

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 92-1940  
Summary Calendar

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HARRELL EUGENE BURR,

Plaintiff-Appellant,

VERSUS

BILLY BROOKHART, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Texas  
(3:92-CV-0792-P)

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(January 14, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

Appellant, a Texas state prisoner, sued under 42 U.S.C. § 1983 alleging an improper arrest which resulted in his conviction and incarceration. The district court dismissed the claim as frivolous pursuant to 28 U.S.C. § 1915(d) on the basis that it was prescribed. We find no error and affirm.

Appellant was arrested on November 17, 1989. His suit was received by the district court on January 24, 1992 and filed on

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<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

April 21 of that year.

We generally do not consider § 1983 cases that directly or indirectly challenge the constitutionality of a state conviction prior to the exhaustion of habeas remedies. However, if a § 1983 claim may be resolved without determining the underlying merits of the state claim, there is no threat to the principles of comity and it is not necessary to defer the disposition of the case. Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112 (5th Cir. 1987). We therefore entertain appellant's claim.

The applicable limitation period in Texas is two years. Rodriguez v. Holmes, 963 F.2d 799, 803 (5th Cir. 1992). Appellant's complaint was not submitted to the district court until well beyond two years after his arrest. Appellant claims, however, that the prescriptive period was tolled because he was not aware that a violation of his civil rights had occurred; because while he was incarcerated in the county jail he had no access to a law library or to counsel; and finally because he was under a legal disability which excused his non-action.

Appellant claims his arrest was without probable cause because there was no evidence that he was the owner or the possessor of the residence or automobile in which the illegal drugs were discovered. He was obviously aware of this alleged lack of evidence at the time of his arrest and, consequently, possessed sufficient information to know that he had sustained an injury and to trigger the commencement of the limitations period at that time. See Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989).

Under prior Texas law, imprisonment was statutorily categorized as a disability which tolled the running of the two year period. However, the statute was amended, effective September 1, 1987, to eliminate the legal disability of imprisonment for tolling purposes. Rodriguez, 963 F.2d at 803. Therefore, appellant was not under a legal disability for well over two years before his suit was filed.

We have not previously interpreted the tolling provisions of Texas law in relation to an inmate's lack of access to a law library or to legal assistance. We have, however, in interpreting those provisions of statutes in states other than Texas held that such a lack, standing alone, does not result in the tolling of the statute of limitations. Schaefer v. Stack, 641 F.2d 227, 228 (5th Cir. 1981); Kissinger v. Foti, 544 F.2d 1257, 1258 (5th Cir. 1977). Appellant's mere allegations do not establish that the court was inaccessible to him during his imprisonment in the county jail. He has not, therefore, shown that the statute of limitations was tolled.

Appellant complains, for the first time on appeal, that he was denied access to the courts in violation of his constitutional rights. We do not consider issues raised for the first time on appeal.

The cause of action asserted is clearly barred by the applicable Texas prescriptive statute and, therefore, the district court did not abuse its discretion in dismissing the claim as frivolous for it lacks any arguable merit.

AFFIRMED.