

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1881
(Summary Calendar)

FELTON L. MATTHEWS,

Plaintiff-Appellant,

versus

STATE OF TEXAS,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas

(3:92-CV-0731-T)

(December 22, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Felton L. Matthews, proceeding pro se,
appeals the district court's dismissal of his civil rights claim

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

under 42 U.S.C. § 1983 and his habeas corpus claim under 28 U.S.C. § 2254. Also, Matthews moves this court to reinstate his case and order discovery and inspection. Finding no reversible error on the part of the district court, we affirm.

I

FACTS AND PROCEEDINGS

Matthews filed a pro se complaint seeking to set aside his state court conviction for burglary and to recover damages resulting from alleged violations of his constitutional rights by state officials. The particulars of his constitutional claims are novel, to say the least, including the rights to pursue an education and to obtain custody of his child.

Matthews was not incarcerated at the time of filing his complaint. He did, however, allege that he was subject to a "sentence of probation" and requested suspension of his probation.

The district court adopted the recommendation of the magistrate judge who found that Matthews' complaint attacked the legality of his conviction, so that he was required to exhaust his state court remedies prior to becoming entitled to federal consideration of any claims made under 42 U.S.C. § 1983. The court entered judgment dismissing the complaint without prejudice, and Matthews, on the same day, filed an ex parte motion for federal intervention. He subsequently filed a notice of appeal.

Recognizing that it had been divested of jurisdiction as a result of plaintiff's filing a notice of appeal, the district court denied the ex parte motion. The court relied on the proposition,

supported by our opinion in Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930 (5th Cir. 1976), that a district court may deny a motion after divestiture of jurisdiction if the ruling is in furtherance of the appeal.

II

ANALYSIS

As noted, Matthews argues that he is entitled to emergency ex parte post-conviction relief so that he can pursue an education and obtain custody of his child. He contends that his constitutional rights have been violated because he was falsely imprisoned, arrested several times for the same crime, and subjected to other forms of harassment by probation officers, police, attorneys and judges.

We acknowledge at the outset that Matthews' status as a probationer does not prevent him from seeking habeas relief. "A person on probation and subject to the conditions of probation is 'in custody' for purposes of the . . . habeas corpus statute." Clark v. Prichard, 812 F.2d 991, 997 (5th Cir. 1987) (citations omitted); see also Spring v. Caldwell, 692 F.2d 994, 996 (5th Cir. 1982). As Matthews alleges that he is on probation and subject to various restrictions as a result of his status, he is entitled to seek habeas relief.

A plaintiff who brings a § 1983 claim that in actuality challenges the validity of his conviction must pursue state remedies. Under such circumstances, the federal suit is tantamount to a habeas corpus petition. Serio v. Members of Louisiana State

Bd. of Pardons, 821 F.2d 1112, 1117 (5th Cir. 1987). Exhaustion of habeas relief is required even if the facts alleged also comprise a potential § 1983 claim. Jackson v. Torres, 720 F.2d 877, 879 (5th Cir. 1983). Matthews' complaint seeks to have his conviction set aside but fails to allege that he has exhausted his state remedies. Therefore, the decision of the district court to dismiss Matthews' complaint on the basis of his failure to exhaust state habeas remedies was not inappropriate.

Neither was it inappropriate for the district court to dismiss the lawsuit without prejudice rather than holding the § 1983 claims in abeyance. See Jackson v. Johnson, 950 F.2d 263, 265 (5th Cir. 1992) (holding in abeyance a federal complaint by a Texas litigant to avoid limitations problems while state remedies are exhausted "harbors potential difficulties"). Matthews should be admonished, however, to file any necessary state action promptly; only time during which the state litigation is actually pending will toll the statute of limitations as to any § 1983 claims he may have. See id.

This court received a letter from Matthews on November 12, 1992, together with a copy of a document addressed to him from the Texas Court of Criminal Appeals. Matthews' letter to us, dated October 28, 1992, states, "[t]his is to advise that the Court has denied without written order the application for writ of habeas corpus." His letter does not, however, offer any relief to Matthews in this case. If he has now exhausted his state remedies, he may return to the district court with a new petition for federal

habeas relief. The judgment of the district court is AFFIRMED.

Along with his brief, Matthews filed a motion to reinstate his case and to obtain a stay of the action pending his exhaustion of state remedies. That motion is denied for mootness in light of the action we now take.

Matthews also filed with this court a motion for discovery and inspection seeking to obtain police reports, phone records, evidence of plea agreements, and other documents. This motion too is denied, for the same reason.

SO ORDERED.