

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8118
Conference Calendar

MICHAEL KENNEDY,

Plaintiff-Appellant,

versus

RAUL MATA, Capt.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. W-92-CA-162

(November 1, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

BY THE COURT:

This case is here on a motion to proceed in forma pauperis (IFP) on appeal. This Court may authorize Kennedy to proceed in forma pauperis on appeal if he is unable to pay the costs of the appeal and the appeal is taken in good faith, i.e., the appeal presents nonfrivolous issues. 28 U.S.C. § 1915(a); see Holmes v. Hardy, 852 F.2d 151, 153 (5th Cir.), cert. denied, 488 U.S. 931 (1988).

Michael Kennedy filed this § 1983 action against Captain Raul Mata, an official of the Texas Department of Criminal Justice (TDCJ), alleging that Mata deprived him of due process of

law at a disciplinary hearing. Kennedy requested monetary damages, and he alleged that he was demoted in line class and lost 90 days of good time credit. The disciplinary records show that Kennedy did lose 90 days good time, but was not reduced in time-earning class. The district court dismissed Kennedy's suit as frivolous under 28 U.S.C. § 1915(d). The district court denied Kennedy's motion to proceed IFP on appeal.

Prisoners who bring § 1983 claims that challenge the constitutionality of their convictions or sentences must initially pursue habeas corpus relief. Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1117, 1119 (5th Cir. 1987). Determining whether a claim sounds in civil rights or habeas, however, is not always simple. If the plaintiff seeks immediate release or a speedier release, the claim must be brought in a habeas action. Id. at 1115. The distinction between the two actions, however, does not rely solely on the relief that the plaintiff nominally seeks. Id. at 1117.

The essential inquiry is, "Does [the plaintiff] challenge the 'fact or duration' of his confinement or merely rules, customs, and procedures affecting 'conditions' of confinement?" Spina v. Aaron, 821 F.2d 1126, 1128 (5th Cir. 1987)(citations omitted). If the former is the case, then another broad rule applies. "If a prisoner challenges a single hearing as constitutionally defective, he must first exhaust state habeas remedies." Serio, 821 F.2d at 1118. If a prisoner first brings a civil rights action when a habeas action is a pre-requisite,

the district court may dismiss without prejudice or stay the case to suspend the running of the statute of limitations until habeas remedies are exhausted. Id. at 1119-20.

Kennedy alleged and the record shows that his punishment was the loss of 90 days good time credit. Good conduct time applies to Kennedy's eligibility for parole or mandatory supervision. Tex. Gov't Code Ann. § 498.003(a)(West Supp. 1993). A challenge to a single allegedly defective hearing affecting the date of a prisoner's parole eligibility is a challenge to the duration of confinement and must be pursued through habeas corpus. Serio, 821 F.2d at 1117-19; Spina, 821 F.2d at 1128. Kennedy is challenging the constitutionality of a single prison disciplinary hearing affecting his parole eligibility date, and he must exhaust his habeas remedies.

Although the district court did not recognize the Serio problem, this Court can "notice sua sponte the lack of exhaustion." McGee v. Estelle, 722 F.2d 1206, 1214 (5th Cir. 1984).

Therefore, IT IS ORDERED that Kennedy's motion to proceed IFP on appeal is GRANTED, the judgment of the district court is VACATED, and Kennedy's case is REMANDED to the district court for a determination of whether the case can be dismissed without prejudice, or if the case should be stayed pending exhaustion, considering the effect of any applicable statute of limitations. See Serio, 821 F.2d at 1119-20.