

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 92-2083  
Summary Calendar

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JEFFREY BALAWAJDER,

Plaintiff-Appellant,

VERSUS

JAMES A LYNAUGH, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CA-H-89-1090)

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March 17, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

Appellant, Jeffrey Balawajder, an inmate of the Texas Department of Criminal Justice (TDCJ), filed a pro se and in forma pauperis civil rights action against the TDCJ, the Texas Alcoholism Foundation d/b/a Texas House, various Texas state officials, and the State of Texas. Following a Spears hearing, see Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), Balawajder filed an amended complaint in which he alleged that the Texas Adult Parole and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Mandatory Supervision Law, Tex. Code Crim. Proc. art. 42.18 (West Supp. 1992), was unconstitutional and that, irrespective of its constitutionality, it was incorrectly applied to him. He also alleged that he was denied access to the courts and mails while on supervised release at Texas House and asserted a variety of pendent state claims. The district court dismissed Balawajder's amended complaint as frivolous pursuant to 28 U.S.C. § 1915(d). We affirm in part and vacate and remand in part.

Appellant alleges he was convicted in Dallas County on February 12, 1987, of theft by check, and sentenced to two years in prison with 300 days credit for jail time already served.<sup>2</sup> On March 3, 1987, he was transferred to the Texas Department of Corrections and on March 8, he was released to the Texas House on mandatory supervision. Balawajder alleges that he signed the certificate of mandatory supervision only because he was threatened with continued imprisonment if he refused. He remained at the Texas House from March 9 through March 28, 1987, when he was ordered to leave. In September 1989, he was convicted of the offense for which he is currently incarcerated.

DISCUSSION:

A complaint filed in forma pauperis can be dismissed sua sponte if it 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,

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<sup>2</sup> Balawajder later filed a state habeas petition and acquired credit for an additional 133 days. R. 1, 282, 288-89; see R. 1. 305.

(1992) (quoting Neitzke v. Williams, 490 U.S. 319, 325, (1989)). We review for abuse of discretion. Denton, 112 S. Ct. at 1734.

Appellant first challenges the constitutionality of the Texas Adult Parole and Mandatory Supervision Law, Tex. Code Crim. Proc. art. 42.18 § 8(c) (West Supp. 1992). He argues that he should have been discharged when his calendar time (time actually served) and accrued good conduct time equalled the length of his sentence.

In pertinent part, § 8(c) provides that "a prisoner who is not on parole shall be released to mandatory supervision" when his accrued good conduct time plus calendar time served equal the maximum term to which he was sentenced. It also provides that the length of mandatory supervision equals the maximum term for which the prisoner was sentenced minus calendar time served, or in other words, the good conduct time.

Balawajder argues "that it is double jeopardy to require a prisoner to re-serve his good-time on mandatory supervision." Appellant's brief at 2. He erroneously asserts that calendar time served is the same as good conduct time. The accrual of good conduct time "is a privilege and not a right." Tex. Govt. Code § 498.003 (West Supp. 1992). The privilege may be forfeited "either by violating [TDCJ's] rules while in its custody, or by violating the guidelines of a conditional release program." See Ex Parte Henderson, 645 S.W.2d 469, 472 (Tex. Cr. App. 1983). Since Texas has not created any liberty interest in the accrual of good conduct time, Balawajder has no constitutionally protected right not to have mandatory supervision calculated as set forth in the statute.

Balawajder next complains that the Texas parole statute was not correctly applied to him because he was released to mandatory supervision only after his calendar time served and accrued good conduct time were 40 days greater than the maximum term of his sentence. The district court did not directly address this issue although Balawajder presented it at the Spears hearing and in his amended complaint. Rather, the court relied on Williams v. Briscoe, 641 F.2d 274 (5th Cir.), cert. denied, 454 U.S. 854 (1981) and Creel v. Keene, 928 F.2d 707 (5th Cir.), cert. denied, 111 S. Ct. 2809 (1991), to conclude that Balawajder did not have a constitutionally protected liberty interest in an early release. However, neither Williams nor Creel examined whether the language of art. 42.18 § 8(c) of the Texas parole statute creates a constitutionally protected liberty interest in early release to mandatory supervision. Although no case has been found in which this Court addressed this issue, § 8(c) arguably creates a liberty interest in early release because of its use of the mandatory term "shall." See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 12, (1979) (whether a prisoner has an expectancy of release occasioning constitutional protection is answered by reference to the language and structure of the particular state statute); see also Story v. Collins, 920 F.2d 1247, 1251-53 (5th Cir. 1991) (suggesting that § 8(c) affords a liberty interest to Texas prisoners). Therefore, this claim should not have been dismissed as frivolous on the basis that there is no liberty interest created by the Texas parole statute.

Even if Balawajder has a constitutionally protected liberty interest in early release to mandatory supervision, the record does not contain enough information from which it can be determined whether he was released at the proper time. Thus, the case must be remanded for additional fact-finding. On remand, the district court may determine that the suit is frivolous because Balawajder's accrued good conduct time was properly calculated.

Appellant next contends that he was denied postage and postal services during his March 9 through March 28 stay at Texas House, in violation of his constitutional right of access to the courts. Convicted prisoners have a constitutional right to adequate, effective, and meaningful access to the courts, a right which requires prison authorities to supply, inter alia, materials with which to draft pleadings and postage to mail them. Bounds v. Smith, 430 U.S. 817, 824-25, 828 (1977). A prisoner may establish a constitutional violation by showing that he was not provided with the means to file a legally sufficient claim. Mann v. Smith, 796 F.2d 79, 84 (5th Cir. 1986).

At the Spears hearing, Balawajder asserted that, because he could not obtain postage stamps during his first week's stay at Texas House, he was not able to timely mail an address change to the California courts and he lost his right to an appeal in a civil rights action identified as C-87-20066-SW. However, the record shows that his action was not dismissed because of a failure to appeal, but because he had raised the same claims in another pending action. Thus, no harm was caused by the dismissal. As

Balawajder has not shown an actual injury, he has failed to state a cognizable Bounds claim. See Mann, 796 F.2d at 84 n. 5.

Balawajder next contends that the district court failed to address his denial-of-access claim regarding another California case identified as 106894. He alleges that this case was dismissed because TDCJ failed to forward his mail and, as a result, he never had the opportunity to timely respond to the defendants' answer. Because the district court did not address this issue and because it is not clear from the record or pleadings whether the TDCJ's actions interfered with Balawajder's ability to pursue case No. 106894, the case must be remanded for additional fact-finding to determine whether this claim has any merit.

Appellant also complains that his due process rights were violated when he was expelled from Texas House. At the Spears hearing, Balawajder stated that he was ordered to leave Texas House after informing officials that he did not want them to give or receive any information about him. He acknowledged that he had received a hearing prior to his expulsion, and that he was not transferred to other custody.

The district court treated Balawajder's claim as a state claim for fraud and did not address his federal due process claim. Nevertheless, given that Balawajder was not transferred to other custody, his federal claim is patently frivolous. The Due Process Clause of the Fourteenth Amendment does not by itself endow a prisoner with a protected liberty interest in the security grade or location of his confinement. Montanye v. Haymes, 427 U.S. 236, 242

(1976); Meachum v. Fano, 427 U.S. 215, 226 (1976). Because Balawajder has not alleged any substantive interest in remaining at the halfway house, his claim is frivolous.

Balawajder also objects to the district court's failure to address his pendent state-law claims for the "torts of negligence, gross negligence, false imprisonment, and double jeopardy." The bases for these claims are that 1) Balawajder was not released on mandatory supervision at the appropriate time; 2) his mail was not properly forwarded; 3) Texas House failed to employ personnel as required by the Texas Administrative Code; and 4) he was improperly denied his request to visit his elderly father. He further complains that the court failed to address his "claims of breach of written and implied contract in so far as they are separate tort claims." The district court apparently did not address these pendent state-law claims because of its dismissal of Balawajder's federal claims. However, in light of the remand noted above, remand is appropriate for a determination of whether to exercise pendent jurisdiction over these claims if the court determines that pendent jurisdiction exists.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.