UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-5275
Summary Calendar

CARL THOMAS GUICHARD, SR.,

Plaintiff-Appellant,

VERSUS

STEPHEN HOWARD,
District Attorney, Orange County, Texas, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(93-CV-339)

(January 27, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Pro se and IFP (see R. 53), Texas prisoner Carl T. Guichard, Sr., sued officials and agencies of Texas and Orange County, Texas, as well as a Chicago company that operates a substance abuse

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

program in a Texas prison. He alleged civil rights violations. The allegations fall into four categories: (1) officials violated Guichard's civil rights in connection with a 1989 conviction for theft; (2) officials violated his civil rights in connection with a 1992 conviction for bail jumping; (3) officials and the Chicago company violated his civil rights by erroneously placing him in a substance abuse program at the Ramsey III Unit in Rosharon; and (4) he was subjected to inappropriate medication and excessive x-rays for the diagnosis and treatment of tuberculosis. Guichard also moved for a change of venue to Tyler, Texas; he made a conclusional allegation of bias against the magistrate judge and a former Orange County prosecutor.

The magistrate judge aptly called the complaint "rambling." For example, Guichard alleges that he is "a father of seven children, an author, agent for a few well-known coaches within the National Football League" and "the father of Mia Farrow's adopted daughter, Dylan O'Sullivan Farrow." Guichard alleged incorrectly that the theft conviction occurred in 1989 and the bail jumping conviction occurred in 1992.

Guichard filed a copy of a state Court of Appeals opinion addressing the theft and bail jumping convictions. Even though Guichard disputes much of the opinion by way of hand-written notes on the copy that he filed, the opinion makes Guichard's allegations more comprehensible.

The state Court of Appeals explained the following: Pursuant to a plea bargain, Guichard pleaded guilty to felony theft in 1989.

The court rejected the plea bargain and set a trial date. Guichard failed to appear and was charged with bail jumping. Guichard appeared later in 1989 and pleaded guilty to both theft and bail jumping. The court accepted the pleas. He was sentenced to seven years deferred adjudication for the theft and two years deferred adjudication for the bail jumping.

Then, as the state appeals court explained, in 1990 Texas moved to impose guilt, alleging violations of the terms of Guichard's probation. A hearing was held much later, in 1992. Guichard apparently was sentenced at that time. Guichard did not notice an appeal in the theft case, and the state appellate court dismissed the appeal on that conviction. The conviction on the bail jumping charge was affirmed.

Guichard alleged improper extradition from Louisiana in 1989 and 1992, and that, in 1989, the Orange County, Texas, sheriff unlawfully opened his legal mail. In 1992, the allegedly improper extradition resulted in his exposure to second-hand cigarette smoke, excessive x-rays, and improper opening of his mail.

He complained of double jeopardy with respect to his 1989 prosecution for theft. After being sentenced to a period of incarceration, he apparently was first placed in the general population in prison. He alleged that in February 1993 he was placed in a drug rehabilitation program but had no history of drug abuse. He complained that in the program, he was forced to work, was subjected to un-American propaganda, and was forced to keep his thoughts to himself, causing stress that resulted in the recurrence

of tuberculosis. He was consequently subjected to improper medication and excessive x-rays. He also complained he was improperly denied parole. Guichard moved to amend his complaint to claim violations of due process, the Confrontation Clause, and his right to trial in connection with his theft conviction and the placement of inaccurate information in his parole file.

The magistrate judge recommended the following: The civil rights claims regarding extradition and conditions of confinement in 1989 should be dismissed as time-barred. Because the claims regarding the 1992 extradition and incarceration sound in habeas corpus, they should be dismissed without prejudice and the statute of limitations suspended to give Guichard an opportunity to exhaust his habeas remedies. The claims regarding the substance abuse program in Rosharon should be dismissed without prejudice for improper venue because the action occurred and the defendants reside in the Southern District of Texas.

Guichard objected to the magistrate judge's report and again moved for a change of venue because of bias. The district court adopted the magistrate judge's report, dismissed the claims as recommended, and rejected the allegation of bias.

OPINION

Guichard argues that the 1989 proceeding was defective and that habeas remedies do not exist. The defects apparently include improper opening of his legal mail. He also argues that the 1992 bail jumping conviction was improper and that no habeas corpus remedy exists for it either. He does not state why no habeas

remedies exist. The state Court of Appeals stated that both the theft and the bail jumping charges were lodged in 1989, when adjudication of both was deferred. Sentence was imposed in both in 1992. Guichard, however, identifies the theft conviction as having occurred in 1989 and the bail jumping conviction in 1992.

Before seeking § 1983 relief for claims that actually challenge a conviction and custody, a convicted person must first exhaust state and federal habeas relief. Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1117, 1119 (5th Cir. 1987). When a Texas prisoner brings such a civil rights action before bringing a habeas petition, the district court should dismiss the action without prejudice and direct the plaintiff to promptly pursue habeas remedies. Rodriguez v. Holmes, 963 F.2d 799, 804-05 (5th Cir. 1992). The statute of limitations is tolled during the pendency of habeas proceedings. Id. When claims that pertain to the validity of the conviction may be separated from those that do not, the court should entertain the separable § 1983 claims. Serio, 821 F.2d at 1119.

The district court found that the civil rights claims about the theft conviction in 1989 are time-barred. There is no federal statute of limitations for actions brought pursuant to 42 U.S.C. § 1983. Federal courts borrow the forum state's general personal injury limitations period. Ali v. Higgs, 892 F.2d 438, 439 (5th Cir. 1990); Owens v. Okure, 488 U.S. 235, 249-50, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989). In Texas, the applicable period is two years. Tex. Civ. Prac. & Rem. Code §16.003(a) (West 1986); see

also Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989). "Under Texas law, knowledge of facts that would lead a reasonable person to undertake further inquiry is sufficient to begin the limitations period." Matter of Placid Oil Co., 932 F.2d 394, 399 (5th Cir. 1991).

The complaint is confusing. The specific events about which the district court found Guichard could no longer complain under § 1983 surround the 1989 extradition from Louisiana. To the extent that civil rights claims are restricted to events occurring in 1989, a civil rights cause of action is time-barred. That portion of the judgment is affirmed.

A habeas petition must complain of a conviction or sentence for which the petitioner is presently "in custody." The petitioner may be either physically confined as in prison or physically not confined as on parole. If the sentence has fully expired at the time that the petition is filed, however, no habeas action lies. Maleng v. Cook, 490 U.S. 488, 490-91, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989).

Guichard gives his current address as the county jail in Belleville, Texas. He does not say whether he is in custody for either or both of the theft and bail jumping convictions. As he gave his address to the district court as a state prison unit, he presumably was in custody at the time that he filed his complaint. He did not allege that he was no longer in custody. This is a matter that can be sorted out if and when Guichard files a habeas

petition. Guichard has given neither this Court nor the district court any basis for sorting it out now.

Furthermore, the confusion illustrates the utility of requiring litigants to first exhaust their habeas remedies. On habeas petition, the state will appear, provide the records, and explain its version of the sequence of events. Guichard has provided no way for doing that now.

In response to the dismissal of the drug program claim for improper venue, Guichard argues that all defendants are in Orange County, Texas, and Austin, Texas. Venue is proper in any district of a state in which any defendant resides if all defendants reside in the same state or in which a substantial part of the events complained of took place. 28 U.S.C. § 1391(b). Without consent of the defendants, trial may not be held in the wrong venue. Gogolin & Stelter v. Karn's Auto Imports, Inc., 886 F.2d 100, 104 (5th Cir. 1989), cert. denied, 494 U.S. 1031 (1990).

This Court has addressed a situation in which a district court dismissed a prisoner's constitutional claim for improper venue on the ground that the act complained of did not occur in the judicial district. Holloway v. Gunnell, 685 F.2d 150, 152-53 (5th Cir. 1982). The Court began its analysis by noting, "The general venue statutes allow a federal question case to be brought not only in the district where the acts or omissions occurred, but also, for example, in the district `where all defendants reside.' 28 U.S.C. § 1391(b). It is possible that venue is proper in this case because of the residence of the defendants." Id.

In the instant case, the magistrate judge stated that the action occurred and all of the defendants reside in another district. He did not state that the defendants do not reside in the Eastern District as well.

The Holloway plaintiff made no allegations to explain why venue was proper, but he was not required to do so. Id. The burden was on the defendants to object to venue, but the district court had not required the Holloway defendants to answer. Id. For the foregoing reasons, the Holloway court declined to reach the merits of the venue issue, stating that to do so would be "inappropriate." Id. Because Guichard's defendants were not served either, the Court should follow Holloway in the instant case.

Aside from the venue issue, Guichard argues that his placement in the drug program was "mistaken." Section 1983 liability, however, may not be based on negligence. Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 759 (5th Cir. 1993). The drug program claim is a § 1983 claim that is separable from the habeas claims.

Because negligence is not constitutionally actionable, the § 1983 claim has no basis in law. It is legally frivolous and could have been dismissed as such. 28 U.S.C. § 1915(d); Booker v. Koonce, 2 F.3d 114, 115 (5th Cir. 1993). Accordingly, while declining to decide the venue issue, this Court affirms the dismissal of the drug program claim on the alternative ground of frivolousness.

Guichard's brief also refers to an allegation that he was subjected to cruel and unusual punishment by being mistreated for tuberculosis. He raised this issue in the district court. The references in the brief might not be sufficient to preserve the issue for appeal. See Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988). In any event, the allegations do not rise to the level of deliberate indifference, as required for a claim that medical care constituted cruel and unusual punishment. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). This claim is legally frivolous.

Guichard also asks for a change of venue because judges and other officials in Houston, Beaumont, and Dallas are biased against him as shown by their actions in the cases complained of. Bias, however, must be shown to have arisen outside of a case. United States v. MMR Corp., 954 F.2d 1040, 1045 (5th Cir. 1992).

Guichard does not argue other items mentioned in the district court, e.g., exposure to second-hand smoke. Issues not raised on appeal are abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

Guichard concludes his brief with a request for appointment of counsel and an order for the production of certain documents in connection with his convictions. The separable civil rights claims are frivolous; counsel is unnecessary. Whether to appoint counsel if Guichard files a proper petition for habeas relief should be left to the discretion of the court hearing that petition. Rule 8(c) of Rules Governing § 22554 Cases; see Pennsylvania v. Finley,

481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). Whether to order the production of documents should also be left to that court. Rules 6 & 7 of Rules Governing § 2254 Cases.

Guichard has moved to supplement the record with additional facts that he related in copies of letters that he sent to Houston attorney John Osborne and Attorney General Reno. New facts may not be pleaded on appeal. Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985). The motion to supplement the record is denied.

AFFIRMED.