

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1867

Summary Calendar

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ALLEN TYRONE ROBINSON,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Texas  
5:92 CV 0134 C

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( May 19, 1993 )

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Allen Tyrone Robinson filed this § 1983 action against James A. Collins, Deputy Director of the Texas Department of Criminal Justice, L.W. Woods, Warden of the Price Daniel Unit, Captain M. Searcy, and Officer H. Wright. He alleged that on December 5 (no year given), he was called out to perform extra duty and reported to Officer Wright. He informed Wright that his knees hurt and that

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

he could not stand on them. Wright told him to talk to the Lieutenant. Robinson alleged that he told Lt. Tarango that his knees hurt and that standing on them to do extra duty would cause them to hurt worse. Tarango told him that he did not want to hear it and asked Robinson if he was refusing to do his extra duty. Robinson replied that he was not and asked if there was some other kind of work he could do that would not require standing on his knees. Tarango ordered him to get to work before he wrote him up.

Robinson alleged that he reported back to Wright and began working. After 45 minutes, his knees started to hurt worse, and he told Tarango, who ordered him back to work. Tarango told Robinson that he had checked his medical records, and they did not say anything about him not being able to do extra duty. Robinson told Tarango that his medical records showed that he had bad knees. Tarango asked him again if he was refusing to do his extra duty, and Robinson told him no, but that his knees were hurting too badly to continue the work. Tarango ordered Wright to write him up for refusing to obey an order, and also ordered Officer Moore to write a statement.

On December 11, Robinson was charged with a disciplinary report for refusing to obey Wright's orders to continue extra duty. His disciplinary hearing was held before Captain Searcy on December 16, and he was found guilty. His punishment was reprimand and reduction in time-earning status. Robinson alleged that Wright testified at the hearing that he did not give Robinson an order as indicated in the report. Robinson claimed that the disciplinary

charge was false and that he was not properly informed of the charges against him, in violation of his rights to due process.

Robinson argued that his Fifth and Fourteenth Amendment rights to equal protection and due process were violated by being charged with the false disciplinary report, failure to give him notice of the specific conduct upon which the charge was based, and failure to give him the opportunity to present a defense. He sought relief in the form of an injunction, compensatory, and punitive damages.

Defendants Collins, Woods, and Searcy were served and answered claiming qualified immunity. Robinson filed a reply to their answer clarifying that his claim was based on Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), for a violation of due process for failure to give him adequate notice of the charges.

The district court ordered Robinson to file a supplemental pleading showing why the defendants were not entitled to qualified immunity. Robinson responded by arguing that the defendants knew or should have known that their actions violated his clearly established right to due process under Wolff. The district court held that he had not pleaded some clearly established law of which a reasonable person would have known, that he had not demonstrated that he could overcome the defendants' claim of qualified immunity, and dismissed his suit with prejudice as to three of the defendants. As to the fourth defendant, Wright, the court dismissed the suit without prejudice under Fed. R. Civ. P. 4(j) because Robinson had not served him within 120 days.

Robinson argues that the district court erred in dismissing his civil rights suit for failure to show that the defendants were not entitled to qualified immunity. He contends that his supplemental pleading showed that there was a clearly established constitutional right and that the defendants knew or reasonably should have known that their actions would violate his constitutional rights.

Robinson is correct that the district court erred, but for a different reason. Although Robinson's complaint at first glance has the appearance of a § 1983 action for deliberate indifference to his serious medical needs, i.e., requiring him to work in contradiction to his medical condition, he never states his claim in that posture and never asks for compensatory damages for pain or injury to his knees. The focus of his complaint is that he was charged with a false disciplinary report and did not receive due process at his disciplinary hearing.

Prisoners who bring § 1983 claims that challenge the constitutionality of their convictions or sentences must initially pursue habeas corpus relief. Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1117, 1119 (5th Cir. 1987). Determining whether a claim sounds in civil rights or habeas, however, is not always simple. If the plaintiff seeks immediate release or a speedier release, the claim must be brought in a habeas action. Id. at 1115. The distinction between the two actions, however, does not rely solely on the relief that the plaintiff nominally seeks. Id. at 1117.

The essential inquiry is, "Does [the plaintiff] challenge the 'fact or duration' of his confinement or merely rules, customs, and procedures affecting 'conditions' of confinement?" Spina v. Aaron, 821 F.2d 1126, 1128 (5th Cir. 1987) (citations omitted). If the former is the case, then another broad rule applies. "If a prisoner challenges a single hearing as constitutionally defective, he must first exhaust state habeas remedies." Serio, 821 F.2d at 1118. If a prisoner first brings a civil rights action when a habeas action is a pre-requisite, the district court may dismiss without prejudice or stay the case to suspend the running of the statute of limitations until habeas remedies are exhausted. Id. at 1119-20.

Robinson stated that his punishment was a reduction in time-earning status from State-Approved Trusty no. 4 to Line Class I. See Texas Department of Criminal Justice - Institutional Division, Inmate Orientation Handbook (March 1990), p. 7, Chapter 1, II. E. Good Conduct Time, for prisoner classifications. A reduction from SAT IV to Line Class I results in the loss of the ability to earn 10 extra days of good conduct time. See Tex. Gov't Code Ann. § 497.003 (West 1990), amended and renumbered at § 498.003 (West Supp. 1993).

Good conduct time applies to Robinson's eligibility for parole or mandatory supervision. § 498.003(a). A challenge to a single allegedly defective hearing affecting the date of a prisoner's parole eligibility is a challenge to the duration of confinement and must be pursued through habeas corpus. Serio, 821 F.2d at

1117-19; Spina, 821 F.2d at 1128. Robinson is challenging the constitutionality of a single person disciplinary hearing affecting his parole eligibility date, and he must exhaust his state habeas remedies.

Although the district court and the state did not recognize the Serio problem, this court can "notice sua sponte the lack of exhaustion." McGee v. Estelle, 722 F.2d 1206, 1214 (5th Cir. 1984).

The judgment of the district court dismissing Robinson's complaint against the defendants, except Wright, for qualified immunity is reversed and this case is remanded to the district court for a determination of whether the case can be dismissed without prejudice, or if the case should be stayed pending exhaustion, considering the effect of any applicable statute of limitations. See Serio, 821 F.2d at 1119-20.

Robinson does not challenge the district court's dismissal without prejudice as to Wright under Fed. R. Civ. P. 4(j) for failure to serve him within 120 days, and that portion of the district court's judgment is affirmed.

Robinson filed a letter in this court alleging that he has been retaliated against for filing this lawsuit, and he requests this court to help him in some way to resolve his retaliation problem. If a motion for injunctive relief, it is denied. His claim of retaliation for filing this lawsuit cannot be addressed for the first time on appeal and must be brought in a separate

§ 1983 complaint. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990).

Affirmed in part and remanded in part.