IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1867

Summary Calendar

WILLIAM STEVE MCGREW,

Plaintiff-Appellant,

versus

WICHITA FALLS POLICE DEPARTMENT, ET AL.,,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(7:93-CV-039-K)

(March 18, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Williams Stephen McGrew filed a 42 U.S.C. § 1983 suit against the Wichita Falls Police Department and two police officers alleging that he was falsely arrested for robbery without probable cause. McGrew also alleged that the officers searched his automobile without a warrant, subjected him to excessive force, and filed false reports following his arrest. McGrew alleged that he

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

had written the Chief of the Police Department about the officer's abusive behavior and further alleged that this was the second time that he had been subjected to abuse by officers.

The defendant police department filed a motion to dismiss the complaint as frivolous under 28 U.S.C. § 1915(d), arguing that the complaint did not allege that the department had an established policy which violated McGrew's rights. The defendant police officers also filed motions to dismiss under § 1915(d) arguing that McGrew's allegations were insufficient to overcome their defense of qualified immunity. The defendants subsequently filed a motion for summary judgment and/or to dismiss based on the same arguments. McGrew did not file an opposition to the motions although he unsuccessfully attempted to file two amended complaints.

The district court granted the motions of the defendants to dismiss the complaint pursuant to 28 U.S.C. § 1915(d). The district court determined that McGrew's complaint challenged the validity of his confinement and that a § 1983 complaint was not the proper vehicle to bring such a claim.

The district court further determined that the complaint was frivolous because McGrew failed to allege facts to negate the officers' qualified immunity in connection with the arrest and did not allege "an official city policy."

McGrew argues that the officers concealed evidence and distorted the truth to obtain a basis for charging him with aggravated robbery of a convenience store. McGrew argues that the

arresting officer stated that he had probable cause to arrest McGrew based on McGrew's car license plate number which had been reported by the clerk witnessing the robbery. McGrew argues that the report submitted by the convenience store reflected that the clerk did not obtain the vehicle's license number during the robbery. McGrew also argued that there was no incriminating evidence in plain view in his car as the officers stated in their reports. McGrew argues that he has been "unjustly incarcerated" as a result of the actions of the arresting officers.

The writ of habeas corpus is the appropriate federal remedy for a state prisoner challenging the fact of confinement. Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1114-17 (5th Cir. 1987). A § 1983 action is the appropriate remedy for recovering damages for mistreatment. Richardson v. Fleming, 651 F.2d 366, 372 (5th Cir. 1981). To determine which remedy a prisoner should pursue, the Court looks beyond the relief sought to determine whether the claim, if proved, would factually undermine or conflict with the state court conviction. Id. at 373. If the basis of the claim goes to the constitutionality of the conviction, a petition for habeas corpus relief is the exclusive initial federal remedy. Id. If a complaint contains both habeas claims and claims that can properly be pursued initially under § 1983, the district court should separate the claims and decide the § 1983 claims if they can be separated. Serio, 821 F.2d at 1119.

Prior to addressing the exhaustion issue, the district court must determine whether McGrew's allegations reflect that he may be

entitled to habeas relief in the state courts. See Colvin v. Estelle, 506 F.2d 747, 748 (5th Cir. 1975) (if a petition fails to state a violation of a federal constitutional right, there is no issue presented for exhaustion in the state courts). It is unclear from McGrew's complaint whether he is presently incarcerated as a result of the defendants' conduct. To be entitled to pursue habeas corpus relief, McGrew must be "in custody" as a result of the conviction under attack at the time that the petition is filed. Parker v. Fort Worth Police Dept., 980 F.2d 1023, 1025 (5th Cir. 1993).

If McGrew is "in custody," the district court should then ascertain whether McGrew's conviction was the result of the entry of a guilty plea. If McGrew entered into a valid unconditional guilty plea, all non-jurisdictional defects, including Fourth Amendment challenges, are waived. See Tollet v. Henderson, 411 U.S. 258, 266-67, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); Wise v. State, 857 S.W.2d 813, 814 (Tex. Ct. App. 1993). McGrew may not have habeas remedies available to him.

If McGrew did not enter a guilty plea, or did not enter a guilty plea conditioned on his ability to raise the issues in question, the district court must then determine whether McGrew's allegations involve claims which could entitle him to habeas relief.

McGrew argues that the officers falsely arrested him without probable cause. Mcgrew also argues that the officers lied in reporting that they found thirteen stolen packs of cigarettes in

"plain view" in his automobile and contends that the officers planted the evidence.

McGrew's arguments that his conviction was based on evidence seized as a result of an illegal arrest and search raises Fourth Amendment claims. See Duckett v. City of Cedar Park, Tex.. 950 F.2d 272, 278 (5th Cir. 1992) (an unlawful arrest made without probable cause violates the Fourth Amendment); see also Terry v. Ohio, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (the Fourth Amendment requires a reasonable justification for a search and seizure). With respect to these claims, the district court may need to determine whether the State provided McGrew with the opportunity for full and fair litigation of his Fourth Amendment claims. If McGrew has been afforded such opportunity, he is not entitled to federal habeas relief with respect to his Fourth Amendment claims. See Stone v. Powell, 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

McGrew also appears to be arguing that the arresting officers perjured themselves at his parole revocation hearing. This allegation may not implicate the Fourth Amendment, but may involve a denial due process. See Black v. Collins, 962 F.2d 394, 407 (5th Cir.), cert. denied, 112 S.Ct. 2983 (1982) (the knowing use of perjured testimony by the prosecution to obtain a conviction may constitute constitutional error). The district court should permit McGrew to further factually develop this allegation to determine if McGrew is alleging that his present incarceration resulted in part from the prosecutor's knowing reliance on false testimony. If the

district court determines that such allegations raise a habeas-cognizable issue, the district court should direct McGrew to exhaust his habeas remedies. Jackson v. Johnson, 950 F.2d 263, 266 (5th Cir. 1992). The district court should also dismiss McGrew's habeas-related § 1983 claims without prejudice, reserving McGrew's right to pursue the claims after exhaustion. See Rodriguez v. Holmes, 963 F.2d 799, 804-05 (5th Cir. 1992). The statute of limitations is tolled during the pendency of habeas proceedings. Id.

McGrew argues that the officers used excessive force after stopping him which caused him agonizing back pain.

Because the resolution of McGrew's excessive-force claim will have no effect on the determination of the validity of McGrew's conviction, he is not required to exhaust his state habeas remedies prior to pursuing this claim. Delaney v. Giarrusso, 633 F.2d 1126, 1128-29 (5th Cir. 1981).

A district court may dismiss an in forma pauperis complaint as frivolous if it lacks an arguable basis in law or in fact. Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1733, 118 L.ed.2d 340 (1992). The dismissal is reviewed for an abuse of discretion. Id. at 1734.

The defendant officers asserted the defense of qualified immunity in response to McGrew's complaint. The district court determined that McGrew failed to allege facts "which negate the officer's good faith or qualified immunity in arresting McGrew."

In considering a defendant's claim of qualified immunity, the Court must initially determine whether the plaintiff has alleged a violation of a clearly established constitutional right. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). "[I]f a law enforcement officer uses excessive force in the course of making an arrest, the Fourth Amendment guarantee against unreasonable seizure is implicated." Id. at 656-57. If the plaintiff has alleged a constitutional violation, the Court must then determine the reasonableness of the officer's conduct. Id. at 657. The objective reasonableness of the officer's conduct must be measured with reference to the clearly established law at the time of the incident in question. Id.

In Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc), this Court stated that a plaintiff alleging excessive force under the Fourth Amendment must prove: (1) a significant injury; (2) which resulted from the use of force that was clearly excessive to the need; and (3) excessiveness that was objectively unreasonable.

The Supreme Court in Hudson v. McMillian, ___U.S.___, 112 S.Ct 995, 998-99, 117 L.Ed.2d 156 (1992) overruled the "significant injury" requirement in an Eighth Amendment excessive-force context. King, 974 F.2d at 657 n.2. To prove an excessive-force claim in an Eighth Amendment context, a plaintiff must show that the force was applied not "in a good-faith effort to maintain or restore discipline," or to protect against a "reasonably perceived" threat, but rather that the force complained of was administered

"maliciously and sadistically for the very purpose of causing harm." Hudson, 112 S.Ct. at 998-99 (internal quotations and citations omitted). McGrew alleged that he was subjected to the use of excessive force by the officers during his arrest in January 1993, which was after Hudson was decided. However, whether Hudson overruled the significant-injury requirement for claims of excessive force during an arrest remains an open question. See Bender v. Brumley, 1 F.3d 271, 278 n.7 (5th Cir. 1993).

In Valencia v. Wiggins, 981 F.2d 1440, 1446-47 (5th Cir.), cert. denied, 113 S.Ct. 2998 (1993), the Court applied the Hudson test in determining whether pretrial detainees were subjected to the use of excessive force by prison guards. Therefore, it is arguable that a reasonable officer confronting the situation in question would have known that Hudson or a less restrictive standard than the standard stated in Johnson was applicable to arrestees who have been allegedly subjected to excessive force.

McGrew's allegations that the officers slammed him on the ground without cause may constitute a nonfrivolous excessive-force claim despite the defendants' assertion of qualified immunity. Regardless of which standard governs the reasonableness of the officers' conduct, these allegations require further factual development before a proper § 1915(d) determination can be made. See Eason v. Thaler, ___F.3d ___, (5th Cir. Feb. 10, 1994, No. 93-1675), 1994 WL 19109 at * 1-2. If the plaintiff "might have presented a nonfrivolous section 1983 claim" through a Spears

hearing or through a questionnaire, then a dismissal as frivolous is premature. Eason, at *1; see Spears v. McCotter, 766 F.2d 179, 180-82 (5th Cir. 1985). McGrew was not given the opportunity to develop his claim regarding its crucial factual components. The district court's dismissal of the excessive-force claim as frivolous at this stage of the proceeding was an abuse of discretion. The case should be remanded for further consideration of the claim.

McGrew seeks damages from the Wichita Police Department in the concluding paragraph of his brief. However, McGrew does not address his claim against the department in his brief.

Issues which are not briefed are deemed abandoned. Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987). Therefore, McGrew's claim against the department is not subject to review on appeal.

McGrew has filed a motion for appointment of counsel on appeal. Counsel may be appointed in civil rights cases presenting "exceptional circumstances." Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). Factors to be considered, among others, are the complexity of the issues and the plaintiff's ability to represent himself adequately. Id. at 213.

The case does not involve complex issues, and McGrew has demonstrated his ability to provide himself with adequate representation. McGrew's motion for appointment of counsel on appeal should be denied.

AFFIRMED IN PART, VACATED IN PART, and REMANDED.