

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3536

(Summary Calendar)

JOHN LAWRENCE MOSER, JR.,

Plaintiff-Appellant,

versus

CHARLENE Y. MAYS,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 92-3142 "D" (4))

(December 20, 1993)

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

PER CURIAM:*

Plaintiff John Lawrence Moser, Jr. brought the underlying 42 U.S.C. § 1983 (1988) action, alleging that the defendant Charlene Y. Mays, the official court reporter at Moser's criminal trial,¹ refused to provide him with a transcript of the closing arguments at his criminal trial, in violation of his right to due process.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

¹ In 1984, Moser was convicted of various criminal offenses in the state of Louisiana.

The district court, adopting the findings of the magistrate judge, ordered that the § 1983 claim be stayed pending Moser's exhaustion of state and federal habeas corpus remedies. Moser now appeals the district court's stay order. We vacate and remand.

I

Moser alleges that he attempted to obtain the transcript of the closing arguments in his criminal trial in October 1991; Moser paid for the transcript in December 1991. In March 1992, Mays informed Moser by letter that he could expect to receive the transcript within "the next two weeks."² In June 1992, however, Mays informed Moser that she could not transcribe the closing arguments because the tapes upon which the arguments were recorded were "virtually inaudible." Moser then brought the present action.

Mays initially moved for summary judgment on the grounds that she was immune from suit under the Eleventh Amendment and that her inability to provide the transcript did not result in the denial of a constitutional right. The magistrate judge denied the motion, finding that the tape of the closing arguments was not substantially inaudible. Mays then had the tapes "professionally enhanced" and provided Moser with the transcript in June 1993. Subsequently, Mays again moved for summary judgment, arguing that Moser's complaint was moot based on his receipt of the transcript. Moser then filed his own motion for summary judgment, acknowledging that he had received the transcript but arguing that he was

² Mays did provide Moser with the transcript of Moser's 1983 insanity hearing and the jury instructions from his 1984 trial, as Moser requested.

entitled to damages because the delay caused by Mays deprived him of due process. The district court, adopting the findings of the magistrate judge, determined that the § 1983 claim should be stayed pending Moser's exhaustion of state and federal habeas corpus remedies.³

Moser now argues that the district court erroneously entered the stay order because the facts indicate that he is entitled to compensatory damages. "An excessive delay in furnishing a pretrial or trial transcript to be used for appeal or for post-conviction relief can amount to a deprivation of due process." *DeLancy v. Caldwell*, 741 F.2d 1246, 1247 (10th Cir. 1984); *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980), *cert. denied*, 450 U.S. 931, 101 S. Ct. 1392, 67 L. Ed. 2d 365 (1981). We evaluate four factors, identified by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2191, 33 L. Ed. 2d 101 (1972), to determine whether a defendant has been denied due process in a given case: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice, if any, to the defendant. See *DeLancy*, 741 F.2d at 1247-48; *Rheuark*, 628 F.2d at 303 & n.8. Where appellate delay is at issue, determining whether the defendant has been prejudiced entails examining the

³ The district court stated that it could not decide whether Moser was entitled to damages under § 1983 without first determining either the merits of Moser's claim for post-conviction relief or the extent to which the delay in receiving the transcript adversely impacted Moser's attempts to obtain such relief. Because such a determination would involve examining the merits of Moser's habeas claims, the district court held that Moser had to exhaust his habeas corpus remedies before bringing a § 1983 claim.

"three . . . interests for prompt appeals: (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal or retrial, might be impaired." *Rheurark*, 628 F.2d at 303 n.8.

Moser, to establish a valid cause of action under § 1983, must demonstrate that an excessive delay caused him prejudice of a constitutional dimension. *See United States v. Woods*, 870 F.2d 285, 287 (5th Cir. 1989) (noting that in habeas corpus cases involving *lost* transcripts, it is the petitioner's burden to point out facts establishing a constitutional violation, unless the state's failure to produce the transcript is such an egregious breach of duty that it relieves the petitioner of this burden). Here, Moser, even though he has been provided with the requested transcript, has not explained how the absence of the transcript caused him any prejudice. *See Mullen v. Blackburn*, 808 F.2d 1143, 1146 (5th Cir. 1987) (speculative assertion that a missing transcript prejudiced a habeas appeal insufficient to demonstrate a due process violation). Moser also fails to point out why he needed the transcript of the closing arguments to demonstrate a constitutional violation. Moreover, Moser was represented by counsel, who had access to the trial transcript, on his direct appeal, and Moser does not contend that counsel's performance was inadequate. In the same vein, we note that Moser has repeatedly

sought post-conviction relief without success. Accordingly, we find that Moser has not satisfied his burden of demonstrating even prima facie constitutional error. *Woods*, 870 F.2d at 288.

Nor do we find that the state's failure to produce the transcript constitutes conduct so egregious as to warrant further proceedings. *Id.* "[A]ny delay by the prisoner in seeking relief is relevant to determining whether the [state] has violated its duty by not making the transcript available." *Id.* Here, Moser waited over seven years after his conviction before requesting the transcript of the closing arguments. Mays notified Moser approximately six months after he paid for the transcript that she could not provide it to him because of the condition of the tapes; approximately one year later, Mays provided Moser with the transcript pursuant to the magistrate judge's determination that the tapes were not substantially inaudible. Accordingly, we do not find that Mays's neglect of duty, if any, was egregious. *Id.* Because Moser has not stated a valid § 1983 claim, the district erred by ordering that Moser's claim be stayed.

For the foregoing reasons, we VACATE the judgment of the district court and REMAND the case for dismissal of the complaint.