IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7379
Summary Calendar

SAMUEL MONTGOMERY,

Plaintiff-Appellant,

VERSUS

STEVE W. PUCKETT, etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
(CA 4:91 312 S D)

(October 18, 1993)

Before SMITH, BARKSDALE, and DeMOSS, Circuit Judges.

PER CURIAM:*

Samuel Montgomery appeals the dismissal, as frivolous under 28 U.S.C. § 1915(d), of his state prisoner's civil rights action brought pursuant to 42 U.S.C. § 1983. Finding no error, we dismiss the appeal as frivolous.

I.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Montgomery, an inmate confined at the Mississippi State Penitentiary, filed a pro se and in forma pauperis (IFP) suit under section 1983, naming as defendants Steve Puckett, the superintendent of the penitentiary, Barry Parker, the associate superintendent, and C. R. Cole, the administrator of Montgomery's prison unit. Montgomery referred the court to numerous letters he had written to prison officials pertaining to his conditions of confinement, mostly concerning the handcuffing procedures in Montgomery's unit. Montgomery also protested that the guards were "roughing him up" while he was in handcuffs. He described one incident in particular and named the guard responsible. Montgomery also included letters regarding his lack of access to the showers and law library.

The magistrate judge held a hearing pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), at which Montgomery alleged that he was subjected to "a whole lot of brutality" in his housing unit. He alleged that he was "roughed up" by the guards, who were not named as defendants, but he admitted that the defendants did not physically abuse him.

The magistrate judge recommended that Montgomery's complaint be dismissed because the restrictive nature of a prisoner's housing classification does not state a constitutional claim. The magistrate judge also noted that the defendants could not be held liable for the guards' actions under a theory of respondeat superior. The magistrate judge recommended dismissing Montgomery's complaint without prejudice so that he could refile against the

proper defendants.[1] The district court did not expressly state that it was dismissing Montgomery's action as frivolous pursuant to 28 U.S.C. § 1915(d). The language of the court's opinion, however, indicates that it intended to dismiss the action because it lacked an arguable basis in law. Thus, the district court's decision is treated as a section 1915(d) dismissal. See Spears, 766 F.2d at 181. n.3.

An IFP complaint may be dismissed as frivolous if it lacks an arguable basis in law or fact. Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992). A dismissal under section 1915(d) is reviewed for abuse of discretion. Id. at 1734; Parker v. Fort Worth Police Dep't, 980 F.2d 1023, 1024 (5th Cir. 1993).

Montgomery argues that he is being subjected to cruel and unusual punishment in violation of the Eighth Amendment. He asserts that the defendants were responsible, in their supervisory capacity, for the guards' rough treatment and that the magistrate judge "incorrectly construed [the Spears testimony] to undermine" his complaint.

Liability under section 1983 may not be imposed on a defendant as a supervisory employee unless he was personally involved in the constitutional deprivation or implemented an unconstitutional policy. Thompkins v. Belt, 828 F.2d 298, 303-04 (5th Cir. 1987).

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[1] A dismissal purported to be without prejudice operates as a dismissal with prejudice whenever the plaintiff would be barred by the applicable limitations period from filing a new complaint. McCullough v. Lynaugh, 835 F.2d 1126, 1127 (5th Cir. 1988). The limitations period in Mississippi for complaints under 42 U.S.C. § 1983 is three years. Miss. Code Ann. § 15-1-49 (Supp. 1992). Given the lengthy limitations period, the dismissal operates without prejudice.

Although Montgomery makes the conclusional statement that the defendants are "responsible," he does not allege the implementation of an unconstitutional policy. In one of his requests for an administrative remedy, he states that the use of shackles is humiliating; this claim, however, does not implicate an Eighth Amendment violation. See Fulford v. King, 692 F.2d 11, 14 (5th Cir. 1982).

Montgomery also alleges that "the conditions of confinement" in his housing unit" are in violation of the Eighth Amendment[.]" He argues that he is being denied daily showers, recreation, and exercise "without due process requirement [sic]." He also argues that he has been denied adequate legal assistance and access to the law library on a regular basis.

The Due Process Clause of the Fourteenth Amendment does not, by itself, endow a prisoner with a protected liberty interest in the security grade or location of his confinement. Meachum v. Fano, 427 U.S. 215, 226 (1976). A protected liberty interest arises only if the state places substantive limits on the officials' discretion. Olim v. Wakinekona, 461 U.S. 238, 250 (1983). Under Mississippi state law, an inmate has no right to a particular classification. MISS. CODE ANN. §§ 47-5-99 to 47-5-103 (1993); Tubwell v. Griffith, 742 F.2d 250, 252 (5th Cir. 1984). Thus, to the extent that Montgomery claims that the conditions in his housing unit are less desirable than those in other units, he has no due process right to live in a particular unit.

The magistrate judge did not address Montgomery's claims that

he has been denied showers, exercise, and access to the law library. Montgomery's pleadings indicate, though, that his claims do not rise to the level of constitutional violations; therefore, dismissal of his complaint was not an abuse of discretion. Although Montgomery alleges that he has been denied certain rights, his pleadings indicate that he has declined to exercise these rights because he objects to being shackled upon leaving his cell. For example, Montgomery avers that he does not go to the day room or out on yard call for exercise because he objects to being strip-searched and handcuffed. He stated that he did not go to the law library because he did not want to "hold the chain" among other inmates with whom he was to attend the library.[2]

Montgomery included, in his pleadings, a letter to the director of the law library asking whether he could attend the library "without going through any unnecessary change[.]" He also included a letter from the prison officials indicating that he has refused showers on numerous occasions. He does not challenge the factual accuracy of that letter. He also stated that he would come out of his cell to shower and anticipates that he would not have to go through any more "unnecessary changes."

The use of shackles and handcuffs is a restraint commonly used on inmates, even those of preferred status. Jackson v. Cain, 864 F.2d 1235, 1243 (5th Cir. 1989). Even if using the restraints

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[2] Montgomery later stated that he did not resist the use of proper restraints to go to the law library; he later states, however, that "holding chain" and being escorted with other inmates are not part of proper handcuffing procedure. Thus, Montgomery does not argue that he did not resist; rather, he takes issue with what is a "proper restraint."

impinged on Montgomery's constitutional rights, it is valid if reasonably related to legitimate penological interests. See id. at 1248. Montgomery's allegation that he is being denied his constitutional rights without justification is plainly baseless. See Denton, 112 S. Ct. at 1733. Remand to the district court would serve only to waste judicial resources.

Montgomery also states that the defendants have denied him "equal protection of the law, in violation of the Equal Protection Clause of the Fourteenth Amendment[.]" Montgomery does not elaborate further on this issue. Although we liberally construe the briefs of pro se appellants, arguments must be briefed to be preserved. Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988). Thus, we need not consider Montgomery's allegation.

The appeal is frivolous and, accordingly, is DISMISSED pursuant to 5TH CIR. R. 42.2.