

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-2594  
Summary Calendar

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BILLY ROSS SIMS,

Plaintiff-Appellant,

VERSUS

L. BAIRD, ET AL.,

Defendants-Appellees.

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Appeals from the United States District Court  
for the Southern District of Texas  
(CA-H-91-2250)

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(March 4, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

Billy Ross Sims appeals the dismissal of his § 1983 action.  
We **VACATE** and **REMAND**.

I.

On August 13, 1991, Sims, a prisoner in the Texas Department of Criminal Justice - Institutional Division, filed a complaint pursuant to 42 U.S.C. § 1983. On August 16, the magistrate judge ordered that a summons be issued for each defendant and delivered

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<sup>1</sup> Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

to Sims for service. This order further stated that "each party shall serve the other party ... a copy of every pleading, motion or other paper filed. Service shall be by mail to the other party".

Sims returned a card verifying his receipt of the August 16 order and three summonses. He also filed a letter with the clerk on August 22, from which it is clear that he had mailed a summons and complaint to each defendant. On September 17, having received no acknowledgement of receipt of service, Sims moved that the defendants be served personally by a United States marshal. This motion was apparently never addressed. On January 22, 1992, the magistrate judge entered an Order to Show Cause, giving Sims 30 days to show why his complaint should not be dismissed for failure to complete service. Sims submitted a response on the day he received notice of the order. In it, he explained his efforts to secure proper service, requested that his complaint not be dismissed, and renewed his motion for a marshal to effect personal service.

On July 22, 1992, the district court dismissed Sims's § 1983 action without prejudice, stating that Sims had not initially requested service by a marshal and had failed to complete service of process within the requisite 120 days. The ruling does not mention the motion for service by a marshal.

## II.

On appeal, Sims does not attempt to show that he perfected service within 120 days as required by Federal Rule of Civil Procedure 4(j). Rather, he contends that he showed good cause for

his failure to do so and, therefore, his action should not have been dismissed.

We review a district court's Rule 4(j) dismissal for abuse of discretion. *Systems Signs Supplies v. United States Dept. of Justice*, 903 F.2d 1011, 1013 (5th Cir. 1990). This is a most exacting standard, and we will find such an abuse only when the district court applies an erroneous legal standard, see *United States v. Schlette*, 842 F.2d 1574, 1577 (9th Cir.), amended, 854 F.2d 359 (9th Cir. 1988), or "commits a clear error of judgment", *United States v. Kramer*, 827 F.2d 1174, 1179 (8th Cir. 1987). This is such a case.

Sims attempted to complete service in accordance with his interpretation of the magistrate judge's order.<sup>2</sup> When he did not receive acknowledgment from the defendants, he moved the court to order service by a marshal, pursuant to Fed. R. Civ. P. 4(c)(2)(B). This request was filed approximately 35 days after the complaint was filed, well within the 120 day period. Sims clearly knew that,

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<sup>2</sup> Sims explains that he interpreted the magistrate judge's August 16 order that "[s]ervice shall be by mail to the other party" to apply to service of the summons and complaint. In his response to the court's January 22 Show Cause Order, he also cited Federal Rule of Civil Procedure 4(c)(2)(C)(ii), which allows process to be served upon individuals via first-class mail, postage pre-paid.

However, in its Memorandum on Dismissal, the district court stated that the defendants, as agents or employees of the state, were to be served personally or by certified mail. This is apparently a reference to Rule 4(d)(6), which requires that service upon a state be made in accordance with the law of that state. Texas Rule of Civil Procedure 106 allows process to be served personally or by registered or certified mail. There is no provision, as in the Federal Rules, for service by first-class mail.

absent an acknowledgement from the defendants, service by mail was defective. His attempt to remedy that defect was apparently overlooked by the district court.

Sims demonstrated a familiarity with the Federal Rules of Civil Procedure beyond what might reasonably be expected of a *pro se* plaintiff. His pleadings reflect an understanding of the appropriate rules, and he took reasonable action in order to attempt to secure proper service. As noted, his requests for service by a marshal were apparently overlooked -- there were no rulings on them. In sum, he has shown good cause for his failure to secure service. Thus, the district court abused its discretion in dismissing his complaint. See *Systems Signs Supplies*, 903 F.2d at 1014.<sup>3</sup>

### III.

According, the judgment is **VACATED** and this case **REMANDED** for further proceedings consistent with this opinion.

**VACATED** and **REMANDED**.

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<sup>3</sup> Appellant's motion for summary judgment, carried with the case, is denied as moot.