

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4449
Conference Calendar

BENITO LOPEZ, JR.,

Plaintiff-Appellant,

versus

DAN MORALES, Attorney
General, State of Texas,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 93-4449
- - - - -
August 19, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Although Benito Lopez, Jr., brought this action under 42 U.S.C. § 1983, his allegations involve a challenge to the constitutionality of his state-court conviction. Accordingly, federal courts should ordinarily decline to address the merits of a potential § 1983 claim that must be exhausted through habeas review. See William v. Dallas County Comm'rs, 689 F.2d 1212, 1214-15 (5th Cir. 1982), cert. denied, 461 U.S. 935 (1983). However, if, as in this case, a § 1983 claim may be dismissed

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

without resolution of the underlying merits of the state claim, there is no threat to the principles of comity, and it is not necessary to defer the disposition of the § 1983 claim. Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112, 1115 (5th Cir. 1987).

There is no federal statute of limitations for actions brought pursuant to § 1983. Federal courts borrow the forum state's general personal injury limitations period and that state's tolling provisions. Hardin v. Straub, 490 U.S. 536, 543-544, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989); Ali v. Higgs, 892 F.2d 438, 439 (5th Cir. 1990). In Texas, the applicable period is two years. Tex. Civ. Prac. & Rem. Code 16.003(a) (Vernon 1986); see Rodriguez v. Holmes, 963 F.2d 799, 803 (5th Cir. 1992). Before 1987, imprisonment, under Texas law, was a disability which tolled the running of the two year statute of limitations. Tex. Civ. Prac. & Rem. Code 16.001 (Vernon 1986). Tex. Civ. Prac. & Rem. Code 16.001 (West Supp. 1993) was amended effective September 1, 1987, to remove imprisonment from the list of legal disabilities for tolling purposes. Thus, limitations then tolled for prisoners began running on September 1, 1987. See Rodriguez, 963 F.2d at 803.

While state law governs the limitations period and tolling provisions, federal law governs when the cause of action accrues. Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989). Under that standard, a cause of action accrues when the plaintiff knows or has reason to know of the injury which forms the basis of the action. Id.

Lopez was convicted in 1983. Notwithstanding his assertions to the contrary, nothing prevented Lopez from presenting his claim that former Tex. Crim. Pro. art. 26.05 (Vernon 1989) violated his right, and the rights of other indigent defendants, to conflict-free assistance of counsel. Thus, since his cause of action accrued prior to September 1, 1987, the limitations period began to run against him on that date. To be timely, Lopez's complaint would have had to have been filed within two years of that date. Because Lopez waited until February 4, 1993, to file this action, his complaint is time-barred. Thus, the district court did not abuse its discretion in dismissing Lopez's claim as frivolous pursuant to 28 U.S.C. § 1915(d). See Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1734, 118 L.Ed.2d 340 (1992).

The decision of the district court is AFFIRMED and Lopez's motion to file a supplemental brief is DENIED as unnecessary.