IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-4209
Summary Calendar

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WILLIE GARNER,

Plaintiff-Appellant,

versus

KIRBY ROBINSON, et al.,

Defendants-Appellees.

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Appeal from the United States District Court for the
Eastern District of Texas
4:92 CV 213

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(May 12, 1993 )

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

I

Texas prisoner Willie Free-I-Gar'ner a/k/a Willie Garner (Garner), formerly incarcerated in the Denton County, Texas jail, sued officials of that jail for civil rights violations. He alleged that officer Mary Baskin thrice opened mail addressed to him in envelopes bearing the return address of his attorney and

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

bearing an inscription stating that the contents were legal mail. He alleged that Baskin's superiors and fellow officers failed to supervise her adequately and participated in or acceded to the openings.

The magistrate judge explained to Garner that the viability of his suit required some prejudice or harm accruing to him as a result of Baskin's acts. The magistrate judge allowed Garner 30 days in which to amend his complaint to allege such an injury. Garner filed an amendment, which omitted any allegation of harm, except to reassert that his constitutional rights were violated.

For Garner's failure to allege harm, the magistrate judge recommended that IFP be denied and that the action be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d). Over Garner's objections that still described no prejudice, the district court adopted the magistrate judge's report, dismissed the action as frivolous pursuant to 28 U.S.C. § 1915(d), and denied IFP.

Early in the proceedings, Garner moved to proceed IFP and for appointment of counsel. The magistrate judge denied appointment of counsel. No action was taken on the IFP motion until after the merits were analyzed.

II

The district court denied IFP and dismissed as frivolous at the same time. This dual disposition of the IFP motion and the case itself creates some procedural problems for three reasons.

First, the actual dismissal for frivolousness depends on IFP having been granted. 28 U.S.C. § 1915(a), (d).

Second, the disposition of the IFP motion here was based on the merits of the complaint. Initially, though, if a plaintiff's financial status warrants it, IFP is granted and the case docketed. Watson v. Ault, 525 F.2d 886, 891 (5th Cir. 1976). This determination should be based solely on the plaintiff's economic status. Cay v. Estelle, 789 F.2d 318, 322 (5th Cir. 1986). Then the district court may evaluate the merits of the claim sua sponte. Ali v. Higgs, 892 F.2d 438, 440 (5th Cir. 1990).

If a claim is frivolous, see Denton v Hernandez, ___ U.S. ___, 112 S. Ct. 1728, 1733, 118 L. E. 2d 340 (1992), it may be dismissed pursuant to 28 U.S.C. § 1915(d). Id. A district court may dismiss an IFP action whenever it properly determines that the action is frivolous, even before service of process. Cay, 789 F.2d at 324. After IFP is granted and an action dismissed as frivolous, the district court may certify that an appeal may not be taken IFP. 28 U.S.C. § 1915(a).

Third, the dual disposition makes the procedural posture of this appeal unclear. The case is now before this court as an appeal of right, not as a motion for IFP; yet Garner was denied IFP in the district court; but still he received a judgment without paying fees. Finally, there was no certification from the district court that Garner may not appeal IFP. Garner, therefore, was not on notice to apply to this court for IFP.

We have concluded, however, that the procedural anomaly, which was not of Garner's making, should not prevent a disposition of the appeal on its merits.

III

Garner argues that his action is not frivolous. He asserts that Baskin acted arbitrarily and capriciously with the intent to harass him, causing him stress and anguish. Even at this late stage, Garner still fails to state that the defendants' alleged acts had a negative effect on any legal proceeding. Legal prejudice suffered by the plaintiff is an essential element of a civil rights suit for prison officials' interference with legal mail. Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.), cert. denied, 112 S.Ct. 2974 (1992); Richardson v. McDonnell, 841 F.2d 120, 122 (5th Cir. 1988).

Garner further argues that the dismissal was premature. He asserts that the defendants should have been served and that his lack of skill in presentation should have been taken into account. The magistrate judge explained the deficiency to Garner, and Garner still did not remedy it. The dismissal, which was based on Garner's failure to plead an essential element of the cause of action, was proper without service of the defendants. See Cay, 789 F.2d at 324.

Garner finally urges that the district court should have appointed counsel for him. Barring exceptional circumstances, a § 1983 plaintiff has no right to appointed counsel. Ulmer v.

Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). Appointment is within the district court's discretion. Id. at 213. The district court did not abuse its discretion in not appointing counsel for this frivolous lawsuit.

IV

For the reasons stated herein, the judgment of the district court is

A F F I R M E D.