UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-4750

(Summary Calendar)

JEFFREY KENT BOYLE,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, Director
Texas Dept. of Criminal Justice,
Institutional Division, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas
(CA9-91-100)

(September 21, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Jeffrey Kent Boyle, proceeding pro se and in forma pauperis, appeals the district court's dismissal of his civil rights suit under 42 U.S.C. § 1983 (1988). Finding no abuse of discretion in the court's dismissal of the suit as frivolous, we affirm.[1]

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] The district court, adopting the report and recommendation of the magistrate judge, also dismissed the suit because of: (a) Boyle's failure to prosecute in a timely manner, pursuant to Fed. R. Civ. P. 41(b); and (b) Boyle's failure to exhaust his state administrative remedies under 42 U.S.C. § 1997e (1988). Because we affirm the dismissal of Boyle's suit as frivolous, we need not address these alternative grounds for dismissal.

Boyle, a state prisoner in the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID"), Eastham Unit, filed suit under § 1983, claiming that prison officials had conducted two harassing searches of his cell on consecutive days, during which several of his magazines were confiscated.[2] On September 19, 1991, the magistrate judge ordered Boyle to file a more detailed pleading within thirty days of receipt of such notice. The magistrate judge warned that failure to obey the order "may lead to a recommendation that the lawsuit be dismissed, with or without prejudice, for failure to prosecute or to obey any order of the Court." Record on Appeal at 68 (citing Fed. R. Civ. P. 41(b)).

On October 3, 1991, Boyle filed his amended complaint, alleging that several copies of his magazines were thrown out during harassing searches on two consecutive days. He also alleged that one of the missing magazines was *Guideposts,* a religious publication. Based upon these allegations, Boyle claimed that: (1) the harassing searches of his cell and taking of his magazines constituted cruel and unusual punishment under the Eighth Amendment; (2) the taking of his *Guideposts* magazine constituted a denial of religious freedom; and (3) the taking of his magazines constituted theft under state law. The magistrate judge recommended dismissal of Boyle's amended complaint as frivolous, pursuant to 28 U.S.C. § 1915(d) (1988). The district court, adopting the recommendation of the magistrate judge, thereafter

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[2] Boyle named as defendants the director and regional director of the TDCJ-ID, the warden at Eastham Unit, and the correctional officers at Eastham who conducted or supervised the searches. *See* Record on Appeal at 84-85.

dismissed Boyle's § 1983 complaint. Boyle filed a timely notice of appeal.

Boyle contends that the court abused its discretion by dismissing as frivolous his Eighth Amendment claim of cruel and unusual punishment.[3] We review a dismissal of an IFP complaint under § 1915(d) for abuse of discretion. *Denton v. Hernandez,* ___ U.S. ___, 112 S. Ct. 1728, 1734, 118 L. Ed. 2d 340 (1992). An IFP complaint may be dismissed under § 1915(d) as frivolous if it lacks an arguable basis in either law or fact. *Nietzke v. Williams,* 490 U.S. 319, 325, 109 S. Ct. 1827, 1831, 104 L. Ed. 2d 338 (1989).

The magistrate judge concluded that "[t]he deprivation of property such as magazines does not rise to the level of an Eighth Amendment claim of cruel and unusual punishment." Record on Appeal at 26 (citing *Wilson v. Lynaugh,* 878 F.2d 846, 848 (5th Cir.), *cert. denied,* 493 U.S. 969, 110 S. Ct. 417, 107 L. Ed. 2d 382 (1989)). In doing so, the magistrate judge failed to consider whether Boyle's claim of "calculated harassment" has an arguable basis in law or fact. The Supreme Court has stated as dictum, and other Circuit Courts have held, that calculated harassment unrelated to prison needs may, under certain circumstances, constitute cruel and unusual punishment under the Eighth Amendment. *See Hudson v. Palmer,* 468 U.S. 517, 530, 104 S. Ct. 3194, 3202, 82

[3] Boyle only challenges the court's finding of frivolousness as it relates to his claim of cruel and unusual punishment. *See* Brief for Boyle at 5-7. Consequently, we deem abandoned his claims based upon religious freedom and state theft. *See Hobbs v. Blackburn,* 752 F.2d 1079, 1082 (5th Cir.), *cert. denied,* 474 U.S. 838, 106 S. Ct. 117, 88 L. Ed. 2d 95 (1985).

L. Ed. 2d 393 (1984);[4] *Scher v. Engelke,* 943 F.2d 921, 924 (8th Cir. 1991) (citing *Hudson*), *cert. denied,* ___ U.S. ___, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992); *Vigliotto v. Terry,* 873 F.2d 1201, 1203 (9th Cir. 1989) (same).

We decide, rather than remand, the question whether Boyle's calculated harassment claim has an arguable basis in law or fact, because it is a question of law based upon the facts alleged by Boyle. In support of his claim, Boyle alleged that prison officials conducted two searches on two consecutive days. These allegations demonstrate, at most, de minimis conduct by prison officials, wholly insufficient to sustain an Eighth Amendment claim. *See Hudson v. McMillian,* ___ U.S. ___, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156 (1992) ("[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." (citation omitted) (attribution omitted)); *see also Scher,* 943 F.2d at 923-24 (stating that ten cell searches in nineteen days could evidence a "pattern of calculated harassment

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[4] The Supreme Court stated:

> "Our holding that respondent does not have a reasonable expectation of privacy enabling him to invoke the protections of the Fourth Amendment does not mean that he is without a remedy for calculated harassment unrelated to prison needs. Nor does it mean that prison attendants can ride roughshod over inmates' property rights with impunity. The Eighth Amendment always stands as a protection against `cruel and unusual punishments.'"

Hudson, 468 U.S. at 530, 104 S. Ct. at 3202.

unrelated to prison needs" for purposes of the Eighth Amendment); *Vigliotto,* 873 F.2d at 1203 (stating that a single cell search is insufficient to sustain a claim of calculated harassment under the Eighth Amendment). We therefore hold as a matter of law that Boyle's claim of calculated harassment has no arguable basis in law or fact.

Accordingly, the district court's dismissal is AFFIRMED.