IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-5080

EARL BROUSSARD,

Plaintiff-Appellant,

v.

HUEL FONTENOT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(1:90CV298)

(December 9, 1992)

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:[*]

Earl Broussard appeals the district court's dismissal of his 42 U.S.C. § 1983 civil rights action as frivolous under 28 U.S.C. § 1915(d). We affirm the dismissal.

I.

Earl Broussard filed a pro se and in forma pauperis § 1983 suit alleging that certain prison officials violated his constitutional rights while he was held at the Orange County

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Jail. In his complaint Broussard claimed that he was denied (1) adequate access to legal materials; (2) his right to see the outside world because the jail lacked windows; and (3) reasonable visitation, including contact visitation.

Following a Spears hearing, see Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), the magistrate judge made a report and recommendation that Broussard's first two claims be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d), and that his third claim remain active pending further proceedings. Broussard filed written objections to the magistrate judge's report. After de novo review of Broussard's objections, the district court adopted the magistrate's recommendation and report, dismissing the first two claims and ordering that the visitation claim remain active. Broussard filed a notice of appeal from the district court's judgment[1] dismissing his first two claims. Subsequently, the magistrate judge filed a second report and recommendation in which he recommended dismissal of Broussard's remaining claim as frivolous pursuant to 28 U.S.C. § 1915(d). The district court adopted this report and recommendation and entered judgment on February 27, 1992, dismissing Broussard's remaining visitation claim as frivolous. Broussard did not file written objections to the magistrate judge's second report, and did not file a notice of appeal from the February 1992 judgment. He now appeals to this court, alleging that the district court erred in dismissing each of his three claims as frivolous.

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[1] This judgment was entered on November 7, 1991.

II.

Before reaching the merits of a case, we must first examine the basis of our jurisdiction, on our own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). Broussard filed his notice of appeal on December 9, 1991, before any final judgment was rendered. The two claims which he appealed neither terminated the litigation, nor were they certified under Fed. R. Civ. P. 54(b). The district court's February 1992 judgment, however, was a final judgment, as it terminated the litigation. This court has jurisdiction to consider a premature appeal in cases where the judgment becomes final prior to the disposition of the appeal even though the notice of appeal does not meet the certification requirements of Fed. R. Civ. P. 54(b). Simmons v. Willcox, 911 F.2d 1077, 1080 (5th Cir. 1990). This being the case here, we may properly consider Broussard's present appeal.

A problem remains, however, with Broussard's December 9, 1991 notice of appeal. Timely filing of a notice of appeal is a requirement which is mandatory and jurisidictional. United States v. Robinson, 361 U.S. 220, 224 (1960); see also Torres v. Oakland Scavenger Co., 487 U.S. 312, 314-17 (1988). By specifically designating the November 1991 judgment in his December 1991 notice of appeal, Broussard clearly did not intend to appeal the February 1992 judgment. See Warfield v. Fidelity & Deposit Co., 904 F.2d 322, 325-26 (5th Cir. 1990). Broussard never filed a notice of appeal designating the February 1992 judgment. Where an appellant notices the appeal of a specified

judgment, we have no jurisdiction to review other judgments or issues which are not expressly referred to nor impliedly intended for appeal. Warfield, 904 F.2d at 325; C. A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1056 (5th Cir.), cert. denied, 454 U.S. 1125 (1981).[2] As a result, this court is without jurisdiction to review the district court's February 1992 judgment dismissing Broussard's visitation claim.

III.

A complaint filed in forma pauperis can be dismissed sua sponte if the complaint is frivolous. 28 U.S.C. § 1915(d). A complaint is frivolous when "it lacks an arguable basis either in law or in fact." Denton v. Hernandez, ___ U.S. ___, 112 S. Ct. 1728, 1733 (1992) (citation omitted). We review the district court's November 1991 § 1915(d) dismissal of Broussard's remaining two claims using an abuse of discretion standard. Id. at 1734.[3]

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[2] It is true that a document intended to serve as an appellate brief may qualify as a notice of appeal provided it is filed within the time allowed by Fed. R. App. P. 4 and it satisfes the requirements of Fed. R. App. P. 3. Smith v. Barry, ___ U.S. ___, 112 S. Ct. 678, 682 (1992). It is the notice afforded by a document, not the litigant's motivation in filing it, which determines the document's sufficiency as a notice of appeal. Id. This liberal construction of the rules, however, fails to help Broussard. While he did file a motion for extension of time for the filing of his appellate brief within the time frame established by Rule 4, this motion did not include any indication whatsoever that Broussard additionally intended to appeal the February 1992 judgment. Thus, even under this circuit's policy of liberal construction of notices of appeal, see C. A. May, 649 F.2d at 1056, we cannot construe any of Broussard's other filings as a timely notice of appeal.

[3] For purposes of our analysis, we will treat Broussard as a pretrial detainee. The record shows that Broussard was

Broussard complains that he was denied access to the courts because the Orange County Jail did not provide adequate access to legal materials.[4] "Prisoners have a constitutional right of adequate effective and meaningful access to the courts, a right which 'requires prison authorities to assist inmates in the

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first convicted of a felony in 1986. He was released on parole October 3, 1988, and was arrested on armed robbery charges November 16, 1988. His parole was revoked in January 1989. On March 16, 1989 he received a seventy-five year sentence for aggravated robbery. Broussard was transferred from the Orange County Jail to the Texas Department of Criminal Justice, Institutional Division in May 1989. The magistrate judge treats Broussard as a pretrial detainee in his first report and recommendation, which is the report pertaining to the claims at issue in this appeal. A pretrial detainee is protected by the due process clause of the fourteenth amendment, which requires that a pretrial detainee not be subjected to conditions which amount to punishment. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

[4] Broussard makes this complaint in relation to his criminal defense, alleging that he was not provided with an adequate law library or legal assistance to help him in preparing his defense in his robbery suit. He never mentions this complaint in relation to civil claims until the filing of his objections to the magistrate judge's report and recommendation. When he does address the matter, however, he does so referring only to other prisoners generally, simply stating that other prisoners may have difficulty filing civil claims and may not have access to counsel. Broussard never alleges that he was injured in any way in the filing of his § 1983 claims. Because actual injury must be shown in order to make out a claim under Bounds v. Smith, 430 U.S. 817 (1977), and because Broussard does not adequately present the issue on appeal, we do not address Broussard's allegations in relation to the filing of his present civil action. See Mann v. Smith, 796 F.2d 79, 84 & n.5 (5th Cir. 1986). Furthermore, the constitutional right articulated by the United States Supreme Court in Bounds is a constitutional right of access to the courts, the emphasis being on "protecting the ability of an inmate to prepare a petition or complaint." Bounds, 430 U.S. at 828 & n.17 (citation omitted); Mann, 796 F.2d at 83. In fact, as in Mann, with regard to his civil claims, Broussard "himself [has] proved in an irrefutable manner that he was able to file a legally sufficient complaint: by doing so." Mann, 796 F.2d at 84.

preparation and filing of meaningful legal papers by providing . . . adequate law libraries or adequate assistance from persons trained in the law.'" Morrow v. Harwell, 768 F.2d 619, 622 (5th Cir. 1985) (quoting Bounds v. Smith, 430 U.S. 817, 828 (1977)).

Inmates who are represented by counsel have no right of access to a law library to work on the criminal cases on which they have counsel. Cruz v. Hauck, 515 F.2d 322, 331 (5th Cir. 1975). During the time he was in the county jail, Broussard had access to legal counsel who had been appointed to represent him in connection with the criminal charges on which he was being held--a fact which he acknowledged at the Spears hearing.[5] We cannot conclude that Broussard's access to his court-appointed attorney[6] was insufficient to satisfy the requirements of Bounds. See Mann v. Smith, 796 F.2d 79, 83-84 (5th Cir. 1986). Therefore, we cannot find that the district court's dismissal of this claim as frivolous was an abuse of discretion.

Broussard also complains that he was denied his right to see the outside world because the jail lacked windows. He claims that as a result, he could not tell night from day and suffered sensory deprivation and disorientation. This contention is without merit. Broussard fails to show that he was subjected to

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[5] Broussard currently has a separate civil action pending against his court-appointed attorney, alleging ineffective assistance of counsel.

[6] Not only did Broussard have access to his court-appointed attorney, he also had access to a law library while at the county jail--a fact proved through the "Inmate Request for Law Books" form which he himself introduced as evidence at the Spears hearing.

any condition at the Orange County Jail which would constitute a punitive measure implicating due process. See Bell v. Wolfish, 441 U.S. 520, 535 & n.16 (1979). Regrettable as it may seem to Mr. Broussard, he was not entitled to a stress-free environment while incarcerated at the Orange County Jail. See Cupit v. Jones, 835 F.2d 82, 86 (5th Cir. 1987). The district court did not abuse its discretion in dimissing this claim as frivolous.

IV.

Finding that the district court did not abuse its discretion in dismissing Broussard's claims as frivolous, we AFFIRM.