UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-1228
Summary Calendar

JEFFREY MACK CHAPIN,

Plaintiff-Appellant,

VERSUS

BILL LONG,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(CA 3 87 2405 R)

(December 8, 1992)
Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[1]

Chapin appeals the dismissal of his § 1983 action for failure to state a claim. We affirm.

I.

Jeffrey Mark Chapin sued Bill Long, the District Clerk of Dallas County, Texas, in his official capacity, pursuant to 42 U.S.C. § 1983. In his answer, Long asserted the defense of

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[1]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

qualified immunity and filed a motion to dismiss on that basis. Chapin filed a second amended complaint naming the state district judge who handled his state criminal case and the district attorney. Chapin also filed a third amended complaint. The court dismissed the case because Chapin did not plead sufficient facts to overcome Long's entitlement to qualified immunity and because the facts pleaded did not state a claim under § 1983.

Chapin appealed the dismissal. This Court held that the district court had failed to consider the equal protection claim that Chapin raised in the third amended complaint and remanded the case. Following the remand, Chapin filed a request for leave to file a fourth amended complaint, which the court granted. Long answered the fourth amended complaint asserting the qualified immunity defense and filed a second motion to dismiss which the court granted. Chapin raises eleven issues on appeal, none of which have merit. Only seven of Chapin's issues require discussion.

II.

A.

Chapin argues first that Long denied him access to the courts. He complains of the clerk's failure to furnish him with all of the record in his criminal case, particularly his presentence investigation report. He also complains of delays in transmitting his habeas petition and court records to the Texas Court of Criminal Appeals.

Chapin further alleges that Long failed to inform him that the

time limits for his habeas application had been suspended for further investigative finding. He also alleged that Long failed to adequately train his subordinates. Chapin further asserted that he was denied equal protection based upon his race, creed, national origin and economic disadvantage.

Defendant Long pleaded the defense of qualified immunity. For Chapin to overcome Long's defense of qualified immunity, he must first show that at the time of the alleged conduct there was a clearly established constitutional right that was violated and that a reasonable person would have known that his conduct violated that constitutional right. **King v. Chide**, 974 F.2d 653, 656-57 (5th Cir. l992).

A critical element of Chapin's denial-of-access-to-the-courts claim is missing. Such a claim is not valid if a litigant's position is not prejudiced by the alleged violation. **Henthorn v. Swinson**, 955 F.2d 351, 354 (5th Cir.), **cert. denied**, 112 S.Ct. 2974 (1992). Chapin has not pleaded facts to show that his habeas petition was in any way prejudiced by the alleged delay by the 292nd JDC or by Long's inadvertence in making the presentence investigation report or the psychological evaluation report a part of the appellate record.

B.

Chapin complains next that the court erred by not informing him of the deficiencies in the complaint before dismissing it. Even if the district court had such a duty, **see Elliot v. Perez**, 751 F.2d 1472, 1482 (5th Cir. 1985), any such error is harmless.

The defendant's motion alleged that Chapin's complaint failed to state a claim because it lacked factual allegations regarding prejudice from the delay. Chapin included no such allegations in his response. In its order of dismissal, the court stated that, **inter alia**, Chapin's complaint failed to allege facts which would show that delay by anyone had any effect of the decision by the Court of Criminal Appeals. Chapin has not alleged such facts in his appellate brief.

C.

Chapin complains next that the court abused its discretion when it denied him discovery, as he would have been able to show that issues of material fact exist. He also maintains that the district court should have conducted a **Spears** hearing on the issue of discovery. "A defendant entitled to claim qualified immunity is shielded not only from liability but also from `the costs of trial [and] . . . the burdens of broad-reaching discovery.'" **Lion Boulos v. Wilson**, 834 F.2d 504, 507 (5th Cir. 1987) (quoting **Harlow v. Fitzgerald**, 457 U.S. 800, 817-18, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Discovery that turns on factual questions necessary to establish a defendant's qualified immunity claim do not encroach upon a defendant's qualified immunity and may be permitted. Chapin fails to demonstrate that the discovery he sought falls into this category.

D.

Chapin also complains that "it seems that . . . Long has some kind of court order or . . . ordinance in which he only applies to

Appellant." Chapin questions whether Long imposes restrictions "upon all indigents or just American Indians, ..." A claimant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination. **McCleskey v. Kemp**, 481 U.S. 279, 292, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1986). The discrimination must be among persons similarly situated. A "violation of equal protection occurs only when the governmental action in question "classif[ied] or distinguish[ed] between two or more relevant persons or groups." **Brennan v. Stewart**, 834 F.2d 1248, 1257 (5th Cir. 1988). Chapin alleged only that he was denied equal protection; he does not point to others similarly situated against whom the defendant has discriminated.

E.

Chapin complains next that the court erred in concluding that he failed to allege facts sufficient to state a claim for conspiracy. "To establish a cause of action based on conspiracy a plaintiff must show that the defendants agreed to commit an illegal act." **Arseneaux v. Roberts**, 726 F.2d 1022, 1024 (5th Cir. 1982). Mere conclusory allegations of conspiracy cannot, absent reference to material facts, constitute grounds for § 1983 relief. **Dayse v. Shuldt**, 894 F.2d 170, 173 (5th Cir. 1990). Chapin fails to specifically allege who the alleged conspirators were, or that they had an agreement to commit an illegal act. This allegation lacks the necessary specificity to state a claim. Moreover, with regard to this claim, Chapin fails to assert an underlying constitutional violation or violation of a federal statute requisite to a § 1983

action. **See Wilder v. Virginia Hosp. Ass'n**, 496 U.S. 498, 508, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

F.

In his complaint, Chapin alleged that the Freedom of Information Act was violated. On appeal, however, he complains that Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a, was violated. Because Chapin failed to argue the Freedom of Information Act violation on appeal, we need not address it. **See Brinkmann v. Dallas County Deputy Sheriff Abner**, 813 F.2d 744, 748 (5th Cir. 1987). As to Chapin's claim that the Texas statute was violated, violations of state law, without more, are not cognizable in a § 1983 action. **Smith v. Sullivan**, 611 F.2d 1039, 1045 (5th Cir. 1980).

G.

Chapin complains finally that the district judge should have recused himself because the judge retaliated against him for filing a motion to recuse after the case was remanded. Additionally, Chapin contends recusal was required because the judge stated in an article that most civil cases brought by prisoners are frivolous. 28 U.S.C. § 455 requires disqualification as follows:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Section 455 is to be strictly applied and the standard for analysis whether a judge shall disqualify himself is the view of the

"average, reasonable person." **In Re Faulkner**, 856 F.2d 716, 720 (5th Cir. 1988). Chapin fails to allege facts requiring the district judge to disqualify himself under this standard. Consequently, the court did not err when it dismissed Chapin's fourth amended complaint for failure to state a claim.

AFFIRMED.