UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2925
Summary Calendar

MICHAEL MCNATT,

Plaintiff-Appellant,

VERSUS

STATE OF TEXAS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-3006)

(September 19, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[1]

Appellant, a part-time police officer with the Clear Lake Shores Police Department, sued the State of Texas, Harris County, and the Harris County district attorney under 42 U.S.C. § 1983 seeking a temporary restraining order and an injunction to prevent his criminal prosecution; an order declaring the Private Investigators and Private Security Agencies Act[2] unconstitutional

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[2] Tex. Civ. Code Ann. art. 4413(29bb) (West Supp. 1994).

as applied to him, and compensatory and punitive damages. The district court denied the temporary restraining order and dismissed Appellant's claims. He appeals. We affirm.

Appellant complains that he was unlawfully arrested without probably cause and in bad faith simply because he was working for a construction company as a "flagman"; that the district attorney's office filed a criminal complaint against him for alleged violations of the Private Investigators and Private Security Agencies Act; and that he was singled out for discriminatory enforcement of that statute. Following a hearing, the district court denied a temporary restraining order. The Defendants each moved to dismiss for various reasons, including abstention under Younger v. Harris, 401 U.S. 37 (1971). The district court, based on Younger, dismissed Appellant's claims for injunctive relief. It did not discuss Appellant's other claims but its order dismissed the case in its entirety. We therefore construe it as a final reviewable order. Unida v. Levi Strauss & Co., 986 F.2d 970, 974 (5th Cir. 1993) (construing a district court's grant of summary judgment as implicit denial of a motion to remand the case to state court).

Although the district court was presented with motions to dismiss, it relied upon matters outside the pleadings to dispose of the claims. Thus, we review its order as one granting summary judgment. See Fernandez-Montes v. Allied Pilot Ass'n, 987 F.2d 278, 283 n.7 (5th Cir. 1993). We examine the issues de novo. See

Abbott v. Equity Group, 2 F.3d 613, 618-19 (5th Cir. 1993), cert. denied, 114 S.Ct. 1219 (1994).

Appellant first argues that the statute he is charged with violating itself violates the Equal Protection Clause because it irrationally denies certified police officers not employed full time the same opportunities for outside employment as are afforded certified police officers who are employed full time. He contends that it was error for the district court to employ Younger abstention because he has alleged that the prosecution against him was undertaken in bad faith. The bad faith exception to Younger is extremely narrow and applies only in cases of proven harassment or prosecutions undertaken without hope of obtaining valid convictions. See Perez v. Ledesma, 401 U.S. 82 (1971); Ballard v. Wilson, 856 F.2d 1568, 1570-71 (5th Cir. 1988).

Appellant seeks an injunction against state criminal proceedings and a declaratory judgment finding the state statute unconstitutional. This falls squarely within the holdings of Younger. His conclusional allegation of bad faith prosecution is insufficient to bring this case under the exception in Younger. The record clearly indicates that the district attorney did not single Appellant out for prosecution and that the office regularly prosecutes cases under the statute which usually result in convictions. Additionally, the statute has twice been held constitutional by state appellate courts. Bragg v. State, 740 S.W.2d 574 (Tex. Ct. App. 1987); Texas Board of Private Investigators etc. v. Bexar County Sheriff's Reserve, 589 S.W.2d

135 (Tex. Civ. App. 1979). We find no error in the dismissal of the claims for injunctive and declaratory relief.

Appellant next contends that it was error for the district court to dismiss his complaint without giving him an opportunity to amend. His only mention in the district court of amendment, however, is in his memorandum opposing the defendant's motions in which he asked, in the alternative, for the opportunity to amend. He did not indicate then nor since how he planned to amend, nor did he submit then or now a proposed amendment. We examine for abuse of discretion. Ashe v. Corley, 992 F.2d 540, 542 (5th Cir. 1993). We find none even if we construe the lone phrase in Appellant's district court brief as a proper request. Having failed to indicate how he planned to amend his complaint and noting that any amendment of his claims for injunctive or declaratory relief against the pending criminal proceeding would have been futile under Younger[3] there was no abuse of discretion.

AFFIRMED.

[3] See Foman v. Davis, 371 U.S. 178, 182 (1962).