

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5164  
Conference Calendar

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FREDERICK TYRONE RIDGE,

Plaintiff-Appellant,

versus

MIKE BATEMAN ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 92-CV-162  
- - - - -  
(December 15, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant Frederick Tyrone Ridge's motion for leave to appeal in forma pauperis (IFP) is GRANTED because Ridge has presented a nonfrivolous issue on appeal. See Holmes v. Hardy, 852 F.2d 151, 153 (5th Cir.), cert. denied, 488 U.S. 931 (1988).

A complaint filed IFP may be dismissed by the court sua sponte if the complaint is frivolous. 28 U.S.C. § 1915(d). A complaint is "frivolous where it lacks an arguable basis either in law or in fact." Denton v. Hernandez, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992) (internal quotation and citation omitted). This Court reviews a § 1915(d) dismissal under the abuse-of-discretion standard. Id. at 1734.

Because Ridge's claims, if proved, would factually undermine or conflict with his state court conviction, the appropriate remedy is a petition for habeas relief. Richardson v. Fleming, 651 F.2d 366, 373 (5th Cir. 1981). Ridge's argument that he "need not legally attack the validity of his conviction to prevail on his section 1983 claim" is frivolous. Assuming he was subjected to an unfair trial through the alleged conspiracy, he is incarcerated in violation of his constitutional rights and must pursue state and federal habeas remedies before asserting a § 1983 claim. See Serio v. Members of Louisiana State Bd. of Pardons, 821 F.2d 1112, 1118-19 (5th Cir. 1987).

Because no specified federal statute of limitations exists for 42 U.S.C. § 1983 suits, federal courts borrow the forum state's general or residual personal injury limitations period. Rodriguez v. Holmes, 963 F.2d 799, 803 (5th Cir. 1992). In Texas, the applicable period is two years. Tex. Civ. Prac. & Rem. Code § 16.003(a) (West 1986). Federal courts also apply the state's tolling provisions to statutory limitations periods. Rodriguez, 963 F.2d at 803.

Ridge's pro se argument, read liberally, is that the district court erred when it concluded that he filed his complaint beyond the applicable Texas limitations period because the period was tolled by his pending habeas action.

Although state law controls the limitations period for § 1983 claims, federal law determines when a cause of action accrues. Brummett v. Camble, 946 F.2d 1178, 1184 (5th Cir.

1991), cert. denied, 112 S.Ct. 2323 (1992). The federal standard provides that the limitations period begins to run from the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured. Rodriguez, 963 F.2d at 803.

Ridge's claim that the defendants conspired to convict him by introducing perjured testimony therefore accrued in February 1990, the time of trial, by which time he knew or certainly should have known of such conspiracy. Ridge's complaint was filed in August 1992, six months after the two-year statute of limitations lapsed.

The magistrate judge, determining that there were no habeas actions pending which raised the same claims, concluded that the Texas tolling provision did not apply and recommended dismissal as frivolous for failure to file the complaint beyond the limitations period. In his objections to the magistrate judge's report, Ridge contended that the limitations period was tolled by Texas law because of "pending state litigation." The district court "adopted" the magistrate judge's report, found that Ridge had a state habeas action pending, yet dismissed his complaint as frivolous. The district court concluded that the limitations period was not tolled by the pendency of Ridge's state habeas action. For reasons set forth below, although dismissal under § 1915(d) for the reasons stated by the district court was erroneous, dismissal was proper on other grounds. See Bickford v. Int'l Speedway Corp., 654 F.2d 1028, 1031 (5th Cir. Unit A

Aug. 1981); see also Clark v. Williams, 693 F.2d 381, 382 (5th Cir. 1982) (reviewing court may dispose of appeal on motion to proceed IFP on appeal).

Texas tolling provisions indicate that, if a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right. This rule enables a federal district court to dismiss the "civil/rights habeas actions" without prejudice and to direct the litigant to pursue promptly state remedies. Jackson v. Johnson, 950 F.2d 263, 266 (5th Cir. 1992). The time during which the litigant is pursuing the available state remedies would toll the statute of limitations, thus allowing the litigant to return to federal court within the limitations period. Id.; see Rodriguez, 963 F.2d at 804-05.

The record does not indicate, nor does Ridge's appellate argument suggest, that he has exhausted his state or federal habeas remedies. See Serio, 821 F.2d at 1118-19. The district court thus did not abuse its discretion in dismissing Ridge's § 1983 complaint without prejudice to move to reopen his lawsuit if he prevailed on his habeas claim in state or federal court. See Rodriguez, 963 F.2d at 804-05.

AFFIRMED.