

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1665
No. 92-1735
Summary Calendar

JEFFREY S. BALAWAJDER,

Plaintiff-Appellant,

versus

DON CARPENTER, Tarrant County
Sheriff, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
CA4 91 640 A

April 27, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Jeffrey Balawajder, a TDCJ inmate, filed a pro se and in forma pauperis 282-page civil rights suit against approximately 124 defendants, alleging that 24 causes of action for assorted violations of his constitutional rights occurred while he resided in the Tarrant County Jail as a pretrial detainee. In July 1992,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the district court issued a memorandum order and opinion determining that all of Balawajder's claims were time-barred by the appropriate statute of limitations. Final judgment was entered accordingly. We affirm in part and reverse and remand in part.

A complaint filed in forma pauperis can be dismissed by the court sua sponte if the complaint is frivolous. 28 U.S.C. § 1915(d). A complaint "is frivolous where it lacks an arguable basis either in law or in fact." Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)). This Court reviews a § 1915(d) dismissal under the abuse-of-discretion standard. Denton, 112 S.Ct. at 1734.

Usually the defense of limitations is an affirmative defense which must be raised by the defendants in the district court. Ali v. Higgs, 892 F.2d 438, 440 (5th Cir. 1990). However, this court can consider a defense on appeal where it has been raised sua sponte by the district court. Id.

Balawajder contends that the district court erred in dismissing his complaint based on the application of the pertinent Texas statute of limitations. He argues that the district court improperly determined the date of the filing of this action and failed to apply the appropriate limitations period for a civil conspiracy.

Balawajder is correct inasmuch as the district court erred in finding the date of the filing of the complaint was September 4, 1991. The date of receipt of the complaint by the

clerk (July 3, 1991), rather than the formal filing date (September 4, 1991), governs the time for limitations purposes. Martin v. Demma, 831 F.2d 69, 71 (5th Cir. 1987).

Balawajder brought this action under 42 U.S.C. §§ 1983, 1985, and 1986. Because there is no federal statute of limitations for actions brought pursuant to 42 U.S.C. §§ 1983 and 1985, federal courts borrow the forum state's general personal injury limitations period. Helton v. Clements, 832 F.2d 352, 334 (5th Cir. 1987). In Texas, the applicable period is two years. Tex. Civ. Prac. & Rem. Code 16.003(a) (Vernon 1986). Unlike §§ 1983 and 1985, § 1986 has its own statute of limitations which requires commencement of a suit within one year after the cause of action accrues. This does not make the time period longer in the context of the present case.¹

While state law governs the limitations period, federal law governs when the cause of action arises. Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989). Under that standard, a cause of action accrues when the plaintiff knows or has reason to know of the injury which forms the basis of the action. Id.

Balawajder does not contest that the applicable statute of limitations is two years. Rather, he argues that because he was injured by a conspiracy, the statute of limitations did not begin to run until the last overt act pursuant to the conspiracy was committed. This argument is without merit. Because the actionable

¹ Balawajder also brought a claim pursuant to 18 U.S.C. § 2520. As § 2520(e) provides a two-year statute of limitations, it also does not extend the limitations period.

civil injury to Balawajder resulted from the overt acts of the defendants, not from the mere continuation of a conspiracy, his characterization of the events as occurring in the course of a conspiracy does not extend the time when the statute of limitations began to run. Helton, 832 F.2d at 335.

It is apparent from the face of Balawajder's complaint that he was aware of the alleged wrongs done to him during the times alleged in his complaint. Thus, because Balawajder's complaint was received on July 3, 1991, all of his claims occurring prior to July 3, 1989, are barred by the Texas two-year statute of limitations. To avoid this consequence, Balawajder argues that the statute of limitations should be equitably tolled in this case.

"[F]ederal courts possess the power to use equitable principles to fashion their own tolling provisions in exceptional situations in which state statutes of limitations eradicate rights or frustrate policies created by federal law." Rodriguez v. Holmes, 963 F.2d 799, 805 (5th Cir. 1992). No exceptional circumstances exist here. The claims Balawajder alleges should be equitably tolled -- access to the courts, access to the mails, inadequate medical care, and overcrowded, inadequate jail conditions -- do not implicate the constitutionality of his state court conviction. There was no impediment, nor does Balawajder allege one, to the filing of a civil rights action on these claims. Indeed, he did file a previous civil rights suit alleging many of the same claims against many of the same defendants. As Balawajder fails to present circumstances indicating that this is an

"exceptional situation" that would warrant equitable tolling, we reject his argument.

The district court determined that the complaint alleged "facts, acts, and omissions giving rise to this action [that] occurred . . . through May 14, 1989." However, Balawajder's complaint, read liberally, may allege that he was denied postage in violation of his constitutional right of access to the courts through September 1989. Rec. on Appeal 1, 169, 282. He does not state, however, that this alleged denial of postage after July 3, 1989, interfered with his ability to prosecute his pending court cases. The complaint also alleges that Balawajder was subjected to illegal wiretapping, denied access to an adequate law library, and denied religious freedom throughout his detention at the Tarrant County Jail (June 14, 1987, through September 12, 1989). Rec. 44-47, 105-06, 169. Balawajder cites other portions of his complaint that allegedly involve constitutional violations committed within two years prior to the filing of his complaint. Rec. 166, 170, 263-81.

Because Balawajder has alleged a few claims that may have arisen after July 3, 1989, and therefore, if viable, would not be time-barred, we must remand for the district court to determine, in the first instance, whether such claims exist and to proceed with those which do.

In so doing, however, we suggest that the first order of business will be to require Balawajder to re-plead carefully the alleged constitutional violations he suffered from and after

July 3, 1989, identifying specifically which defendants participated in which incidents. Neither this court nor the district court has the time to sort through vague charges against dozens of defendants. Balawajder has filed a number of lawsuits and can be held accountable for reasonably sophisticated pro se legal efforts. If he uses this lawsuit to harass or vex the courts or prison authorities, sanctions should be imposed. Fed. R. Civ. P. 11; 28 U.S.C. § 1927.

For these reasons, the judgment of the district court is AFFIRMED insofar as it bars litigation of causes of action that occurred before July 3, 1989, and REVERSED to the extent the complaint alleges claims that occurred after that date, and REMANDED for further proceedings.