**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 92-5256
Summary Calendar

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Harry Lee Jackson,

Plaintiff-Appellant,

VERSUS

City of Beaumont Police Department, et al,

Defendants-Appellees.

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Appeal from the United States District Court
for the Eastern District of Texas

(87-CV-1226)

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(July 12, 1994)

Before WISDOM, JOLLY, and JONES, Circuit Judges. [1]

WISDOM, Circuit Judge:

In this case, we review the district court's grant of summary judgment for the defendants on plaintiff Harry L. Jackson's claim under 42 U.S.C. § 1983. We affirm the district court's holding that Jackson did not timely file his complaint and, thus, failed to meet the applicable statute of limitations.

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1 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 imposed 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 Pursuant to that rule, the court has determined that this opinion should not be published.

The scope of our inquiry and holding is limited to the limitations question, rendering an exhaustive review of the factual background unnecessary.[2] Harry Jackson, pro se and in forma pauperis, filed a claim under 42 U.S.C. § 1983 against the City of Beaumont Police Department, the City of Beaumont, Officer E.R. Pachall, Officer Don Gordon, and Supervisors Jane Doe and John Doe. In his complaint, Jackson alleged that police officers used excessive force in the course of arresting him on May 7, 1985. Under the two-year statute of limitations for § 1983 actions, Jackson had until May 8, 1987, to file his complaint.[3]

This Court relied on an incomplete record in rendering its decision in the first appeal. We erroneously noted that Jackson was arrested on May 7, 1985, and incarcerated until sometime between November 12, 1985, and January 6, 1986. Under the applicable Texas law at the time, this period of incarceration would have constituted a legal disability capable of tolling the statute of limitations.[4]

Upon remand after the second appeal, however, the defendants

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[2]For the curious, this case has a lengthy procedural history that includes two prior appeals to this Court. A detailed background of the case may be found in our published opinion disposing of Jackson's second appeal. Jackson v. City of Beaumont Police Dept., 958 F.2d 616 (5th Cir. 1992).

[3]We look to state law on personal injury actions for the statute of limitations of an action under § 1983. Owens v. Okure, 488 U.S. 235, 250, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). In Texas, the statute of limitations for personal injury actions is two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (West 1986); Burell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989).

[4]Tex. Civ. Prac. & Rem. Code Ann. § 16.001.

introduced evidence for the first time demonstrating that Jackson was released from incarceration on May 8, 1985 -- the day after his arrest. Hence, the limitations period applicable to Jackson's present claims was tolled for one day only.[5]

Jackson delivered his complaint to prison officials on or about October 10, 1987, while incarcerated for a crime unrelated to the present action. Upon receiving the papers by mail, the district court officially filed the complaint on November 2, 1987. As Jackson had not met his May 8, 1987 filing deadline, the magistrate judge to whom this case was assigned recommended to the district court that the defendants's motion for summary judgment be granted.

In his objections to the magistrate judge's report, Jackson verified the chronology of events but asserted that he had constructively filed his complaint within the two-year period. He argued that on March 3, 1986, he gave his complaint to an agent of the Federal Bureau of Investigation (FBI). Unpersuaded by that construction of events, the district court rejected Jackson's plea and granted summary judgment for the defendants. Jackson filed a timely notice of appeal from the district court's denial of his Rule 60(b) "Motion for Relief from Judgment or Order".[6]

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[5]This Court's confusion probably stemmed from the fact that Jackson was subsequently arrested and imprisoned on unrelated charges on June 3, 1985. A subsequent imprisonment does not, however, toll a statute of limitations.

[6]We note at the outset that no issue of appellate jurisdiction exists. Jackson filed a notice of appeal on the same day that he filed a motion for relief from the judgment. When the district court denied the latter, Jackson failed to file

The determinative question is whether Jackson's contention that he timely filed his complaint by delivering it to the FBI on March 3, 1986, raises a genuine issue of material fact preclusive of summary judgment for the defendants. We review the grant of summary judgment de novo. We affirm if there exists no genuine issue as to any material fact and judgment is justified as a matter of law.[7]

Although state law defines the applicable limitations period, the Federal Rules of Civil Procedure define how a claim may be properly commenced.[8] The two work in conjunction. Fed. R. Civ. P. 3 provides that an action commences upon the "filing" of a complaint with the court. Fed. R. Civ. P. 5(e) provides that a filing is accomplished when a pleading is delivered to the clerk of the court. While Rule 5(e) also allows a complaint to be filed with a judge (at the judge's discretion), it does not so authorize any other individual or agency. Jackson did not comply with these basic rules when he gave his complaint to an FBI agent on March 3, 1986.

Jackson nonetheless asks that we recognize this delivery as a

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a new notice of appeal. That error is no longer fatal under the new amendments to the Federal Rules of Appellate Procedure. More, we apply this change retroactively. See Burt v. Ware, 14 F.3d 256 (5th Cir. 1994) (the retroactive application of the amendment to Fed. R. App. P. 4(a)(4) is just and practicable and works no injustice).

[7]Fed. R. Civ. P. 56(c); Amburgey v. Corhart Refractories Corp., Inc., 936 F.2d 805, 809 (5th Cir. 1991) (internal quotations and footnote omitted).

[8]Martin v. Demma, 831 F.2d 69 (5th Cir. 1987).

constructive filing in the light of his pro se status. It is true that we give a "generous construction" to a pro se petitioner's pleadings.[9] That policy is rooted in the desire to decide a complaint on the merits rather than on the procedural deficiencies that might result from a pro se petitioner's legal ignorance.

That policy, however, has no application here. The district court took judicial notice of the fact that Jackson has been properly filing civil rights actions since 1983. He has thus demonstrated a familiarity with these rules and procedures. We are not moved by Jackson's plea for recognition of his delivery to the FBI agent as a proper filing within the strictures of Rule 5(e). The generous reading we give to a pro se petitioners could never justify the administrative burdens that would accompany exceptions to Rule 5(e) for federal agencies and officials.[10]

Next, Jackson argues that he mailed a copy of his complaint to Judge Justice on March 3, 1986. Jackson never presented this argument to the magistrate or to the district court in his objections. Instead, he raised it for the first time in his motion for relief from judgment. Although he does not assign error to the district court's denial of that motion, we will treat his argument

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[9]Kahey v. Jones, 836 F.2d 948, 949 (5th Cir. 1988).

[10]We note that our decision has no bearing on the propriety of a prisoner's delivery of his complaint to the prison officials for mailing. See Houston v. Lack, 487 U.S. 266, 270-76, 101 L.Ed.2d 245 (1988) (notice of appeal is timely if delivered to prison authorities).

as such.[11] In any event, we can dispose of it easily for Jackson has introduced no evidence whatsoever indicating that he mailed his complaint to Judge Justice. The district court did not abuse its discretion when it denied Jackson's motion.[12]

Jackson contends that, even if we reject his arguments as to the timeliness of his filing, an entry in the district court's docket sheet indicates that his complaint was received in March 1986. The entry to which he refers is dated November 11, 1987, and reads:

> ORDERED that this Beaumont Division Civil Rights case, assigned to Judge Cobb shall be referred to U.S. Magistrate Hines for handling of discovery and other pre-trial proceedings. s/HC 3/27/86 v7 p109.

Jackson somehow construes the notation "3/27/86" as proof that his complaint was received prior to March 27, 1986, and, thus, before the limitations period expired. The order entered on the docket sheet, however, is merely a general referral order directing that all prisoner civil rights actions assigned to Judge Cobb be referred to Magistrate Hines. Hence, the notation "3/27/86" offers no insight into the question of timeliness.

The district court correctly held that Jackson did not file his complaint within the applicable limitations period. As the court clerk did not receive Jackson's complaint until November 2,

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[11]The alternative for Jackson would be equally unavailing: He would be raising this issue for the first time on appeal. U.S. v. Faubion, 19 F.3d 226, 232 n.31 (5th Cir. 1994); King v. United States, 565 F.2d 356 (5th Cir. 1978).

[12]See Edward H. Bohlin Co., Inc. v. Banning Co., Inc., 6 F.3d 350, 353 (5th Cir. 1993) (we review denial of motions under both Rule 59(e) and Rule 60(b) for abuse of discretion).

1987, his claim is time barred.

AFFIRMED.