

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2594
Conference Calendar

MILLER BRANCH,

Plaintiff-Appellant,

versus

ATTORNEY GENERAL OF STATE OF
TEXAS ET AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA H 93 1562
- - - - -
(October 27, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:*

Miller Branch filed a pro se, in forma pauperis civil rights complaint alleging an Eighth Amendment violation arising from a February 1984 incident at the Dallas County jail, and a double jeopardy claim arising from his conviction for aggravated assault. In an amended complaint Branch also challenged his conviction for aggravated robbery.

There is no federal statute of limitations for § 1983 actions, and the federal courts borrow the forum state's general

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

personal injury limitations period. Henson-El v. Rogers, 923 F.2d 51, 52 (5th Cir.), cert. denied, 111 S.Ct. 2863 (1991). The forum state of Texas has a statute of limitations of two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986). Until August 31, 1987, the legal disability of imprisonment tolled the running of the limitations period. Id. at §§ 16.001((a)(2), (b). Effective September 1, 1987, however, the statute was amended to remove imprisonment as a legal disability. Id. at § 16.001 (Vernon 1991). The amendatory act also provided that a period of limitations that was tolled on August 31, 1987, because the individual was imprisoned, began to run on the effective date of the act. See Acts 1987, 70th Leg., ch. 1049, § 65; Burrell v. Newsome, 883 F.2d 416, 418-19 (5th Cir. 1989).

Although the federal courts look to state law to determine the applicable statute of limitations, they look to federal law to determine when the cause of action accrues. Burrell, 883 F.2d at 418. Under federal law a cause of action accrues at the time the plaintiff "knows or has reason to know of the injury which is the basis of the action." Id. Branch knew of his injuries at the time of the incident in February 1984. The limitations period, therefore, began to run on September 1, 1987, when his legal disability was removed, and the two-year period expired on September 1, 1989. Henson-El, 923 F.2d at 52. Branch did not file his complaint until May 1993, over three years after the expiration of the statute of limitations. The district court properly dismissed with prejudice this portion of Branch's complaint.

The writ of habeas corpus is the appropriate federal remedy for a state prisoner challenging the fact or duration of confinement. Preiser v. Rodriguez, 411 U.S. 475, 490, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). If the basis of the claim goes to the constitutionality of the conviction, both state and federal habeas corpus remedies must be exhausted before a § 1983 action on the same claim may proceed. Hernandez v. Spencer, 780 F.2d 504, 504 (5th Cir. 1986).

Branch is challenging his convictions for aggravated assault and aggravated robbery. These claims affect the fact and duration of his custody and the district court properly construed that portion of his complaint as a petition for writ of habeas corpus and dismissed the claims without prejudice. See 28 U.S.C. § 2254(b), (c).

AFFIRMED. The motion for release pending appeal is DENIED as moot.