

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-2832

(Summary Calendar)

MORGAN E. JOHNSON,

Plaintiff-Appellant,

versus

JOHNNY KLEVENHAGEN, Sheriff,
ET AL.,

Defendants-Appellees, .

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-2424)

(July 26, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Morgan E. Johnson, an inmate in the Harris County Jail in Houston, appeals the district court's dismissal of his civil rights action as frivolous under 28 U.S.C. § 1915(d). We vacate and remand.

I

Johnson brought suit under 42 U.S.C. § 1983 (1988), alleging that Defendants denied him due process during a disciplinary

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

hearing. Johnson alleged that the Defendants provided neither notice of the specific misconduct charged, nor a copy of the jail's rules and regulations. He further alleged that the Defendants refused both to provide him with a written statement of the reasons supporting the disciplinary committee's decision and to allow him to call a witness in his defense. As a result of the disciplinary committee's determination, Johnson lost visitation and commissary privileges. Johnson also alleged that the disciplinary committee indicated to him that the "state prison" would use the incident as part of his parole eligibility record. However, the district court stated that Johnson had received adequate due process protection because he was given notice of the charge and spoke on his own behalf at the hearing. The district court therefore concluded that the claim was frivolous under § 1915(d) because it had no arguable basis in law or fact and dismissed Johnson's claim with prejudice. Johnson now appeals.

II

A district court may dismiss an in forma pauperis proceeding when it is satisfied that the action is frivolous. 28 U.S.C. § 1915(d). A complaint may be dismissed as frivolous if it lacks an arguable basis in fact and law. *Ancar v. Sara Plasma, Inc.*, 964 F.2d 465 (5th Cir. 1992). Dismissal of an in forma pauperis claim is inappropriate if the claim is not based on pure fantasy or a legally inarguable proposition. *Eason v. Thaler*, 14 F.3d 8, 9-10 (5th Cir. 1994). We will disturb the district court's dismissal

only upon a finding of abuse of discretion. *Denton v. Hernandez*, ___ U.S. ___, 112 S.Ct. 1728, 1734, 118 L.Ed.2d 340 (1992).

Johnson claims that he was subjected to disciplinary punishment without adequate due process protection.

The Supreme Court has set out two standards in [the area of disciplinary proceedings], depending on the sanction imposed upon the prisoner and the consequences flowing from it. A prisoner punished by solitary confinement and loss of good-time credits must receive: (1) "written notice of the charges" against him at least twenty-four-hour before the hearing, (2) a "written statement of the factfinders as to the evidence relied on and the reasons" for the disciplinary action taken, and (3) the opportunity "to call witnesses and present documentary evidence in his defense," unless these procedures would create a security risk in the particular case. [*Wolff v. McDonnell*, 418 U.S. 539, 563-66, 94 S.Ct. 2963, 2978-80, 41 L.Ed.2d 935 (1974).] On the other hand a mere few days administrative segregation, having no effect on parole, only merits an "informal, nonadversary evidentiary review" as long as the prisoner receives notice and has an opportunity to present a statement. [*Hewitt v. Helms*, 459 U.S. 460, 466-67, 103 S.Ct. 864, 874, 74 L.Ed.2d 675 (1983).]

Jackson v. Cain, 864 F.2d 1235, 1252 (5th Cir. 1989).

Here, because one of the sanctions imposed could affect his chances for parole, Johnson arguably should have received a hearing that conformed to the more stringent *Wolff* standard.¹ See *Lang v. Quinlan*, No. 92-1435, slip op. at 9 (5th Cir. April 9, 1993) (suggesting that the *Wolff* standard is implicated when sanctions "could conceivably affect [an inmate's] parole date"); *Dzana v.*

¹ On remand, the district court should determine whether the relevant Texas Department of Criminal Justice regulations would allow the state parole board to consider the disciplinary committee's determination during Johnson's parole hearing. If the regulations prohibit the parole board from considering that determination, Johnson's claim could be dismissed under § 1915(d) because the other sanctions imposed by the disciplinary committee only implicate the procedural protections of notice and opportunity to present a statement. See *Hewitt*, 459 U.S. at 466-67, 103 S.Ct. at 874.

Foti, 829 F.2d 558, 562 (5th Cir. 1987) (suggesting that *Wolff* applies when sanctions "can affect the amount of time a prisoner spends behind bars under confinement"). Although the district court noted that Johnson was entitled to the due process protection provided by *Wolff*, the court appears to have applied the *Hewitt* standard. Thus, the district court held that Johnson "received adequate due process protections" because "he was given notice of the charge and attended the hearing, where he spoke on his own behalf." The district court did not address Johnson's allegations that he was not allowed to call the accusing officer as a witness and that the disciplinary committee did not provide written reasons supporting the action taken against him. Because Johnson's allegations are not pure fiction and his § 1983 claim is not based on a legally inarguable proposition, dismissal of his due process claim as frivolous under § 1915(d) constitutes an abuse of discretion. See *Eason*, 14 F.3d at 9-10.

III

For the foregoing reasons, we vacate the judgment of the district court and remand for further proceedings.

E. GRADY JOLLY, Circuit Judge, dissenting:

I respectfully dissent and would affirm. I find no arguable basis for the deprivation of a constitutional right in this case. In my view, the remand is a meaningless exercise because there is no reasonable possibility that Morgan E. Johnson will obtain any

relief for the constitutionally inconsequential claims that are raised in his complaint.