IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5363
Summary Calendar

CLEMMIE RAY WICKWARE,

Plaintiff-Appellant,

VERSUS

JAMES A COLLINS, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:92-CV-73)

(May 9, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Clemmie Wickware appeals the dismissal, for failure to prosecute, of his 42 U.S.C. § 1983 complaint. Concluding that the district court abused its discretion, we reverse and remand.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Proceeding pro se and in forma pauperis, Wickware alleged that he was denied adequate medical treatment while incarcerated at the Texas Department of Criminal Justice (TDCJ). A magistrate judge ordered that the case be set for an evidentiary hearing pursuant to Spears v. McCotter, 766 F.2d 179, 182 (5th Cir. 1985), at which the attorney general was to be present and furnish Wickware's medical records. The order directed that a medical doctor and TDCJ administrator be at the hearing to interpret the records.

Wickware filed objections to the order, arguing that he never signed a notice of consent to the hearing before a magistrate judge. Wickware contended that his case involved a request for injunctive relief over which a magistrate judge had no power. The magistrate judge recommended that the district court sua sponte dismiss Wickware's complaint without prejudice for failure to prosecute. The district court reviewed Wickware's objections to the recommendation and dismissed Wickware's suit without prejudice pursuant to E.D. Tex. R. 7.

II.

On appeal, Wickware argues the allegations set forth in his complaint and does not address the fact that his suit was dismissed for failure to prosecute. Nevertheless, dismissal for failure to prosecute is the only issue "arguably presented to [this court] for review." Searcy v. Houston Lighting & Power Co., 907 F.2d 562, 564 (5th Cir.), cert. denied, 498 U.S. 970 (1990).

Although not cited by the district court, FED. R. CIV. P. 41(b) provides that a defendant may move for dismissal if the plaintiff fails to comply with any order of the court. A sua sponte dismissal by the district court pursuant to FED. R. CIV. P. 41(b) must be upheld on appeal unless the court finds that the district court abused its discretion in choosing that sanction. McNeal v. Papasan, 842 F.2d 787, 789-90 (5th Cir. 1988). A dismissal with prejudice based upon the failure to prosecute, however, is considered to be an extreme sanction that is to be imposed "only when the plaintiff's conduct has threatened the integrity of the judicial process [in a way which] leav[es] the court no choice but to deny that plaintiff its benefits." Id. at 790 (internal quotation and citation omitted). If a plaintiff's claim is barred by the statute of limitations, a dismissal without prejudice is tantamount to a dismissal with prejudice. Id. at 793 n.1.

Although the district court dismissed the complaint without prejudice, Wickware is precluded from litigating his inadequate-medical-care claim because it dealt with incidents occurring over two years ago (December 4, 1991, through January 24, 1992).[1] Federal courts apply the forum state's general personal injury limitations periods to actions under § 1983. Owens v. Okure, 488 U.S. 235, 251 (1989). The applicable Texas limitation period is two years. Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir.

[1] In the first pages of his complaint, Wickware alleged that his inadequate medical treatment began on December 4, 1992. The dates referred to later in his complaint and in his appellate brief indicate that he alleges inadequate medical treatment that began December 4, 1991.

1989).

When the dismissal is effectively with prejudice, this court looks at whether the record discloses both "a clear record of delay or contumacious conduct by the plaintiff" and whether "a lesser sanction would not better serve the best interest of justice." McNeal, 842 F.2d at 790. We will not affirm the dismissal on the basis of a silent record. Id. at 793. We "cannot affirm a dismissal unless the district court expressly considered alternative sanctions and determined that they would not be sufficient to prompt diligent prosecution or the record reveals that the district court employed lesser sanctions prior to dismissal (assuming that plaintiff was capable of performing them) that in fact proved to be futile." Id. (quoting Callip v. Harris County Child Welfare Dep't, 757 F.2d 1513, 1521 (5th Cir. 1985)). Such lesser sanctions include assessment of fines, costs, or damages; conditional dismissal; dismissal without prejudice; and explicit warnings. Rogers v. Kroger Co., 669 F.2d 317, 321 (5th Cir. 1982).

The record reflects that the district court neither expressly considered alternative sanctions that it determined would not be sufficient to prompt compliance with the Spears hearing order, nor employed any lesser sanction, such as a warning or fine. Therefore, the district court's dismissal was an abuse of discretion.

The judgment of dismissal is REVERSED and REMANDED for further proceedings. We express no view on the ultimate merits of Wickware's claim.