

IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-5188
(Summary Calendar)

WILLIAM BRYAN SORENS,

Plaintiff-Appellant,

versus

JAMES A. LYNAUGH, ET AL.,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Mississippi
(90-CV-27)

(September 26, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:¹

William B. Sorens appeals the denial of his petition for damages and for equitable relief from the Texas Department of Correction's because of its refusal to deliver to him an authorized published publication. For the following reasons, we affirm the judgment of the trial court.

FACTS

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

William B. Sorens, an inmate of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID) at the Stiles Unit in Beaumont, Texas, filed the instant 42 U.S.C. § 1983 action pro se and in forma pauperis. The action arose out of Sorens' and his parents' attempt to publish the Grace Newsletter --a religiously-oriented publication related to the moral reformation which Sorens underwent following his conversion to Christianity. Sorens would send articles for the newsletter from prison to his parents' home, for them to edit. They would then attempt to send the edited articles back to Sorens.

Prison officials, however, prevented Sorens from receiving the drafts and final editions of the newsletter from his parents because his parents had not been verified as publishers, and were therefore in violation of the "publishers only" rule of the prison correspondence rules. This rule, promulgated as a result of the class action in Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978), mandates that inmates may receive publications from verified publishers or publication suppliers only, and that any publication mailed to inmates from unverified sources will be rejected.² The newsletter was also rejected because of a prison rule that barred packages from being sent to the inmates.

Sorens' action, which named thirteen officials of the TDCJ-ID as defendants, proceeded to a bench trial before a federal

² The rule reads as follows: "An inmate may receive publications in the mail only from the publisher or publications supplier, including bookstores." TDCJ-ID Correspondence Rule 3.9.10.1.

Magistrate Judge. Following the trial, the Magistrate Judge ruled in favor of the defendants, concluding that Sorens had not established that the defendants had violated his civil rights. Sorens timely moved for a new trial, which was denied. Sorens appeals the Magistrate Judge's final order dismissing his complaint and denying his motion for a new trial.

STANDARD OF REVIEW

The trial court's findings of fact will be reversed only if they are clearly erroneous. Gibbs v. King, 779 F.2d 1040, 1046 (5th Cir. 1986) cert. denied 476 U.S. 1117, 106 S.Ct. 1915 90 L.Ed.2d 659 (1986). The trial court's conclusions of law are reviewed de novo. Frazier v. Garrison, 980 F.2d 1514, 1520 (5th Cir. 1993).

DISCUSSION

"Publisher's Only" Rule

Sorens contends that the district court erred when it concluded that neither Sorens nor his parents were verified or approved publishers, and that they did not seek to become so under the correspondence rules. He further argues that the defendants never provided him with notice of the "publishers only" rule regarding certification as a publisher or publications supplier. According to the prison correspondence rule, in order for a business to become a verified publisher under the publisher's only rule, that business must prove that the publisher was engaged in publishing full-time. Acceptable evidence of this status included a taxpayer identification

number, a business listing, and posting of business hours. Sorens testified at trial that this rule, as well as the other correspondence rules, were available for his review.

Prison officials testified that they regularly informed inquiring people on how to become a publisher. They also testified that neither Sorens nor his parents attempted to determine exactly what procedures they needed to follow or what information they needed to provide in order to become certified as a publisher under Texas Department of Correction's correspondence rules. Sorens' mother testified that she tried to become a publisher, but was unable to complete the process. Sorens testified that the only evidence he offered to prove that his parents were full-time publishers was a letter from his father asserting that they were engaged in full-time publication. Based on the evidence before it, we find that the trial court did not err in concluding that neither Sorens nor his parents had complied with the publisher's only rule.

Deprivation of Liberty Interest

Sorens contends that the prison correspondence rules create a liberty interest in having his newsletter reviewed for content. A content review of a publication is necessary in order to establish its acceptance into the prison without an issue by issue review for contraband information. He argues that he was deprived of that liberty interest by arbitrary and ad hoc rules, which prevented the review of his newsletter for automatic reception into the prison. Assuming that the prison rules

created a liberty interest in obtaining a content review, it was limited to those publications whose publishers had been verified.

The publisher of Sorens' newsletter was never verified.

Therefore, whatever liberty interest that might be created by this rule was not implicated by the prison officials decision not review the content of the unverified Grace Newsletter.

Constructive Censorship

Sorens contends that, by their refusal to review its content, the defendants have engaged in constructive censorship of his newsletter. The prison in which Sorens is located has a rule against the delivery of packages. Sorens argues that by labeling his newsletter--which arrived in a large envelope --as a package, the prison officials were enforcing an arbitrary and inconsistent policy which created a burden on him and his parents. This Court has already upheld the constitutionality of the prison rule which restricts inmate reception of packages because of its relationship to a legitimate security risk. See Guajardo, 580 F.2d at 762. In doing so, we recognized the disadvantages it places on the family and friends of an inmate. Id. Accordingly, Sorens' contention is without merit.

Failure to Rule on Pre-Trial Motion

Sorens contends that the Magistrate Judge erred by failing to rule on his motion for summary judgment. He argues that the defendants' failure to respond to the motion placed them in default and that he should have received a judgment as a matter of law in his favor. A movant for summary judgment must show

that he is entitled to judgment as a matter of law. See Reese v. Anderson, 926 F.2d 494, 499 (5th Cir. 1991). "[B]ecause the movant bears the initial burden of demonstrating the absence of genuine issues of material fact, the opposing party's failure to respond cannot alone support a summary judgment." John v. Louisiana, 828 F.2d 1129, 1130 (5th Cir. 1987) (footnote omitted). Failure to rule on a pre-trial motion is harmless error in the absence of prejudice. Benavides v. County of Wilson, 955 F.2d 968, 970 (5th Cir.), cert. denied, 113 S.Ct. 79 (1992).

Sorens argues that the Magistrate Judge's failure to rule on his motion prejudiced him at trial because he was then forced to present exhibits and matters which could have been disposed of prior to trial. The resulting time constraints at trial, he argues, precluded him from presenting all of his exhibits and materials. We disagree.

Sorens' motion, comprising nearly 100 pages, consisted primarily of an explanation of the history and purpose of the Grace Newsletter, and an attempt to demonstrate its viability as a publication recognized and acknowledged by outside readers. His motion argued that the newsletter was improperly rejected for content under the correspondence rules, but he did not argue the issue of his or his parents' status as approved publishers under the correspondence rules. His motion thus ignored the key issue presented at trial--the existence of, and Sorens' compliance with, the publishers only rule. Because Sorens would not have

prevailed on his summary judgment motion, Sorens was not prejudiced by the failure to rule on his motion.

Failure to Compel a Witness to Appear

Sorens contends that the Magistrate Judge erred by ordering the appearance of defendant Carl Jeffries, but not enforcing that order when Jeffries was unable to appear. He argues that the purpose of Jeffries' testimony as chairman of the Director's Review Committee was to contradict certain testimony offered by one of the defendants.

At the outset of trial, defendants' counsel noted to the court that defendant Jeffries was not available because of his participation in settlement negotiations in an unrelated lawsuit. At that time, Sorens agreed to proceed with the trial without the presence of Jeffries, and agreed to "remind" the court to revisit the issue later should Jeffries' testimony be necessary for Sorens' case. Sorens did not, however, renew his request for the presence of Jeffries as per his earlier agreement with the court. As such, Sorens has not pointed to any error committed by the court at trial, and this ground of error is therefore without merit.

Motions

Sorens has also attached various motions to his brief on appeal. He seeks to proceed in forma pauperis (IFP) on appeal, and moves for production of a trial transcript, transmission of the full district court record to the Clerk of this Court, and a copy of the transcript for himself.

Sorens was granted leave to proceed IFP in the district court, after a \$20 partial payment of filing fees. There is no evidence in the record that such status has been revoked. Sorens has been allowed to conduct his appeal IFP. No filing fees have been assessed, and each volume of the record has been clearly marked "in forma pauperis." The full eight-volume record from the district court, as well, has been transmitted to the Clerk's Office of this Court for use in adjudicating Sorens' appeal. Thus, the part of the motion seeking to proceed in forma pauperis is denied as moot.

It is unclear from Sorens' brief whether he has a copy of the record. He cites to docket entries, exhibits, and his own motions, but does not cite to the trial transcript. In light of our disposition, Sorens' brief on appeal, and the fact that Sorens has not demonstrated any need for the transcripts for the proper disposition of his appeal, this part of the motion is also denied.

CONCLUSION

For the following reasons, the judgement of the trial court is AFFIRMED. Sorens' motion is DENIED.