

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1779

Summary Calendar

MARK L. NICHOLS and
JASON L. FERNANDEZ,

Plaintiffs-Appellants,

versus

JIM BOWLES, Dallas County
Sheriff, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas
(4:92 CV 208 A)

May 28, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Mark L. Nichols and his stepson, Jason L. Fernandez, proceeding pro se and in forma pauperis, brought this civil rights action against various Dallas and Tarrant county officials. They allege that their civil rights were violated when two of these officials refused to accept a surety bond written by Nichols to bail out Fernandez. The district court

* 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 Pursuant to that rule, we have determined that this opinion should not be published.

dismissed plaintiffs' complaint, and Nichols and Fernandez appeal from that dismissal. Finding (1) that the district court did not abuse its discretion in dismissing plaintiffs' claim regarding defendants' refusal to accept the surety bond written by Nichols, but (2) that the court failed to address whether plaintiffs have raised a cognizable civil rights claim regarding Fernandez's right to a bond hearing and to have counsel appointed, we affirm in part and reverse and remand in part.

I

Nichols and Fernandez filed this action in March 1992, proceeding pursuant to 42 U.S.C. § 1983. They allege that their civil rights were violated when Jim Bowles, the Dallas county Sheriff, and Don Carpenter, the Tarrant county Sheriff, refused to accept a surety bond written by Nichols to bail out Fernandez. Beyond Bowles and Carpenter, plaintiffs have named the following as defendants in this action: John Vance, the Dallas county district attorney; the Dallas county bail bond board; Tim Curry, the Tarrant county district attorney; the Tarrant county bail bond board; and the entities on the bail bond lists of Tarrant and Dallas counties.

The district court determined that plaintiffs' complaint failed to allege facts with particularity which would overcome a plea of immunity on the part of defendants and establish a right to recovery. Accordingly, the court ordered plaintiffs to amend their complaint. Plaintiffs complied with this order by filing an amended complaint in which they reiterated their allegation

that their civil rights were violated when Nichols was not permitted to write a surety bond for Fernandez. However, they also alleged that Fernandez was not informed of his right to receive a bond hearing or to have counsel appointed, and that this too constitutes a violation of his civil rights.

In August 1992, the district court dismissed plaintiffs' claims against the Dallas county and Tarrant county defendants as frivolous and for failure to state a claim. The district court also dismissed plaintiffs' claims against the entities on the Dallas and Tarrant county bail bond lists, but this dismissal was without prejudice.¹ The district court based these dismissals on its determinations that (1) Nichols did not have a property interest in writing bonds without a license and, therefore, plaintiffs failed to state a constitutional claim regarding this issue, and (2) Fernandez had no reasonable expectation to be released on a personal recognizance bond. The district court did not address Fernandez's allegations that he was not given a bond hearing or informed of his right to appointed counsel.

II

Section 1915(d) of Title 28 of the United States Code authorizes federal courts to dismiss a complaint filed IFP "if . . . satisfied that the action is frivolous or malicious." A complaint is "frivolous" within the meaning of section 1915(d)

¹ Dallas county was served with the complaint on August 25, 1992. The county then moved to dismiss the action and for Rule 11 sanctions. In its amended final judgment, the district court granted Dallas county's motion to dismiss but denied its motion for sanctions.

if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992). This court has held that a complaint is legally frivolous when it involves the "mere application of well-settled principles of law." Moore v. Mabus, 976 F.2d 268, 271 (5th Cir. 1992). For example, a complaint is legally frivolous where the plaintiff alleges an "infringement of a legal interest which clearly does not exist." Neitzke, 490 U.S. at 327. We review section 1915(d) dismissals, whether they be based on a determination that the complaint is legally or factually frivolous, for abuse of discretion.² See Denton v. Hernandez, ___ U.S. ___, ___, 112 S. Ct. 1728, 1734 (1992); Ancar, 964 F.2d at 468.

In challenging the district court's dismissal of their complaint as frivolous pursuant to section 1915(d), Nichols and Fernandez have raised the following issues on appeal: (a) whether defendants' refusal to permit Nichols to write a surety bond for Fernandez without a license constitutes a cognizable due process claim; (b) whether the alleged failure of defendants to inform Fernandez of his right to a bond hearing and the right to have appointed counsel constitutes a cognizable section 1983 claim; and (c) whether the district court abused its discretion

² We note that we have also held that "Spears[v. McCotter, 766 F.2d 179, 181 (5th Cir. 1985),] should not be interpreted to mean that all or even most prisoner claims require or deserve a Spears hearing. A district court should be able to dismiss as frivolous a significant number of prisoner suits on the complaint alone" Green v. McKaskle, 788 F.2d 1116, 1120 (5th Cir. 1986).

by denying the plaintiffs' motion for leave to amend their complaint.

A

Plaintiffs' first assertion is that Nichols was denied due process because he was not permitted to write a surety bond for Fernandez. Because we find that Nichols has no property interest under Texas law to write surety bonds, we disagree.

To obtain relief under section 1983, a plaintiff must prove that he was deprived of a constitutional right or a federal statutory right, and that the person depriving him of that right acted under color of state law. Hernandez v. Maxwell, 905 F.2d 94, 95 (5th Cir. 1990). To establish a due process violation, the burden was upon Nichols to show that the refusal by defendants to allow him to write Fernandez's surety bond constitutes a "deprivation of or intrusion upon a property or liberty interest." Thomas v. Smith, 897 F.2d 154, 155 (5th Cir. 1989). Therefore, to prevail on this claim, the burden was on plaintiffs to establish that Nichols had a property interest in writing surety bonds despite his failure to obtain a license permitting him to do so.

Plaintiffs do not allege that, prior to writing the surety bond for Fernandez, Nichols applied for such a license and was wrongfully denied one. Rather, they simply allege that Nichols should not have been required to hold a license, and that the surety bond he wrote for Fernandez should have been accepted by defendants. "A property interest is an individual entitlement

grounded in state law, which cannot be removed except for cause." Id. (internal quotations and citations omitted). Because Nichols is not licensed to write surety bonds in Texas, Texas law prohibits him from acting as a bondsman. See TEX. REV. CIV. STAT. ANN. art. 2372p-3 § 3(a) (Vernon Supp. 1993). In short, Nichols has failed to establish that, under Texas law, he possesses a property interest in writing surety bonds,³ and we conclude, therefore, that the district court properly dismissed this claim as frivolous. Neitzke, 490 U.S. at 327.

B

Plaintiffs also assert that Fernandez's civil rights were violated because he was not informed of his right to a bond hearing or the right to have counsel appointed to represent him on this matter. Under Texas law, a criminal defendant is entitled to a bond hearing,⁴ and an indigent defendant may have a right to court-appointed counsel in such a proceeding. See Ridgeway v. Baker, 720 F.2d 1409, 1413 (5th Cir. 1983) (stating that the right to appointed counsel "extends to every case in which the litigant may be deprived of his personal liberty if he loses"); cf. Gideon v. Wainwright, 372 U.S. 335, ___ S. Ct. ___ (1963). Because the court below failed to address these claims and the record is factually incomplete regarding them, we remand this case to the district court with instructions to develop the

³ Price v. Carpenter, No. 91-1553 (5th Cir. Dec. 13, 1991) (rejecting a similar contention) (unpublished; copy attached).

⁴ See TEX. CODE CRIM. PROC. ANN. ARTS. 1.07, 17.21 (Vernon's 1977).

record regarding (1) whether Fernandez was given a bond hearing, (2) whether he was entitled to appointed counsel on this matter, and (3) whether his due process rights were thereby violated.

C

Nichols and Fernandez also assert that the district court abused its discretion by denying their motion for leave to amend their complaint. Specifically, Nichols and Fernandez filed a motion for leave to file supplemental pleadings and an amended complaint, which the district court denied.

We have held that a district court does not abuse its discretion in denying a motion to amend a complaint when allowing the requested amendment would prove futile. McAfee v. 5th Circuit Judges, 884 F.2d 221, 222 (5th Cir., 1989), cert. denied, 493 U.S. 1083 (1990). We have already concluded that Nichols, who is not licensed to write surety bonds in Texas, has no property interest in writing such bonds. See supra Part II.A; Price, No. 91-1553, at p.2; Thomas, 897 F.2d at 155. Without such a property interest, there is no set of facts which can support this due process claim. Accordingly, we conclude that the district court did not abuse its discretion in denying plaintiffs' motion to amend their complaint regarding this claim. Neitzke, 490 U.S. at 327.

As for plaintiffs' assertions that Fernandez was deprived of his right to a bond hearing and appointed counsel, defendants were permitted to add these claims to their complaint through the amendment ordered by the district court. Moreover, pursuant to

our instructions supra at Part II.B, the district court will fully address these claims on remand. Accordingly, we conclude that any error resulting from the district court's refusal to grant plaintiffs' motion for leave to file supplemental pleadings and an amended complaint was harmless.

III

For the foregoing reasons, we AFFIRM in part, and VACATE and REMAND in part.