UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-4644
Summary Calendar

DARNELL JOHNSON,

Plaintiff-Appellant,

VERSUS

TAMMIE RANDOLPH,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(92-CV-102)

(September 21, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellant, a Texas Department of Corrections inmate, sued a prison guard under 42 U.S.C. § 1983 alleging that, as punishment, she, on one occasion, deprived him of two pieces of incoming mail which he has never received. Following a Spears[2] hearing, a magistrate judge recommended dismissal as frivolous pursuant to §

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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] Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

1915(d). The magistrate judge, by analogy to a Second Circuit and district court cases,[3] held that the facts alleged did not rise to constitutional dimension. The district court accepted the recommendation and dismissed. Finding other authority of the Supreme Court and this court more persuasive, we vacate and remand.

We examine dismissals pursuant to § 1915(d) for abuse of discretion. Denton v. Hernandez, ___ U.S. ___, 112 S. Ct. 1728 (1992).

In Procunier v. Martinez, 416 U.S. 396 (1974), overruled on other grounds, Thornburgh v. Abbott, 490 U.S. 401 (1989), the Supreme Court found that "the decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards." In Taylor v. Sterrett, 532 F.2d 462 (5th Cir. 1976), we concluded that "censorship of general inmate mail must pursue a substantial government interest to conform to constitutional standards," noting that "censorship" referred to withholding inmate mail as well as refusing to deliver it to the outside. Id. at 469. The record contains no evidence regarding minimum procedural safeguards attendant to the deprivation of Appellant's mail in this case. Additionally, Appellant alleges that the withholding of his mail was an on-the-spot punishment. In Cooper v. Sheriff, Lubbock County, Tex., 929 F.2d 1078, 1083-84 (5th Cir. 1991) the plaintiff was denied food for violating a

[3] See Morgan v. Montanye, 516 F.2d 1367 (2d Cir. 1975), cert. denied, 424 U.S. 973 (1976); Chinchello v. Fenton, 763 F.Supp. 793, 796 n.5 (M.D. Pa. 1991); Pickett v. Schaefer, 503 F.Supp. 27, 28 (S.D.N.Y. 1980).

prison regulation requiring him to dress fully for meals. We held that, in cases where a prisoner is punished for violating a prison regulation, the Court must examine the regulation itself, determine whether the prison officials acted within the scope of the regulation, and analyze whether the regulation is valid. Cooper, 929 F.2d at 1083-84. We also held that if the defendant's conduct fell outside the scope of the regulation it then constituted punishment which required due process protection. Id. There is no evidence in this record regarding any prison regulation at issue which Appellant may have violated. Even if there was, there is nothing in the record to suggest that permanently withholding his mail constituted the appropriate penalty. Finally, if withholding the inmate's mail was not authorized by a valid prison regulation then it must be accompanied by procedural due process protection. There is no evidence in the record regarding such protection.

Appellant's complaint has an arguable basis in both fact and law and its dismissal as frivolous was an abuse of discretion.

VACATED and REMANDED.