IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4917

SAUREZ ANDERSON,

Plaintiff-Appellant,

versus

T. D. CROW, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(CA6:89-473)

(January 19, 1994)

Before HIGGINBOTHAM and DUHE', Circuit Judges, and LITTLE*, District Judge.

PER CURIAM:**

Saurez Anderson, proceeding pro se and in forma pauperis from a Texas penitentiary, sued eight defendants under 42 U.S.C. § 1983

---

*District Judge of the Western District of Louisiana, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

for two injuries he suffered in 1988. The first occurred on June 2, 1988, when a guard closed the food tray slot of Anderson's cell on Anderson's left middle finger, causing bleeding and the loss of a fingernail. The second occurred on June 10, 1988, when Anderson refused to comply with an order to move to another cell and guards had to forcibly remove him. A magistrate judge recommended dismissal of these claims as frivolous pursuant to 28 U.S.C. § 1915 after holding Spears hearings. The district court adopted the magistrate's recommendations and dismissed Anderson's claims with prejudice. Following Anderson's appeal of that dismissal, this court vacated and remanded for reconsideration in light of Hudson v. McMillian, 112 S.Ct. 995, 998 (1992). On remand, a magistrate held an expanded Spears hearing, which again resulted in the district court dismissing Anderson's claims as frivolous. Anderson appeals these dismissals, contending that his claims are not frivolous and that this court should allow him to pursue them in forma pauperis.

A frivolous claim has no arguable basis in law or in fact. Denton v. Hernandez, 112 S.Ct. 1728, 1733 (1992). This standard is lower than that set by Federal Rule of Civil Procedure 12(b)(6), so even if the complaint fails to state a claim, dismissal is not necessarily proper. Neitzke v. Williams, 109 S.Ct. 1827, 1831 (1989) (9-0 decision). See also Wilson v. Barrientos, 926 F.2d 480, 482 (5th Cir.), modified in part on other grounds, 926 F.2d 483 (5th Cir. 1991) (on petition for rehearing). A court may make limited credibility determinations in a section 1915 proceeding to

assess the inherent plausibility of a prisoner's allegations based on objective factors, but cannot go so far as to decide the merits of the case. Wilson, 926 F.2d at 482. A court should not order section 1915 dismissal if a disputed factual allegation emerges in a Spears hearing that would warrant relief if true, and that is not "clearly baseless . . . fanciful . . . fantastic . . . and delusional." Denton, 112 S.Ct. at 1733-34. Because of the difficulty of the trial court's task, this court reviews a trial court's decision to dismiss under section 1915(d) for abuse of discretion. See id. at 1733; Wilson, 926 F.2d at 481.

Anderson's allegations raise a factual dispute about what happened when guards arrived at his cell to move him. Anderson says that the guards arrived angry because they believed he had bribed other inmates to throw things at them. He further says that while he protested the cell transfer, the only physical action he took was to move away from the entering officer. The officers contend that he actively resisted their efforts to move him and they had to use considerable force to control him. Once the move began, the parties do not dispute that violence erupted and Anderson sustained significant injury.

If Anderson's allegations are true, he has potentially alleged a claim actionable under Hudson because it involves the malicious use of more than de minimis force. Hudson, 112 S.Ct. at 1000; Hudson v. McMillian, 962 F.2d 522, 523 (5th Cir. 1992) (on remand). Finding his claims frivolous because the officers' testimony seems more credible than Anderson's exceeds the proper scope of a section

1915 inquiry. See Neitzke, 109 S.Ct. at 1829-30; Wesson v. Oglesby, 910 F.2d 278, 281-82 (5th Cir. 1990). Cf. Mayfield v. Collins, 918 F.2d 560, 561 (5th Cir. 1990) (finding a prisoner's 38th civil rights complaint incredible). The court erred in dismissing this claim at such an early stage.

Anderson's allegation of malicious injury to his finger is not frivolous either. Anderson alleges that the guard was angry with him because the guard believed him to have encouraged inmates to throw things, that the guard told him after the injury that he should have moved faster, and that the guard smiled after the incident was over. Anderson's testimony, taken at face value, could establish the malicious use of more than de minimis force. The fact issues Williams raises suffice to survive dismissal at this early stage. Cf. Moody v. Miller, 864 F.2d 1178, 1181 (5th Cir. 1989) (per curiam) (affirming a § 1915 dismissal because no interpretation of the facts plaintiff alleged could give rise to a constitutional violation).

REVERSED AND REMANDED.