IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1588
Summary Calendar

ROBERT ALAN MACKIN,

Plaintiff-Appellant,

VERSUS

DON CARPENTER,
Tarrant County Sheriff,
and
JIM WHITE,
Warden,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(4:91 CV 954 Y)

March 18, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Robert Macklin appeals the dismissal of his state prisoner's civil rights action brought pursuant to 42 U.S.C. § 1983. Finding no reversible error, we affirm.

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* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Mackin's civil rights complaint named as defendants the Sheriff of Tarrant County and the Warden of the Tarrant County Jail, alleging that Macklin was denied physical access to a law library while a pre-trial detainee in the Green Bay Unit of the Tarrant County jail. Although legal research materials were provided upon request, Mackin contends that rules governing requests for legal materials were so restrictive that they prevented him from conducting any meaningful research and constituted an unconstitutional deprivation of his right to access to the courts. Mackin requests damages and declaratory relief.

The defendants moved to dismiss the complaint or force summary judgment. See FED R. CIV. P. 12(b)(6), 56(c). Mackin did not file a memorandum in opposition to the motion. The district court found that he had failed to state a claim and dismissed the complaint.

Mackin contends that the district court improperly dismissed his complaint for failure to state a claim. On review of a dismissal for failure to state a claim under rule 12(b)(6), we must take the plaintiff's factual allegations as true and must not affirm "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A.

Mackin alleged that his only access to legal materials at the Green Bay Unit was by "inmate request." The institutional rules

prohibited the distribution of law books and severely limited the number of cases and other materials he could receive. Mackin alleged, "If I didn't know exactly what to ask for, I could get nothing at all, in most cases . . . . Request after request was sent back denied with `re-submit' written on it. In some instances I re-submitted as many as five times and still didn't receive the information I requested."

"[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds v. Smith, 430 U.S. 817, 828 (1977). See Green v. Ferrell, 801 F.2d 765, 772-73 (5th Cir. 1986); Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985). We need not decide whether the library-access policy complied with Bounds, however, as the district court correctly concluded that Mackin had not stated a claim in that he did not allege facts showing that he was denied meaningful access to the courts as a result of that policy. See Mann v. Smith, 796 F.2d 79, 84 n.5 (5th Cir. 1986).

Mackin alleged, "The harm to me became apparent when I went to trial with court-appointed attorney's [sic] who either didn't have the knowledge, or didn't put forth the effort, to represent me in a manner that would make my lack of legal knowledge less harmful." In other words, Mackin contends that he was denied access to a law library in connection with his preparation for his criminal trial

at which he was represented by counsel. As the Bounds Court noted, "[W]hile adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here . . . does not foreclose alternative means to achieve that goal [such as the provision of] professional or quasi-professional legal assistance[.]" 430 U.S. at 830-31. Since Mackin was represented by counsel at his trial, he was not denied access to the courts.

B.

Mackin contends that the district court should have given him an opportunity to amend his complaint. He did not move for leave to amend until more than three weeks after the district court's order of dismissal and FED. R. CIV. P. 58 judgment were entered. The district court did not rule on the motion to amend. Following the entry of the rule 58 judgment, however, amendment of the complaint was no longer possible. See Whitaker v. City of Houston, 963 F.2d 831, 835 (5th Cir. 1992). This issue is without merit.

C.

Mackin complains that the district court granted the motion to dismiss without giving him notice and an opportunity to respond. Mackin argues that he should have been permitted to conduct discovery and develop a factual record in support of the allegations in his complaint. A rule 12 motion to dismiss tests the legal sufficiency of the allegations contained in the complaint,

which, for purposes of the motion, are considered in the light most favorable to the plaintiff. Auster Oil & Gas v. Stream, 764 F.2d 381, 386 (5th Cir. 1985). The allegations in Mackin's complaint showed that he could not prove that he was denied access to the courts as a result of the jail library policies. He was provided with an alternate method of access to the courts, as he was represented by counsel. No amount of discovery would have changed that fact. Thus, the district court properly dismissed the action before giving Mackin an opportunity to conduct discovery.[1]

D.

Citing Arundar v. DeKalb County Sch. Dist., 620 F.2d 493 (5th Cir. 1980), Mackin contends that the district court erred by dismissing his complaint with prejudice. Arundar is inapposite because it involved a rule 12(b) dismissal pursuant to a district court local rule that provided that the failure to file a response to a motion would be construed to indicate that there was no opposition to the motion. Id. at 493-94. Mackin's complaint was dismissed on the merits. The other case cited by Mackin, Wright v.

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[1] The motion to dismiss was filed and served on May 7, 1992. The district court did not rule on the motion until June 3, 1992, and judgment was not entered until June 9, 1992. In the interim, Mackin filed a request for production of documents. In his cover letter to the clerk of court, Mackin represented that he did not intend to answer the motion to dismiss until discovery was completed.

Mackin's response to the motion to dismiss was due on May 27, 1992. See N.D. Tex. R. 5.1(e) (requiring that response to motion be filed within twenty days from date motion was filed). While Mackin's letter to the clerk could have been construed as a motion for enlargement of time, it was filed after the date when the response was due, and Mackin has made no showing that his failure to act was due to excusable neglect. See Fed. R. Civ. P. 6(b).

Dallas County Sheriffs Dep't, 660 F.2d 623, 624 (5th Cir. Nov. 1981) (per curiam), involved a dismissal for failure to prosecute and does not compel a different result in this case.

E.

Finally, Mackin contends that the district court should have applied the summary judgment standard when ruling on the motion to dismiss. As Mackin correctly notes, when matters outside the complaint are presented to and not excluded by the court, a motion to dismiss for failure to state a claim should be treated as one for summary judgment. See rule 12(b). While the defendants did support their motion with an affidavit, the district court restricted its analysis to the allegations contained in the complaint and excluded the affidavit from consideration. Therefore, the motion was properly analyzed as a motion to dismiss, and the notice and hearing requirements of rule 56 were not triggered. Cf. Estate of Smith v. Tarrant County Hosp. Dist., 691 F.2d 207, 208 (5th Cir. 1982).

The judgment of dismissal is AFFIRMED.