

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-7054  
Summary Calendar

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JEROME HUNTER and FREDERICK RIDGE,  
Plaintiffs,

FREDERICK RIDGE,  
Plaintiff-Appellant,

VERSUS

JAMES A. COLLINS,  
Director, Texas Department of Criminal Justice,  
Institutional Division, ET AL.,  
Defendants-Appellees.

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Appeal from the United States District Court  
For the Southern District of Texas

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( July 12, 1993 )

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Jerome Hunter and Frederick Ridge, state prisoners, filed a pro se civil rights action under 42 U.S.C. § 1983, against the defendants, James D. Collins, Director of the Texas Department of Criminal Justice (TDCJ), and other named prison officials, alleging that they were falsely imprisoned when they received a 30-day cell restriction without the requisite disciplinary proceedings and that they were denied a "state-created liberty interest."

Hunter and Ridge applied to proceed in forma pauperis (IFP). The magistrate judge ordered the plaintiffs to file more definite statements of facts and answer questions posed by the court. Ridge complied with the order and indicated that he was given a 30-day cell restriction after he was found guilty of violating a prison rule prohibiting failure to appear for work. Ridge indicated that he was given notice of the charge the day before the hearing, that he attended the hearing, pleaded not-guilty, and testified but called no witnesses. Ridge alleged that when the 30-day period expired, he remained under cell restriction without an additional hearing and that such was a "further" act of retaliation.

The district court granted IFP for both plaintiffs. The district court dismissed Ridge's § 1983 action as frivolous under 28 U.S.C. § 1915(d), and dismissed Hunter's § 1983 action for failure to prosecute under Fed. R. Civ. P. 41(b). Ridge filed a timely notice of appeal. Hunter did not appeal.

#### **OPINION**

"A section 1915(d) dismissal is reviewed for abuse of discretion. A complaint may be dismissed as frivolous if it lacks

an arguable basis in fact or law." Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992).

Ridge argues that prison officials violated his constitutional right to procedural due process when they caused him to remain under cell restriction for "over two weeks" after 30 days elapsed without providing him with notice and an opportunity to be heard, citing Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983). Ridge's argument characterizes the period following the 30-day cell restriction as an "illegal lock-down" imposed to retaliate against him for filing a lawsuit.

State prison officials have wide discretion in the operation of penal institutions, and federal courts follow a policy of minimal intrusion into issues involving prison administration. See Wolff v. McDonnell, 418 U.S. 539, 555-62, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). "[L]awfully incarcerated persons retain only a *narrow range* of protected liberty interests." McCord v. Maggio, 910 F.2d 1248, 1250-51 (5th Cir. 1990) (citation omitted; emphasis added).

This Court makes the following inquiry when reviewing a prisoner's § 1983 claim alleging unconstitutional segregation from the general prison population: (1) whether the prisoner had some "*liberty interest*" in remaining among the general prison population," and (2) if there existed such a liberty interest, what "*level of process*" was the prisoner entitled to before the interest could be curtailed? Dzana v. Foti, 829 F.2d 558, 560-61 (5th Cir. 1987).

In disciplinary segregation cases, the first step in Dzana requires an inquiry into the pertinent prison rules and regulations. Disciplinary rules do not automatically create liberty interests. Jackson v. Cain, 864 F.2d 1235, 1249-50 (5th Cir. 1989). Prison rules and regulations may create a liberty interest, however, to the extent that they provide "mandatory discretion-limiting standards." The Supreme Court in Helms held that a liberty interest was created by Pennsylvania's disciplinary procedures for prison inmates because they contained "*language of an unmistakably mandatory character*" and that the prisoner's entitlement to such procedure could not be curtailed without applying "the strictures of the Due Process Clause." Helms, 459 U.S. at 470-71 (emphasis added). As set forth in Dzana, such strictures generally entitle a prisoner subjected to disciplinary segregation to at least some notice of the charges against him and an opportunity to present his views. Dzana, 829 F.2d at 561.

In his § 1983 complaint, Ridge indicates that his initial 30-day restriction was imposed under "disciplinary action offense codes 25.0 and 27.0." Ridge also alleged general violations of the TDCJ rules and regulations by prison officials. In his "More Definite Statement of Facts," Ridge identifies offense code 25.0 as involving a refusal or failure to "turn out for work" and code 27.0 as "out of place." Ridge thus assumes that the rules created a liberty interest and concludes that his "constitutional right to procedural safeguards ... implicated by that interest were violated." However, Ridge cannot allege the violation of a

"procedural safeguard" until he has shown that he possessed a liberty interest in the TDCJ rules at issue. Dzana, 829 F.2d at 560-61.

Whether prison rules or regulations create a liberty interest requires specific reference to the language of the statute, rule, or regulation at issue. See Hewitt, 459 U.S. at 470-71 & n.6; Jackson, 864 F.2d at 1251; Dzana, 829 F.2d at 560-61. Because Ridge fails to cite the language of the rules he claims have created a liberty interest, it is not possible to determine from the record whether such an interest exists.

Without determining that Ridge possessed a liberty interest, the district court held that Ridge failed to show a due process violation under Helms because he was afforded an adequate hearing that *preceded* the imposition of his 30-day cell restriction. However, Ridge concedes that the 30-day cell restriction was properly imposed and argues only that restriction beyond that time requires officials to provide him with notice of any other charges against him and an opportunity to be heard. This non-frivolous issue was not addressed by the district court.

Because the failure to consider a non-frivolous issue is an abuse of discretion, this Court hereby vacates the district court's § 1915(d) dismissal as frivolous and remands this case to the district court for proper consideration of the issue. See Ancar, 964 F.2d at 468. Ridge should also be given an opportunity to amend his complaint to identify specifically the prison rules

creating the alleged liberty interest. See Fed. R. Civ. P. 15(a); James ex rel. James v. Sadler, 909 F.2d 834, 836 (5th Cir. 1990).

Ridge also argues that the deprivation arose out of governmental policy and was not random or unauthorized, citing Parratt v. Taylor, 451 U.S. 527, 538, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

Under the Parratt-Hudson doctrine, state remedies for negligent and intentional deprivations of state-created liberty interests may satisfy the Due Process Clause. See Zinermon v. Burch, 494 U.S. 113, 127-32, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990). In the event the district court should find on remand that the rules at issue created a liberty interest of which Ridge was deprived, the district court must then determine whether the state procedures available for challenging the deprivation satisfy the demands of due process.

Ridge also raises factual allegations for the first time on appeal that prison supervisory personnel deliberately mishandled his legal correspondence in retaliation for filing prior lawsuits and that the appellees deliberately "injected a false official move slip to cover up the whole scenario of his illegal lockdown." These issues were not before the district court. Because remand is necessary, Ridge should be allowed to amend his complaint to incorporate these allegations. See Fed. R. Civ. P. 15(a).

The trial court's dismissal under § 1915(d) is vacated and the case is remanded to the trial court for further proceedings.