UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4070
Summary Calendar

ALCIDE ILLA GRIMON,

Plaintiff-Appellant,

versus

EDDIE J. COLLINS, ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas
(1:B-88 CV 1014)

(March 29, 1993)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Alcide Illa Grimon, proceeding *pro se* and *in forma pauperis*, appeals the dismissal of his civil rights action as frivolous under 28 U.S.C. § 1915(d). Concluding that the district court abused its discretion, we vacate and remand.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

On August 18, 1988, officers Eddie Collins and Willie Aaron of the Port Arthur, Texas police department arrested Grimon on cocaine possession charges. Grimon invoked 42 U.S.C. § 1983, claiming that Collins and Aaron utilized excessive force in effecting his arrest. At a **Spears**[1] hearing Grimon stated that after he offered the cocaine in his possession to Collins and Aaron the officers beat him with their pistols, and kicked and choked him, causing broken ribs and injury to one eye.[2] Following that hearing, the magistrate judge ordered the defendants served and appointed counsel for Grimon.

After Grimon rejected a $500 settlement offer, appointed counsel unsuccessfully sought to withdraw. During the pretrial conference, after the parties agreed to trial before a magistrate judge, Collins and Aaron renewed their offer. Ignoring the advice of his attorney, Grimon again refused to settle. The court then granted appointed counsel's motion to withdraw.

Shortly thereafter, acting *sua sponte*, the magistrate judge issued an opinion recounting deposition testimony of Anita Alpough which indicated that Grimon started the altercation with Collins and Aaron, and medical opinion obtained by appointed counsel indicating that Grimon suffered no broken ribs. The court also

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[1] **Spears v. McCotter**, 766 F.2d 179 (5th Cir. 1985).

[2] Grimon indicated that after the beating started he placed some of the cocaine in his mouth.

found that Collins and Aaron utilized only the force necessary to prevent Grimon from destroying evidence and endangering himself by swallowing the cocaine in his possession at the time of his arrest.[3] The district court thus concluded that qualified immunity protected Collins and Aaron from liability, and dismissed Grimon's action as frivolous under 28 U.S.C. § 1915(d). Grimon timely appealed.

Analysis

On appeal, Grimon maintains that the trial court dismissed his claim as frivolous under section 1915(d) after making impermissible credibility assessments. Dismissals under section 1915(d) are reviewable only for abuse of discretion.[4] As we repeatedly have noted, however, while trial courts may factor credibility into the section 1915(d) calculus, in doing so they must be ever mindful that they are "only for the purpose of determining whether a suit is frivolous, not deciding the case on the merits."[5] A section 1915(d) evaluation is not a trial on the merits. Thus, where the plaintiff alleges plausible and internally consistent facts, the district court may not dismiss under section 1915(d) by

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[3] The record provides scant support for these "findings."

[4] **Denton v. Hernandez**, 112 S.Ct. 1728 (1992).

[5] **Wilson v. Barrientos**, 926 F.2d 480, 482 (5th Cir. 1991) (quoting **Cay v. Estelle**, 789 F.2d 318 (5th Cir. 1986)); **Wesson v. Oglesby**, 910 F.2d 278 (5th Cir. 1990) (quoting **Cay**).

deciding to credit the defendant's account of events.[6] In finding that Collins and Aaron acted reasonably under the circumstances, the court *a` quo* necessarily chose their version of the facts over Grimon's. The court acted improvidently in dismissing under section 1915(d) on the basis of such a credibility assessment.[7]

Accordingly, we must VACATE the judgment appealed and REMAND for futher proceedings consistent herewith.

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[6] **Pedraza v. Meyer**, 919 F.2d 317 (5th Cir. 1990) (citing **Wesson**).

[7] Collins and Aaron argue that the district court properly dismissed Grimon's suit as frivolous and in the alternative properly found that qualified immunity entitled them to summary judgment. We cannot accept either of these contentions. The record demonstrates that Grimon's complaint, as supplemented by his **Spears** hearing testimony, did not lack an arguable basis either in law or in fact. **Neitzke v. Williams**, 490 U.S. 319 (1989). Further, although Collins and Aaron ultimately may demonstrate their entitlement to judgment, even summary judgment, on qualified immunity grounds, the record before us reflects neither a summary judgment motion nor the notice which must precede a *sua sponte* grant of such relief. See **NL Industries, Inc. v. GHR Energy Corp.**, 940 F.2d 957 (5th Cir. 1991) (district court may grant summary judgment *sua sponte* only after adequate notice to adverse party).