United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 4, 2020
Lyle W. Cayce
Clerk

No. 19-30809

DARRYL PUDERER,

Plaintiff—Appellant,

versus

BURL N. CAIN, *Warden*, *Individually and in their official capacities*; TRISH FOSTER, *Legal Programs Director*, *Employed at Louisiana State Penitentiary*, *Individually and in their official capacities*; JAMES LEBLANC, *Secretary*, *Louisiana Department of Public Safety and Corrections*, *Individually and in their official capacities*; TIMOTHY DELANEY, *Assistant Warden*, *Individually and in their official capacities*,

Defendants—Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:19-CV-156

Before WILLETT, HO, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Darryl Puderer, Louisiana prisoner # 601803, appeals the judgment dismissing his pro se 42 U.S.C. § 1983 complaint as frivolous because it was time barred. By moving for leave to proceed in forma pauperis (IFP), he also challenges the district court's denial of leave to proceed IFP on appeal and its certification that the appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997).

According to Puderer, his March 2019 complaint was timely because he was entitled to equitable or statutory tolling after March 11, 2015. Puderer says tolling is appropriate due to inadequate prison-library resources and legal assistance, which constitute a State-created impediment to filing his case.

Under Louisiana's general personal injury prescriptive period, Puderer had one year, or until March 11, 2016, to file his § 1983 complaint, absent suspension or interruption of that period. *See Bargher v. White*, 928 F.3d 439, 444-45 (5th Cir. 2019); LA. CIV. CODE art. 3492. He filed the complaint on March 8, 2019, at the earliest. *See Cooper v. Brookshire*, 70 F.3d 377, 379-80 (5th Cir. 1995). Although he invokes the common law doctrine of equitable tolling to argue that the complaint was timely, we liberally construe the argument as asserting that the prescriptive period should be suspended under the doctrine of contra non valentem, *see Bradley v. Sheriff's Dep't St. Landry Parish*, 958 F.3d 387, 394 (5th Cir. 2020), which applies in exceptional circumstances, *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 245 (La. 2010), when the "plaintiff is effectually prevented from enforcing his rights for reasons external to his own will," *Bradley*, 958 F.3d at 394 (internal quotation marks and citation omitted).

Puderer does not assert that he was unable to file the § 1983 action between March 2015 and March 2019 because the courts were closed or otherwise unable to consider his complaint, because of administrative or

contractual restraints, or because he was unaware of the cause of action. *See Harris v. Hegmann*, 198 F.3d 153, 158 (5th Cir. 1999); *Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). To the extent he contends that the defendants prevented him from filing the § 1983 case by providing an inadequate law library, legal materials, and assistance, *see Hegmann*, 198 F.3d at 158, we have held that an inadequate law library does not prevent a prisoner from filing a pro se paper that would be liberally construed as a complaint in federal court, *Schaefer v. Stack*, 641 F.2d 227, 228 (5th Cir. 1981) (applying Florida law). We also have held that an inmate's status as an indigent layman who lacks legal assistance is not a ground for suspending the Louisiana prescriptive period for a § 1983 action. *Kissinger v. Foti*, 544 F.2d 1257 (5th Cir. 1977). We likewise have held, in an analogous context, that an inmate's pro se status, ignorance of the law, and lack of access to the prison law library do not constitute the sort of rare and exceptional circumstances that justify equitable tolling of the statute of limitations for a § 2254 application. *See Felder v. Johnson*, 204 F.3d 168, 170-72 (5th Cir. 2000).

For all these reasons, Puderer's argument that his complaint was timely is frivolous. His argument that he should have received an evidentiary hearing also is frivolous because the complaint was untimely even assuming the accuracy of his factual allegations. Accordingly, the instant appeal lacks arguable merit and is not taken in good faith. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). The motion for leave to proceed IFP is DENIED, and, in the interest of judicial economy, the appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 201-02 & n.24; 5TH CIR. R. 42.2. The motions for appointment of counsel and for an evidentiary hearing are DENIED as well.

Both the district court's dismissal of the § 1983 action and our dismissal of this appeal count as strikes for purposes of 28 U.S.C. § 1915(g).

See Coleman v. Tollefson, 135 S. Ct. 1759, 1763 (2015). Puderer is WARNED that, once he accumulates three strikes, he may not proceed IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).