IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5078

Summary Calendar

DANNY RAY CLINE,

Plaintiff-Appellant,

versus

CITY OF LONGVIEW, TEXAS, ET. AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:92-CV-329)

(January 28, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

In this § 1983 case, the plaintiff appeals the dismissal of his claims against all but one defendant as being time-barred and the dismissal of his claims against the remaining defendant for failure to exhaust his habeas remedies. We affirm.

I.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Danny Ray Cline, an inmate confined in the Texas prison system, filed a pro se and in forma pauperis § 1983 complaint and amended complaint concerning an arrest in 1986 and two convictions in 1987. As defendants, the complaint names the City of Longview, Gregg County, various judges, attorneys, policemen, firemen, and grand jury members.[1] As to his 1986 arrest for escape from custody, Cline alleges false arrest, vindictive prosecution, violation of his equal protection rights, and conspiracy to deprive him of his constitutional rights. With regard to his February 1987 conviction for arson of a motor vehicle, Cline alleges that an illegal search and arrest lead to his conviction, his equal protection rights were violated, his due process rights were violated because of the delay in receiving an examining trial, conspiracy to deprive him of his constitutional rights, and ineffective assistance of counsel. Finally, with respect to his July 1987 conviction for arson of a habitation, Cline again alleges that he was denied his right to an examining trial, violation of his equal protection rights, a due process violation, conspiracy, and ineffective assistance of counsel.

A magistrate judge recommended that the complaint be dismissed with prejudice pursuant to 28 U.S.C. § 1915(d),[2] because all claims

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[1]In addition to the City of Longview and Gregg County, the complaint names K. King, B.F. Robinson, Larry Starr, Steven Gamble, Rebecca Simpson, Harry Heard, David Ingram, Hazel Pikes, Brian Ray, Danny Butler, David Hazel, David Burrows, Margret E. Hall, and Roger Pope. The amended complaint adds Ray Hardy as a defendant.

[2]Section 1915(d) authorizes a district court to dismiss an in forma pauperis complaint "if satisfied that the action is

were time-barred. Cline filed an objection, urging that the statute of limitations was tolled, because he had filed two previous civil rights claims, which were dismissed without prejudice for him first to exhaust his state remedies. He added that he was not challenging the fact or length of his convictions in this suit but in a separate habeas corpus petition. Therefore, he contends that he may simultaneously bring this suit challenging the facts surrounding his convictions under § 1983 and his habeas action under § 2254 challenging his conviction directly.

In a supplemental report, the magistrate agreed that the civil rights claims which had been previously dismissed for exhaustion of state remedies were tolled. The magistrate noted, however, that in this case, Cline had named defendants not named in the previous two complaints and that tolling could not operate as to the new defendants. The only common defendant was Cline's trial attorney, Harry Heard. The magistrate therefore recommended that the claims against the new defendants be dismissed as time-barred. Finally, the magistrate dismissed any claims against defendant Heard without prejudice, because Cline had not exhausted his state and federal habeas corpus remedies. The district court adopted the magistrate's recommendation, and this appeal followed.

II.

In § 1983 suits, federal courts borrow the forum state's general or residual personal injury limitations period. Owens v.

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frivolous." See also Denton v. Hernandez, 112 S.Ct. 1728, 1733 (1992); Neitzke v. Williams, 490 U.S. 319, 325 (1989).

Okure, 109 S.Ct. 573 (1989); Rodriguez v. Holmes, 963 F.2d 799, 803 (5th Cir. 1992). In Texas, the applicable period is two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 1986). The state's tolling provisions apply as well. Hardin v. Straub, 109 S.Ct. 1998, 2000 (1989); Rodriguez, 963 F.2d at 803. Absent tolling, Cline's § 1983 claims are too late. He submitted this case to the Clerk of Court on April 15, 1992. See Martin v. Demma, 831 F.2d 69, 71 (5th Cir. 1987) (receipt of the complaint determines the time of filing for limitations purposes). The events he complains of occurred in 1986 and 1987, far exceeding the two year period.

Cline argues that his claims are tolled, because he filed two previous civil rights suits within the period of limitations which were dismissed because they sounded in habeas corpus and had to be presented in state court first. See Rodriguez, 963 F.2d at 805; Jackson v. Johnson, 950 F.2d 265, 266 (5th Cir. 1992). In this case, however, Cline has named different defendants against whom tolling cannot operate. Cf. Moore v. Long, 924 F.2d 586 (5th Cir. 1991) (whether an amended § 1983 complaint adding a new party relates back to the original complaint under F.R.C.P. 15(c)). Therefore, the district court properly dismissed Cline's claims against the new defendants with prejudice.[3]

[3]The district court's order does not mention defendant Ray Hardy who was named in the amended complaint; however, Hardy is also a new defendant and any claims against him are time-barred as well.

Only Cline's trial attorney, Harry Heard, was named in one of Cline's prior civil rights suits. The record does not describe Cline's prior claims against Heard. Assuming that Cline is repeating those claims here, his § 1983 suit against Heard is not time barred. However, he must exhaust his habeas remedies with this claim before trying again to seek § 1983 relief. See e.g. Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112 (5th Cir. 1987). The district court concluded that Cline had not exhausted his allegations in the Texas Court of Criminal Appeals and therefore dismissed the case against Heard without prejudice so that Cline may renew this claim after his habeas remedies are exhausted. This dismissal was proper. See Jackson, 950 F.2d at 266; May v. Collins, 948 F.2d 162, 169 (5th Cir. 1991).

AFFIRMED.