

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9008
Conference Calendar

ENRIQUE MANZANO BORROTO,

Plaintiff-Appellant,

versus

JAMES R. WILSON, JR., ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:92-CV-2102-X
- - - - -

March 18, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

In his civil rights complaint, which puts at issue the events leading to his arrest and conviction, Enrique Manzano Borroto alleged that Dallas police officers stopped him without probable cause, that the officers used excessive force, that his arrest was unlawful, that the officers perjured themselves, and that he received ineffective assistance of counsel.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

"When a state prisoner attacks the fact or length of his confinement, the appropriate cause of action is a petition for habeas corpus, even though the facts of the complaint might otherwise be sufficient to state a claim under Section 1983." Jackson v. Torres, 720 F.2d 877, 879 (5th Cir. 1983) (internal quotations omitted). Most of Borroto's claims raise constitutional issues concerning the fact or duration of his confinement. Therefore, as to those claims, the district court properly construed Borroto's complaint as one requesting habeas relief. Because Borroto's excessive force claim does not challenge the fact or length of his confinement, however, he is not required to exhaust state remedies before pursuing it in a § 1983 action. Delaney v. Giarrusso, 633 F.2d 1126, 1128-29 (5th Cir. Unit A Jan. 1981); see Hernandez v. Spencer, 780 F.2d 504, 504-06 (5th Cir. 1986).

"[I]n instances in which a petition combines claims that should be asserted in habeas with claims that properly may be pursued as an initial matter under § 1983, and the claims can be separated, federal courts should do so, entertaining the § 1983 claims." Serio v. Louisiana State Bd. of Pardons, 821 F.2d 1112, 1119 (5th Cir. 1987). Additionally, because the effect of dismissal on the running of applicable limitations periods is uncertain, the district court should not have dismissed the complaint without considering whether to hold the complaint in abeyance pending exhaustion of the habeas claims. Id. at 1119-20; Jackson, 720 F.2d at 879.

The judgment of the district court is VACATED and the cause REMANDED for entry of a stay or dismissal without prejudice of the unexhausted claims and for further proceedings on the excessive force claim.