

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4220
Summary Calendar

BERTRAND BROWN,

Plaintiff-Appellant,

versus

JAMES A. LYNAUGH, Director, Texas
Department of Criminal Justice,
Institutional Division, Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:92-CV-277)

(March 4, 1994)

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

PER CURIAM:*

Bertrand Brown, proceeding *pro se* and *in forma pauperis*, appeals the dismissal of his civil rights complaint under 28 U.S.C. § 1915(d). We affirm in part, vacate the dismissal, and remand for further proceedings.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Brown, an inmate at the Michael unit of the Texas Department of Criminal Justice, invoked 42 U.S.C. § 1983 and sued various prison officials, complaining of missing legal materials and other personal property. According to Brown, the property was lost or stolen during his return to the Michael unit from John Sealy Hospital. Correctional officers at the hospital told him that the materials had been placed in the van that was to take him to the Ellis II unit, an interim stop. Upon his arrival at Ellis II, however, he learned that the materials were not in the van. When he inquired about his legal materials the attending correctional officers merely laughed. His subsequent efforts to locate the property were similarly rebuffed.

After a **Spears**¹ hearing, the magistrate judge recommended dismissal under 28 U.S.C. § 1915(d); the district court adopted that recommendation. Brown timely appealed.

Analysis

An *in forma pauperis* complaint may be dismissed under 28 U.S.C. § 1915(d) if it has no arguable basis in law or fact.² Although dismissal of an IFP complaint as frivolous is a matter left to the discretion of the district court, the bounds of discretion are exceeded when, *inter alia*, the court employs an

¹ **Spears v. McCotter**, 766 F.2d 179 (5th Cir. 1985).

² **Neitzke v. Williams**, 490 U.S. 319 (1989).

erroneous legal conclusion.³ Such is the case herein.

Applying **Hudson v. Palmer**,⁴ the trial court dismissed Brown's claims on the grounds that he had an adequate post-deprivation remedy under state law. **Hudson**, however, relates only to procedural due process claims.⁵ Brown contends that he was denied access to the courts by the deprivation of his legal materials, an abridgement of substantive constitutional rights grounded in the first amendment and the substantive due process component of the fourteenth amendment.⁶ Although dispositive of Brown's claims concerning his other property, **Hudson** does not bar the complaint about the legal materials.

To state a claim of denial of access to the courts a plaintiff must allege a deliberate impediment and prejudice to his legal position.⁷ Brown has done both. He alleges that his legal materials were either misplaced or destroyed; if the materials inadvertently were misplaced at first, they became irretrievably lost due to the alleged callous refusal of prison officials to attempt timely to locate them. The legal theory posited is at least arguably sound.

As to prejudice, Brown alleges that the loss of the documents

³ **Moore v. Mabus**, 976 F.2d 268 (5th Cir. 1992).

⁴ 468 U.S. 517 (1984).

⁵ **Jackson v. Procunier**, 789 F.2d 307 (5th Cir. 1986).

⁶ **Id.**; see also **Brewer v. Wilkinson**, 3 F.3d 816 (5th Cir.), petition for cert. filed (U.S. Dec. 8, 1993) (No. 93-7016).

⁷ **Richardson v. McDonnell**, 841 F.2d 120 (5th Cir. 1988).

prevented his timely filing of petitions for review in this court and in the Supreme Court. The district court found no causal connection, attributing Brown's inability to make filings to the refusal of the respective courts to excuse his tardiness. The court *a` quo* cited no authority for that conclusion; we know of none.

The order dismissing Brown's claim of denial of access to the courts is VACATED. In all other respects the district court's judgment is AFFIRMED. The case is REMANDED for further proceedings consistent herewith.