UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 92-8249 & 92-8250
Summary Calendar

SYNNACHIA McQUEEN,

Plaintiff-Appellant,

versus

RAUL MATA, Captain, et al.,

Defendants-Appellees.

and

SYNNACHIA McQUEEN,

Plaintiff-Appellant,

versus

DAVID TURNER, CO III Officer, ET AL.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(W 91 CV 320 & @ 91 CA 315)

(December 18, 1992)

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

PER CURIAM:*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Before us are consolidated appeals from the district court's orders dismissing McQueen's civil rights cases for failure to comply with a filing fee order and, in Case No. 92-8249, revoking McQueen's IFP status on appeal. We hold that the district court improperly refused to permit McQueen to appeal in forma pauperis, and, on the merits, the court should not have dismissed these cases for failure to pay the $20 filing fee ordered by the magistrate. We vacate and remand these cases to the district court.

The district court apparently believed that the magistrate judge denied McQueen leave to proceed IFP in the district court when the magistrate judge ordered him to pay partial filing fees. This was a misconception. The magistrate judge implicitly granted leave to proceed IFP when it imposed the $20 filing fees. See Grissom v. Scott, 934 F.2d 656, 657 (5th Cir. 1991). A pauper whose IFP status has not been decertified need not move again for leave to appeal IFP on appeal. FRAP 24(a). The district court may, however, deny a litigant's motion to proceed IFP on appeal if it certifies that the litigant is not proceeding in good faith. Id. Here, the court made no such certification, and the court erred in apparently denying McQueen permission to appeal IFP under the misconception that he had not been granted IFP status by the magistrate judge. Because it further appears both that McQueen has adequately demonstrated his financial need to appeal IFP and has raised an arguable point for appellate review, i.e., whether the district court should have dismissed his case,

this court therefore grants his motion for leave to appeal IFP in Case. No. 92-8249.

On the merits of both cases, the district court acted too hastily in granting a dismissal -- effectively with prejudice -- for failure to prosecute. Fed. R. Civ. P. 41(b). Ordinarily, lesser sanctions such as a conditional dismissal or dismissal without prejudice are to be preferred unless the plaintiff has behaved contumaciously. Callip v. Harris County Child Welfare Dept., 757 F.2d 1513, 1521 (5th Cir. 1985). When McQueen filed his cases and sought IFP status, he alleged that he had $21.75 in his prison trust-fund account. The prison authorities essentially verified his information. If McQueen did not have even the $40 that the magistrate judge ordered him to pay as filing fees in both cases, the magistrate judge likely abused his discretion by ordering payment of those fees. Smith v. Martinez, 706 F.2d 572, 573 (5th Cir. 1983). On remand, the magistrate judge should request that McQueen submit a new IFP affidavit and the court should reconsider the amount of filing fees that are appropriate.

The judgments of dismissal in these cases are VACATED and the cases REMANDED for further proceedings.