IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8085

Summary Calendar

CHERYL DAVIS,

Plaintiff-Appellant,

versus

GONZALO ESPARZA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas
A 92 CA 358 JN

May 27, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Cheryl Davis, a prisoner of the State of Texas at Gatesville, appeals from the district court's dismissal of her civil rights action as frivolous. Finding that the district court did not abuse its discretion in concluding that Davis' claim is frivolous, we affirm.

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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 Pursuant to that rule, we have determined that this opinion should not be published.

I

Cheryl Davis filed this civil rights action, along with a request to proceed in forma pauperis (IFP), against a case manager, Gonzalo Esparza, and a mail room official, J. Lara, in their capacities as employees of the Texas prison system. Davis alleges that these defendants violated her constitutional right of access to the courts by denying her request to correspond directly with an inmate writ-writer, Donny Harvey, who had been assisting her in preparing her case before his transfer to a federal facility.[1] According to Davis, the denial of her request made her unable to comply with court orders and to meet court deadlines, thereby effectively depriving her of access to the courts.

Davis' complaint and request to proceed IFP were reviewed by a magistrate judge. Although the magistrate ostensibly denied Davis' request to proceed IFP,[2] he proceeded to evaluate the merits of Davis' claim pursuant to 28 U.S.C. § 1915 ("Proceedings in forma pauperis"), thereby allowing Davis to proceed without paying a fee.[3] The magistrate determined that Davis'

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[1] Davis' complaint was neither stamped as filed nor entered on the docket sheet in the district court. Nevertheless, it is obvious from the magistrate judge's report and the district court's opinion that the complaint was considered below.

[2] The magistrate determined that Davis had sufficient funds to pay the required filing fees, and, therefore, that her request to proceed IFP should be denied. The magistrate also went on to state that, should Davis' complaint be dismissed, the IFP issue would be moot.

[3] Section 1915(a) provides that "[a]ny court of the United States may authorize the commencement . . . of any suit, action

> request for representation by one particular lay person runs afoul of the Fifth Circuit's holding that a defendant has no Sixth Amendment right to representation by a lay person. [See Bonacci v. Kindt, 868 F.2d 1442, 1443 (5th Cir. 1989).] Additionally, the Petitioner gives no specific examples of how the requirement that she not communicate directly with Donny Harvey has caused her to miss court ordered deadlines.

Accordingly, the magistrate concluded that Davis' complaint contains merely summary allegations, and he recommended that the district court dismiss it as frivolous. Davis raised objections to the magistrate's recommendation. After conducting a de novo review, the district court adopted the magistrate's recommendation and dismissed Davis' complaint pursuant to 28 U.S.C. § 1915(d) ("The court may . . . dismiss the case if . . . satisfied that the action is frivolous . . . ."). Davis' motion to proceed IFP on appeal was granted, and Davis appeals from the district court's dismissal of her action.

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or proceeding . . . without prepayment of fees and costs . . . by a person who makes affidavit that he is unable to pay such costs or give security therefor." 28 U.S.C. § 1915(a).

II

Section 1915(d) of Title 28 of the United States Code authorizes federal courts to dismiss a complaint filed IFP "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." A complaint is "frivolous" within the meaning of section 1915(d) if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). This court has held that a complaint is legally frivolous when it involves the "mere application of well-settled principles of law." Moore v. Mabus, 976 F.2d 268, 271 (5th Cir. 1992). For example, a complaint is legally frivolous where the plaintiff alleges an "infringement of a legal interest which clearly does not exist." Neitzke, 490 U.S. at 327. We review section 1915(d) dismissals, whether they be based on a determination that the complaint is legally or factually frivolous, for abuse of discretion.[4] See Denton v. Hernandez, __ U.S. __, __, 112 S. Ct. 1728, 1734 (1992).

In her complaint, Davis states that, (1) because she is unlearned in law, she is "incapable of proceeding with any form of seeking redress without aid[,]" (2) she has been unable to obtain aid from an attorney, and (3) the refusal by defendants to allow her to correspond with Harvey has resulted in her "not

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[4] We note that we have also held that "Spears[v. McCotter, 766 F.2d 179, 181 (5th Cir. 1985),] should not be interpreted to mean that all or even most prisoner claims require or deserve a Spears hearing. A district court should be able to dismiss as frivolous a significant number of prisoner suits on the complaint alone . . . ." Green v. McKaskle, 788 F.2d 1116, 1120 (5th Cir. 1986).

being able to timely comply with court orders . . . ." Although Davis alleges in her complaint that defendants denied her court access, she based her claim entirely on the fact that defendants denied her request to correspond with Harvey, a writ-writer with some paralegal training. Davis did not allege that defendants refused to fulfill their obligation to present her with adequate law libraries or with adequate assistance from persons trained in the law. See Mann v. Smith, 796 F.2d 79, 83 (5th Cir. 1986) (5th Cir. 1986) (the government is obligated to provide prisoners wishing to make a constitutional claim in a civil rights complaint or habeas corpus petition with adequate law libraries or adequate assistance from persons trained in the law), citing Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491 (1977). Because Davis' limited claim that defendants denied her court access by denying her access to Harvey is a claim without an arguable basis in law, the magistrate recommended that the district court dismiss Davis' claim as frivolous pursuant to 28 U.S.C. § 1915(d). See Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992) (a district court may dismiss an in forma pauperis proceeding if the claim has no arguable basis in law and fact).

Nevertheless, Davis attempted to amend her complaint before the district court adopted the magistrate's report and recommendation. Specifically, Davis filed objections to the magistrate's report stating:

> The U.S. Magistrate errs . . . in setting forth that Plaintiff set forth "only" that she cannot afford an attorney, and that she cannot obtain an attorney to aid her. Plaintiff "clearly" set forth also that she was

> incapable of using a law library; that her capability and ability to use one is impaired. . . . Mr. Harvey has a paralegal certificate from Southern Career Institute. . . . The court fails to allow Plaintiff an opportunity to amend her complaint to show that she is not provided aid from any attorneys, from senior law students, or through voluntary assistance by members of the local bar association.

The district court refused to allow Davis to amend her complaint, but then undertook "a de novo review of the entire file in this case" before adopting the magistrate's recommendation and dismissing the case as frivolous. Presented with similar circumstances, we have held that, "[u]nder the liberal rules governing pro se filings, we find that the district court should have treated [the] filing [of an "Opposition to Magistrate's Report and Recommendation"] as an amendment to appellant's complaint." Barksdale v. King, 699 F.2d 744, 746-47 (5th Cir. 1983) (relying on Rule 15(a) of the Federal Rules of Civil Procedure, which states that "[a] party may amend his pleadings once as a matter of course at any time before a responsive pleading is served . . . ."). Accordingly, we accept Davis' filing as an amendment to her complaint and consider whether Davis' allegations sufficiently state a claim against defendants. Id. at 747.

Davis has not alleged that she has been denied access to an adequate law library. In Bounds, the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons

trained in law." 430 U.S. at 828 (1977) (emphasis added). Moreover, Davis does not allege that defendants have implemented an absolute ban forbidding inmates from assisting other inmates with the preparation of habeas corpus petitions. See Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 747 (1969) (stating that such a ban is unconstitutional, at least as applied to illiterate prisoners);[5] see also United States v. Mancusi, 325 F. Supp. 1028, 1032 (W.D. N.Y. 1971) ("There is no question that reasonable restrictions may be placed upon any inmate assistance program."). Although we have acknowledged in dicta that, where inmates cannot read English or are otherwise illiterate, a library alone may not satisfy the constitutional requirement that prisoners be given meaningful access to the courts,[6] Davis has made no allegation of such extreme circumstances. Rather, she simply states in a summary fashion that (1) she is not learned in law and is unable to use a law library, (2) she has not yet been provided aid from attorneys or senior law students,[7] and (3) she

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[5] In Johnson, the Court also recognized that, "[e]ven in the absence of [alternatives to inmate assistance], the State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief . . . ." 393 U.S. at 490.

[6] See Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985) (where jail facilities did not include a law library, concluding that county's bookmobile check-out system, accompanied by assistance from law students, did not meet the requirements of Bounds), citing Cruz v. Hauck, 627 F.2d 710, 720-21 (5th Cir. 1980).

[7] Although she states in her complaint that she did seek and was unable to obtain aid from an attorney, Davis has never indicated that she sought and was denied general assistance in

needs Harvey's legal assistance--despite the fact that he has been transferred to a federal facility. Although Harvey's paralegal training may have greatly enhanced Davis' legal efforts, the Constitution does not entitle Davis to his help in pursuing her actions. We conclude that, because Davis' allegations invoke the mere application of well-settled principle of law (namely, the principle embodied in Bounds that a prisoner's right to court access is generally satisfied through the availability of an adequate law library, and the principle that reasonable restrictions may be placed on inmate legal assistance programs), the district court did not abuse its discretion in dismissing Davis' claim as frivolous pursuant to 28 U.S.C. § 1915(d). See Moore, 976 at 271.

III

For the foregoing reasons, we AFFIRM the district court's dismissal of Davis' action pursuant to 28 U.S.C. § 1915(d).

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utilizing the law library and preparing her filings.