 2d 9, 11, 201 P.3d 707 (2008). Failure to comply with this 30-day statute of limitations bars the petition. *Peterson v. Schnurr*, 57 Kan. App. 2d 56, 58, 447 P.3d 380 (2019); *Taylor v. McKune*, 25 Kan. App. 2d 283, 286, 962 P.2d 566 (1998).

The KDOC asserts that McKinney's petition was untimely because his petition states that he received the Secretary's final decision on June 1, yet his petition was not filed, as shown on the file stamp, until November 8, 2019—well beyond the 30-day deadline.

We disagree. Although the file stamp shows that McKinney filed his petition after the 30-day deadline, the certificate of service shows that he placed his petition in the

prison mail system on June 17. "[U]nder the prison mailbox rule, a habeas petition is considered filed when it is delivered to prison authorities for mailing—not on the date it is eventually filed with the court clerk—since those prison authorities control what happens after the paper is delivered to them." *Sauls v. McKune*, 45 Kan. App. 2d 915, 916, 260 P.3d 95 (2011). Applying the prison mailbox rule, as we must, we consider his petition filed on June 17, within 30 days of June 1. See 45 Kan. App. 2d at 916. McKinney's petition was thus timely filed.

*Mootness*

Finally, the Secretary claims that this appeal is moot. KDOC makes a conclusory assertion that McKinney changed his religious affiliation to Wiccan, so "any claims concerning Native-American religious activities are moot." McKinney counters that he is attending a different call-out because his own (the NAC) is unavailable and the homogenized Native American call-out fails to meet his religious needs.

We will dismiss an issue on appeal as moot only if it can be shown clearly and convincingly that the actual controversy has ended, that the only judgment that could be entered would be ineffectual for any purpose, and that the judgment would not impact any of the parties' rights. *Mundy v. State*, 307 Kan. 280, 288-89, 408 P.3d 965 (2018). A case is not moot if "it may have adverse legal consequences in the future." *State v. Montgomery*, 295 Kan. 837, Syl. ¶ 4, 286 P.3d 866 (2012).

KDOC's conclusory assertion fails to show that the apparent change in McKinney's religious affiliation meets the above criteria. We agree with McKinney that the controversy has not necessarily ended, as he could change his religious affiliation again and may do so. We thus deny the KDOC's request to dismiss the petition as moot.

*Standard of Review and Basic Legal Principles*

Having resolved the procedural issues, we reach the merits of the petition.

K.S.A. 60-1503(a) authorizes the summary dismissal of a habeas corpus petition "[i]f it plainly appears from the face of the petition and any exhibits attached thereto that the plaintiff is not entitled to relief in the district court." When a district court summarily dismisses a petition without issuing a writ under K.S.A. 60-1503(a), appellate courts are in just as good a position as the district court to determine whether relief is warranted. "The same is true after a judge issues a writ and the court determines (after a preliminary habeas corpus hearing) that 'the motion and the files and records of the case conclusively show that the inmate is entitled to no relief.' K.S.A. 2020 Supp. 60-1505(a)." *Denney v. Norwood*, 315 Kan. 163, 175, 505 P.3d 730 (2022). So, our review is unlimited. *Johnson v. State*, 289 Kan. 642, 649, 215 P.3d 575 (2009). We assume the facts alleged are true and if we find those facts support the petitioner's claims under any theory, we must reverse the decision to summarily dismiss. *Washington v. Roberts*, 37 Kan. App. 2d 237, 240, 152 P.3d 660 (2007). We also "broadly construe" pro se petitions. *Laubach*, 32 Kan. App. 2d at 868.

*Preservation and Applicability of the Legal Bases Raised in McKinney's Petition*

To state a claim under K.S.A. 60-1501 a petition must allege "shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Johnson*, 289 Kan. at 648. The KDOC has only scantly briefed the merits. It first alleges that McKinney's petition alleges no shocking or intolerable conduct. Yet this ignores McKinney's allegations of KDOC's continuing constitutional mistreatment of his religious liberty. When determining whether a petition alleges shocking and intolerable conduct or continuing mistreatment of a constitutional stature, "courts must accept the

facts alleged by the inmate as true." *Hogue v. Bruce*, 279 Kan. 848, 850, 113 P.3d 234 (2005).

McKinney's petition claims that by denying his request for accommodations, KDOC violated his right to the free exercise of religion under the First Amendment to the United States Constitution and the protections provided through the RLUIPA, 42 U.S.C. § 2000cc et seq. Although McKinney did not apply these rules to the facts of his case, he attached several copies of legal excerpts discussing and applying them to his petition. He also specifically argued in his response to the Secretary's answer that LCF personnel violated both the First Amendment and RLUIPA. McKinney's petition is properly brought as a 60-1501 claim, as we are satisfied that he has adequately alleged continuing mistreatment of a constitutional nature by his First Amendment claims.

The KDOC also suggests that RLUIPA does not apply here. But the Supreme Court has explained that "RLUIPA's text applies to all laws passed by state and local governments." *Cutter v. Wilkinson*, 544 U.S. 709, 732, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) (Thomas, J., concurring). "RLUIPA applies in the prison context." *Kay v. Bemis*, 500 F.3d 1214, 1221 (10th Cir. 2007); see also *Ahmad v. Furlong*, 435 F.3d 1196, 1197 (10th Cir. 2006); *Hammons v. Saffle*, 348 F.3d 1250, 1258 (10th Cir. 2003); *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001).

The KDOC next contends that McKinney just wanted more accommodations, that nothing requires the KDOC to provide every religious exercise he wants, and that courts generally give great deference to the management and operation of a prison system.

We agree that courts generally give great deference to the management and operation of the prison system. See *Jamerson v. Heimgartner*, 304 Kan. 678, 681, 372 P.3d 1236 (2016). The right to practice religion must be balanced with due deference to

the expertise of prison administrators in establishing necessary regulations to maintain order, security, and discipline. *Cutter*, 544 U.S. at 723.

That balance is captured in the relevant prison policy which governs KDOC's decision here. Its "Determination to Accommodate Inmate Requests," IMPP 10-110D (attached to the Secretary's answer), states as to religious accommodations:

> "A. Requests for accommodation of certain religious practices and observances shall be considered from offenders who provide sufficient evidence of their belief and affiliation with the religion.
>
> . . . .
>
> "B. The determination to be made when an offender requests an accommodation of a religious practice shall be whether any existing restriction on the practice or any justification offered for denial of the practice is in furtherance of a compelling correctional interest, and is the least restrictive means of furthering that compelling correctional interest.
>
> "C. A claimed religion or religious belief is entitled consideration for accommodation if it:
>
> 1. Has an established historical or organizational foundation; or,
> 2. Occupies a place in the lives of its claimed adherents that is parallel to that Of more conventional religions, rather than a personal philosophy." IMPP 10-110D VI.

The policy then states that when "an offender seeks recognition of a set of beliefs or religion by the Department or facility," the same procedures outlined above (for accommodations) shall apply to that determination. Included in the relevant factors that may be considered are:

> "a. The history or origin of the religion or religious beliefs, including when, where, and by whom it was founded or established;
>
> "b. Whether the religion is organized, or has established or formed churches . . . or other facilities or groups for the purpose of practicing the religion;

"c. Where unconventional or uncommon, whether it can be confirmed that the offender's set of beliefs or religion plays the same role in the offender's spiritual life as more conventional religions or religious beliefs play in the lives of their practitioners; and,

"d. The relationship between the accommodation and the religious belief or beliefs." IMPP 10-110D VI.C.3.

The policy clarifies that this determination is not based on whether the warden/superintendent or a designee approves of the religion, but on the procedures above, and "[w]hether the manner in which the offender seeks to practice the religion or exercise the beliefs will disrupt departmental and facility practices, policies, or operations that are founded on concerns for security, safety, rehabilitation, or sound correctional management." IMPP 10-110D.VI.D.1.b.

McKinney styled his request as a "request for accommodation of religious practices," but he also made clear that he was requesting the authorization of a religion new to the KDOC. He proposed "to establish a Native American Church call-out" and attached pages explaining "why the current Native American call-out is not working," pointing out differences between the two.

As shown above, the same procedures apply whether or not the KDOC considered McKinney's request to be for a religious accommodation or to recognize a new religion. In either event, the determination "shall be whether any existing restriction on the practice or any justification offered for denial of the practice is in furtherance of a compelling correctional interest, and is the least restrictive means of furthering that compelling interest." IMPP 10-110D.VI.B. But the district court's conclusion that the current Native American call-out is "adequate" fails to convince us that it applied the standard required by KDOC's own policies. And the district court's failure to make factual findings in support of its conclusion does not assist us in reviewing the record for evidence to support the justification KDOC offered for denial of the practice—that the

two religions were close enough. Nor does KDOC point to any such evidence in its appellate brief.

We reach a similar conclusion when we examine McKinney's free exercise claim, recognizing that he has not stated a 42 U.S.C. § 1983 claim. The free exercise claim could survive dismissal only if McKinney showed that a prison regulation "substantially burdened . . . sincerely-held religious beliefs." *Boles*, 486 F.3d at 1182. "The first questions in any free exercise claim are whether the plaintiff's beliefs are religious in nature, and whether those religious beliefs are sincerely held." *Snyder v. Murray City Corp*., 124 F.3d 1349, 1352 (10th Cir. 1997). Inmates must then allege that prison personnel substantially burdened the practice of their religion without a justification reasonably related to legitimate penological interests. See *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

Once an inmate makes the threshold showing of a substantial burden, the court applies the four-factor analysis outlined in *Turner* to determine whether the regulation is reasonably related to a legitimate penological interest: (1) Is there a valid, rational connection between the regulation and the governmental interest justifying it; (2) is there an alternative means available to the inmate to exercise the right; (3) would the accommodation have a significant ripple effect on the guards, other inmates, and prison resources; and (4) is there an alternative that fully accommodates the prisoner at de minimis cost to valid penological interests. See 482 U.S. at 89-91.

Yet the district court's conclusion that the current Native American call-out was "adequate" fails to show that it applied the *Turner* factors or any other First Amendment analysis when deciding this case.

The test for whether religious exercise is substantially burdened under RLUIPA largely tracks First Amendment analysis. It provides in pertinent part:

> "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

Thus, once a prisoner has established that his religious exercise has been substantially burdened, the burden shifts to prison officials to show that their decision or policy "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). This echoes the language in KDOC's IMPP 10-110D.VI.B. that we examined above.

But unlike the Free Exercise Clause, RLUIPA does not require a religious belief to be a "'central tenet'" or "'fundamental'" to be protected. *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 n.7 (2008); see also *Van Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009). "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise . . . , not whether the RLUIPA claimant is able to engage in other forms of religious exercise." *Holt v. Hobbs*, 574 U.S. 352, 361-62, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015). Thus, an inmate could prevail on a RLUIPA claim even if he failed on a free exercise claim.

The record fails to show that the district court considered the relevant factors under the KDOC's own regulation, the Free Exercise Clause, or RLUIPA before dismissing McKinney's petition. We cannot see that the district court considered whether McKinney's beliefs were sincerely held or whether they would be substantially burdened by not having a Native American Church call-out. Nor did it apply the *Turner* factors or the least restrictive means test required by KDOC policy to consider the appropriateness of KDOC's actions. And it did not identify any legitimate penological interests that could justify the KDOC's denial.

We assert no opinion on whether McKinney has a right to a NAC call-out or to another religious accommodation. But because the record does not conclusively show that McKinney is not entitled to relief, we reverse the district court's order summarily dismissing McKinney's petition and remand to the district court for further proceedings to determine the merits, if any, of McKinney's claims.

Reversed and remanded.