IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5115

Summary Calendar

JOHN E. SIMMONS,

Plaintiff-Appellant,

v.

BETTY J. COX, Etc., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(93-CV-188)

(December 3, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

I.

John E. Simmons, an inmate of the Texas Department of Criminal Justice, Institutional Division, filed a pro se civil rights action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Texas against Warden

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

James Shaw and two prison guards. He also moved to proceed in forma pauperis (IFP).

According to Simmons' complaint, in January 1993, Officer Daniel Defore, a prison guard, was escorting him down a hallway when Defore told him to put his hands behind his back while he was walking. Simmons replied that there was no prison regulation requiring him to do so. Lieutenant Betty J. Cox, another prison guard, then approached Defore and Simmons and asked what was going on. After being apprised of the dispute, Cox called Simmons a "smartass" and told Defore to handcuff Simmons so that they could "shakedown" Simmons' cell.

When Simmons was later returned to his cell, he found that his "legal work" was scattered about the cell and that his radio and headphones were on the floor "be[]nt and b[ro]ken." He also noticed that his cup, deodorant, shampoo, mirror, toothpaste, and green jacket had been confiscated. He received a written notice of the confiscation two days later, and the confiscated property was returned eight days later.

Simmons alleged in his complaint that his civil rights under § 1983 were violated because (1) Cox and Defore violated his right to free speech by retaliating against him for telling Defore that he was not obligated to walk down the hallway with his hands behind his back; (2) Cox deprived him of his property without due process of law; and (3) Warden Shaw failed to train Cox and Defore properly. He sought monetary damages as relief.

The district court referred Simmons' suit to a magistrate pursuant to 28 U.S.C. §§ 636(b)(1), (3). After reviewing Simmons' claims against Defore and Cox, the magistrate recommended that no due process violation had occurred because the guards' actions were unpredictable and unauthorized, pre-seizure safeguards were impossible, and a post-deprivation remedy existed. The magistrate also viewed Simmons' failure-to-train claim against Warden Shaw as without merit because "Simmons failed to show that he suffered a constitutionally cognizable deprivation." Finally, the magistrate recommended that the district court dismiss Simmons' suit without prejudice as frivolous and deny his request to proceed IFP pursuant to 28 U.S.C. § 1915(d). Over Simmons' objections, the district court adopted the magistrate's report. The Court dismissed Simmons' suit without prejudice and denied him IFP status. Simmons then moved this court to permit him to proceed IFP and filed a timely notice of appeal.

II.

By denying IFP and dismissing Simmons' complaint as frivolous at the same time, the district court created several procedural problems. See Garner v. Robinson, No. 93-4209, at 2-3 (5th Cir. May 12, 1993) (unpublished opinion). First, IFP must be granted before a complaint can be dismissed for frivolousness. See 28 U.S.C. § 1915(d).

Second, the district court denied Simmons' IFP motion on the basis of the merits of his complaint. A district court should initially grant IFP if the plaintiff's financial status warrants it and then docket the case. Mitchell v. Sheriff Dept., Lubbock County, Tex., 995 F.2d 60, 61 n.1 (5th Cir. 1993); Watson v. Ault, 525 F.2d 886, 891 (5th Cir. 1976). Thus, the initial determination to grant IFP should be based solely on the plaintiff's economic status. Mitchell, 995 F.2d at 61 n.1; Cay v. Estelle, 789 F.2d 318, 322 (5th Cir. 1986); Ault, 525 F.2d at 891. The district court may later dismiss the complaint under § 1915(d) if the court finds that the complaint is frivolous. Mitchell, 995 F.2d at 61 n.1; see Ali v. Higgs, 892 F.2d 438, 440 (5th Cir. 1990). The district court may determine whether the complaint is frivolous at any time, even before service of process. Ali, 892 F.2d at 440; Cay, 789 F.2d at 324. If the district court dismisses a complaint as frivolous, the court should then certify that an appeal may not be taken IFP. 28 U.S.C. § 1915(a); Garner, No. 93-4209, at 3.

The district court's dual disposition of Simmons' motion to proceed IFP and his complaint makes the procedural posture of the proceeding before this court unclear. Simmons was denied IFP status in the district court, but he still received a judgment without paying fees. There was no certification from the district court that Simmons may not appeal IFP, yet Simmons has moved this court to so proceed. Simmons also filed a notice to appeal the district court's final judgment dismissing his

complaint without prejudice. In cutting through the procedural morass thus created, we have determined that we should consider all of Simmons' filings now before this court as a motion to proceed IFP. See Fed. R. App. P. 24(a) ("A motion for leave so to proceed [IFP] may be filed in the court of appeals within 30 days after service of notice of action of the district court," i.e., denial of motion to proceed IFP, certification of appeal not being taken in good faith, or finding that the litigant is otherwise not entitled to proceed IFP); Fed. R. App. P. 24(a) advisory committee's note ("[Rule 24(a)] establishes a subsequent motion in the court of appeals, rather than an appeal from the order of denial or from the certification of lack of good faith, as the proper procedure for calling in question the correctness of the action of the district court.").

III.

To proceed on appeal IFP, a litigant must be economically eligible, and his appeal must not be frivolous within the meaning of § 1915(d). Jackson v. Dallas Police Dept., 811 F.2d 260, 261 (5th Cir. 1986). Once the litigant has submitted an affidavit attesting to his indigence, thus establishing his financial condition, our inquiry is limited to whether the litigant raises any arguable legal points--any non-frivolous issues. Mitchell, 995 F.2d at 61; Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983).

A complaint is "frivolous" within the meaning of § 1915(d) if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). A complaint is not automatically legally frivolous in the context of § 1915(d) because it fails to state a claim. Id. at 331. However, a complaint is legally frivolous if the plaintiff alleges "claims of infringement of a legal interest which clearly does not exist" or "claims against which it is clear that the defendants are immune from suit." Id. at 327.

IV.

Simmons asserts that the issues raised in his § 1983 complaint are not frivolous within the meaning of § 1915(d). We examine each of the issues presented in Simmons' complaint in turn.

A.

Simmons first asserts that Cox and Defore violated his First Amendment right to free speech by searching his cell in retaliation for his response to Defore's request that he keep his hands behind his back while walking down the hallway. We believe that this issue is legally frivolous.

An inmate enjoys no Fourth Amendment protection against unreasonable searches in his prison cell. Hudson v. Palmer, 468 U.S. 517, 526 (1984). However, an inmate does retain "those First Amendment rights of speech 'not inconsistent with [his] status as . . . [a] prisoner or with the legitimate penological

objectives of the corrections system.'" Id. at 523; Jackson v. Cain, 864 F.2d 1235, 1248 (5th Cir. 1989).

In Jackson, this court reviewed a prisoner's First Amendment retaliation claim. Jackson, 864 F.2d at 1248. Jackson, a Louisiana prisoner, was transferred from one prison to another and told that the state would pay to mail the clothes, which he would no longer be permitted to wear at the new prison, to the address of his choice. Id. at 1238. At the new prison, Jackson was told that he had one day to pay the postage to mail these clothes or they would be destroyed. Id. He then filled out the prison-mandated form, and on the line entitled "witnessed by:" he wrote, "'I feel that I am sound enough essentially to witness for myself what belongs to me and what doesn't.'" Id. Jackson also wrote to the warden, complaining that some of his clothing which had been taken from him when he arrived at the new prison was not listed on the form and was missing. Id. at 1238-39.

Jackson alleged that he was transferred to an undesirable work assignment for his comment on the form and for his letter to the warden and that a prison guard told him that officials would rescind his "punishment" if he would stop writing letters. Id. at 1239. The district court summarily dismissed Jackson's § 1983 action. Id. at 1238. On appeal, this court observed that "filling out a prison-mandated form and complaining about treatment by means of a private letter can be compatible with the acceptable behavior of a prisoner and thus may not adversely affect the discipline of the prison." Id. at 1248. We therefore

recognized that Jackson had stated a cognizable First Amendment claim.

We do not find Simmons' case to be analogous to Jackson's. Simmons apparently disobeyed a guard's direct order rather than comply with what he perceived to be injustice and seek redress through written complaints, as had Jackson, or established grievance procedure. Simmons' action--i.e., his statement to Defore that he did not have to keep his hands behind his back while walking down the hallway--is not "compatible with the acceptable behavior of a prisoner" and can have an adverse affect on prison discipline. See id.; cf. Turner v. Safley, 482 U.S. 78, 87 (1987) (explaining that the action of prison officials is valid if such action is reasonably related to legitimate penological interests, even though the action might inpinge on a constitutional right). Therefore, because Simmons has claimed infringement of a First Amendment interest which does not exist, he raises an issue which is frivolous pursuant to § 1915(d).

B.

Simmons also asserts that Defore and Cox confiscated and damaged his personal property in violation of his procedural due process rights. We disagree.

Deprivation of an inmate's property by prison officials, even when intentional, does not violate the inmate's procedural due process rights as guaranteed by the Due Process Clause of the Fourteenth Amendment provided that an adequate state post-deprivation remedy exists. Hudson, 468 U.S. at 533; see Caine v.

Hardy, 943 F.2d 1406, 1412 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1474 (1992). Simmons has a right of action under Texas law for any alleged negligent or intentional deprivation of his property. See Thompson v. Steele, 709 F.2d 381, 383 (5th Cir.), cert. denied, 464 U.S. 897 (1983). Thus, he has not stated a procedural due process claim, and this issue is frivolous pursuant to § 1915(d).

C.

Simmons further argues that Warden James Shaw failed to properly train the guards and thus violated Simmons' civil rights. We find this argument without merit.

"Supervisory liability exists even without personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." Thompkins v. Belt, 828 F.2d 298, 304 (5th Cir. 1987) (citations and quotations omitted). The existence of a constitutionally deficient policy cannot be inferred from a single wrongful act. Id.

Simmons does not allege that Warden Shaw was even aware of Cox's and Defore's treatment of Simmons, i.e., the search of his cell and the confiscation of his property. Moreover, the existence of a constitutionally deficient policy cannot be inferred from the one incident to which Simmons refers in his complaint. Simmons' claim for supervisory liability against Warden Shaw is therefore frivolous under § 1915(d).

V.

For the foregoing reasons, we DENY Simmons' motion to proceed IFP.