

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7800
Summary Calendar

WILLIE COLTON,

Plaintiff-Appellant,

VERSUS

WILLIAM B. ROSAMOND,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
(CA 1:92-246-DD)

(June 3, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:¹

Willie Colton appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint as time-barred. We vacate and remand.

I.

Colton, a Mississippi state prisoner, alleged in his complaint that, on or about September 2, 1989, Winston County Sheriff William B. Rosamond and others assaulted and battered him following his arrest. Colton also alleged that he was denied medical treatment for his broken nose for three days. He requested monetary damages.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Colton's complaint was received by the clerk for the Southern District of Mississippi on August 21, 1992. It was filed September 4, and ordered transferred to the Northern District. The complaint was filed in the Northern District on September 8, 1992.

The magistrate judge held a **Spears** hearing, after which he recommended dismissal on the ground that Colton's action was barred by Mississippi's three-year statute of limitation. Miss. Code Ann. § 15-1-49 (Supp. 1993). Over Colton's objections, the district court adopted the magistrate judge's report and dismissed.

II.

The district court correctly held that § 15-1-49 was applicable to Colton's § 1983 action. **See Elzy v. Roberson**, 868 F.2d 793, 794 (5th Cir. 1989) ("courts considering § 1983 claims should borrow the state's residual or general personal injury limitations period"). However, for limitation purposes, a complaint is considered filed when it is received by the clerk. **See Hernandez v. Aldridge**, 902 F.2d 386, 388 (5th Cir. 1990), **cert. denied sub nom. Hernandez v. Rice**, 498 U.S. 1086 (1991). In this case, the clerk for the Southern District of Mississippi received Colton's complaint on August 21, 1992, within the three-year limitation period.

Moreover, although venue was not proper in the Southern District, the statute of limitations was tolled when Colton filed his complaint there. The Southern District apparently transferred the case to the Northern District pursuant to 28 U.S.C. § 1406(a), which provides that "a case laying venue in the wrong division or district" can be dismissed, "or if it be in the interest of

justice, transfer[red] . . . to any district or division in which it could have been brought."

The Supreme Court has held that a transfer under § 1406(a) was proper in a similar situation, because "dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it [filed the action in a district court in which venue was lacking]." **Goldlawr, Inc. v. Heiman**, 369 U.S. 463, 466 (1962). The Court reasoned that: "When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply." **Id.** at 467.

Because Colton's complaint was received by the clerk of the Southern District of Mississippi within the three-year limitation period, we vacate the district court's judgment and remand for further proceedings.

VACATED and REMANDED.