IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1008

Summary Calendar

RAYMOND FLORES,

Plaintiff-Appellant,

versus

JOE DRISKELL, Former Warden
Venus Pre-Release Unit CCA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:92 CV 1791 R)

June 4, 1993

Before KING, DAVIS and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Raymond Flores, an inmate in the Texas Department of Criminal Justice (TDCJ), brought this case against several prison officials, alleging that his constitutional rights were violated when he was placed in lock-up for sixteen days without a hearing. Finding that Flores failed to file his complaint within the

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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 Pursuant to that rule, we have determined that this opinion should not be published.

applicable limitations period and that his claims are frivolous, the district court dismissed Flores' action. We affirm.

I

Flores alleges that his constitutional rights were violated when he was placed in lock-up between October 18, 1989 and November 2, 1989 without a hearing. According to Flores, he was brought before Joseph Driskell, former assistant warden of the Venus Pre-Release Unit, on October 18, 1989, after a complaint was lodged against him by Betty Stoffer, an employee in the Venus United Kitchen. This complaint arose out of a dispute between Flores and Stoffer, which resulted in verbal confrontations on October 17 and 18.

According to Flores, during his meeting with Driskell, Driskell insulted him with racial slurs and vulgar language, and called him a liar. Shortly after leaving Driskell's office, Flores was placed in pre-hearing detention. Flores was allegedly not informed of any charge against him until October 25, when a jail official informed Flores that Stoffer had filed charges against him alleging that he had threatened to slap her. On November 2, 1989, the day Flores was released from lock-up, he was visited by the TDCJ monitor and allegedly told that he had investigated Stoffer's charge against Flores and found it to be untrue. The TDCJ monitor also allegedly told Flores that he recommended that no action be taken against Flores, but that the warden of Venus had rejected his recommendation and decided to transfer Flores to the maximum-security Ellis I Unit. Flores was

transferred several times, first to Ellis I, then to the Bill Clements Unit, which Flores alleges is a maximum-security facility, and finally to the Ramsey III Unit, a minimum-security facility.

Flores, proceeding pro se and pursuant to 42 U.S.C. § 1983, filed this action on August 4, 1992, alleging that various prison officials violated his civil rights. Specifically, Flores alleged in his complaint that: (1) Stoffer violated his right of access to the courts and his right to due process; (2) Driskell violated his right of access to the courts, and his rights to due process, equal protection, and freedom from cruel and unusual punishment; (3) Venus' chief of security, TDCJ's Venus monitor, and the directors and owners of the Corrections Corporation of America (CCA) violated various constitutionally protected rights; (4) TDCJ's director violated various constitutionally protected rights by failing to intervene and stop the violations that occurred at Venus, and by failing to transfer Flores to another pre-release unit; and (5) the defendants generally violated TDCJ's rules, various court decrees, and Texas state law. As for relief, Flores stated in his complaint that he seeks monetary damages, declaratory relief, and injunctive relief in the form of a court order against (1) the violation of his alleged right to be transferred to another pre-release facility, (2) violations of his constitutional rights and TDCJ's rules and decrees, and (3) retaliation against writ-writers.

Flores' case was reviewed by a magistrate judge who determined that Flores failed to file his complaint within the applicable two-year limitations period. Nevertheless, the magistrate judge also reviewed the merits of Flores' claims and recommended that the court dismiss (1) his claims regarding TDCJ's refusal to transfer him to a pre-release unit because prisoners do not have a constitutional right to be placed in any particular prison, (2) his claim for injunctive relief on behalf of writ-writers because Flores lacks the standing to bring such an action, and (3) his claim for injunctive relief against Venus because Flores was no longer incarcerated there. Flores objected to the magistrate judge's report, contending that (1) Texas' repeal of its prisoner-tolling provision violates prisoners' right of access to the courts, (2) his transfer from Venus was retaliatory, and the violations of his constitutional rights continue because TDCJ refuses to transfer him to another pre-release facility, (3) his release date has been delayed in retaliation for his writ-writing activities, and (4) the magistrate judge erred in evaluating the merits of his claim. The district court adopted the magistrate judge's report and dismissed Flores' action as frivolous pursuant to 28 U.S.C. § 1915(d).

II

Flores' appeal raises two issues: (**a**) whether Flores' complaint is time-barred, and (**b**) whether Texas' repeal of the imprisonment tolling provision of its statute of limitations for

personal injury claims violates prisoners' access to the courts.

A

Although no statute of limitations is set forth in 42 U.S.C. § 1983, the Supreme Court has held that courts entertaining claims brought under section 1983 "should borrow the state statute of limitations for personal injury actions." Own v. Okure, 488 U.S. 238, 236, 109 S. Ct. 573, 574 (1989), citing Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938 (1985); see Gartrell v. R.S. Gaylor, 981 F.2d 254, 256-57 (5th Cir. 1993). The forum state in the case before us is Texas, and, under Texas law, personal injury actions must be brought "not later than two years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon 1986); see Gartrell, 981 F.2d at 256-57. In the past, Texas tolled the limitations period while a person was imprisoned[1] but, effective September 1, 1987, this tolling provision was eliminated. Accordingly, the applicable period of limitations is two years beginning on the date the cause of action accrues, or, when the cause of action accrues prior to the effective date of the statute, September 1, 1987. Id.; see Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989).

"While the limitations period is determined by reference to state law, the standard governing the accrual of a cause of action under section 1983 is determined by federal law."

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[1] TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (Vernon 1986 & Supp. 1993), amended by Acts 1987, 70th Leg., ch. 1049, § 56, eff. Sept. 1, 1987.

Burrell, 883 F.2d at 418; see Gartrell, 981 F.2d at 257. "Under federal law, a cause of action accrues the moment the plaintiff knows or has reason to know of the injury,"[2] or when "the plaintiff is in possession of the `critical facts' that he has been hurt and the defendant is involved." Freeze v. Griffith, 849 F.2d 172, 175 (5th Cir. 1988), quoting Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir. 1980).

Flores' alleged constitutional injuries occurred when he was placed in lock-up on October 18, 1989 and when he was transferred from Venus on November 3, 1989.[3] On these dates, Flores was "in possession of the `critical facts' that he [was] hurt and the defendant[s] [were] involved." Freeze, 849 F.2d at 175. Nevertheless, Flores did not bring this action until September 2, 1992. As expressly admitted by Flores in the brief he has

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[2] Helton v. Clements, 832 F.2d 332, 334 (5th Cir. 1987); see also Burrell, 883 F.2d at 418.

[3] In the brief he has submitted on appeal, Flores directly addresses only these claims. Because Flores has not raised adequate challenges to the district court's dismissal of his claims (1) for injunctive relief for himself and other inmates, and (2) that TDCJ officials refused to remedy his transfer, we conclude that these claims have been waived for the purposes of this appeal. See In re Municipal bond Reporting Antitrust Litigation, 672 F.2d 436, 439 n.6 (5th Cir. 1982) (considering issues waived where appellant's brief failed to set forth contentions and accompanying reasons). We also do not address Flores' claim that TDCJ officials retaliated against him by delaying his release date, for such a claim must initially be pursued through a petition for habeas corpus relief, and there is no indication in the record that Flores has actively pursued such relief. See Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112, 1117-19 (5th Cir. 1987) (recognizing that, where the resolution of a section 1983 claim may automatically entitle a claimant to immediate or earlier release, resolution of the section 1983 claim would "reduce any related state habeas corpus actions to `an exercise in futility'").

submitted to this court, "[a]s for being time barred, Plaintiff filed his suit 10 months after the two-year statute of limitation . . . ." Accordingly, we conclude that Flores' complaint is time-barred.

B

Flores also contends that Texas has violated prisoners' right of access to the courts by repealing the imprisonment-tolling provision of its statute of limitations. See supra Part II.A. According to Flores, Texas generally does not give prisoners the legal assistance they need to bring their actions before the two-year limitations period expires.

As stated by the Supreme Court, a complaint is "frivolous" within the meaning of [28 U.S.C. § 1915(d)] if "it lacks an arguable basis in either law or fact." Denton v. Hernandez, ___ U.S. ___, 112 S. Ct. 1728, 1733-34 (1992), quoting Neitzke v. Williams, 490 U.S. 319, 325 (1989). The Supreme Court has expressly stated what prison authorities must do to ensure that the right of prisoners to access the courts is satisfied: "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491 (1977) (emphasis added). Moreover, to prevail on a denial-of-access claim, a petitioner must show actual prejudice. See Mann v. Smith, 796 F.2d 79, 84 (5th Cir. 1986).

In asserting his denial-of-access claim, Flores simply states that he waited until he received the legal assistance he wanted before pursuing his claim. Therefore, Flores has failed to show that he suffered prejudice as a result of TDCJ policies which do not comply with the Bounds "adequate law libraries or adequate assistance" standard. See Mann, 796 F.2d at 84. In fact, Flores has not even alleged that TDCJ denies prisoners the use of adequate law libraries. Bounds, 430 U.S. at 828; 97 S. Ct. at 1491. Accordingly, we conclude that his claim is frivolous pursuant to section 1915(d). See Moore v. Mabus, 976 F.2d 268, 271 (5th Cir. 1992) (A complaint is legally frivolous when it involves the "mere application of well-settled principles of law.").

III

For the forgoing reasons, we AFFIRM the district court's dismissal of Flores' action.