

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8409
(Summary Calendar)

PAUL FAZZINI,

Plaintiff-Appellant,

versus

US BUREAU OF PRISONS and
WARDEN OF FCI LA TUNA,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(EP-93-CV-175)

(November 12, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Paul Fazzini, a federal prisoner proceeding pro se and in forma pauperis (IFP), appeals the dismissal of his suit against Defendants-Appellees, the Bureau of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Prisons (BOP) and the Warden of FCI La Tuna, as frivolous under 28 U.S.C. § 1915(d). He also moves this court to appoint counsel, to order production of documents, and to invite third parties to file briefs amicus curiae. Finding no reversible error, we affirm the judgment of the district court and deny Fazzini's motions.

I

FACTS AND PROCEEDINGS

In April 1993, Fazzini filed his complaint pursuant to Bivens,¹ the Administrative Procedure Act (APA), and civil RICO. All claims grew out of pending changes to the inmate telephone system at La Tuna.

The magistrate judge recommended dismissal for frivolousness, based on (1) Fazzini's failure to demonstrate how his constitutional rights were or would be violated, (2) federal prisoners not being entitled to the same rights and privileges as free men and women, and (3) Fazzini's failure to exhaust his administrative remedies. The report warned Fazzini that he had to file any objections within ten days of his receipt of the report. The magistrate judge's report was filed on April 30, 1993, but the record is unclear on the precise date of its receipt by Fazzini.

Fazzini filed a motion for leave to file late objections to the magistrate judge's report and he filed his objections. He dated both documents May 12, 1993.

The district court, noting that Fazzini did not file timely

¹ Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

objections, adopted the magistrate judge's report, and dismissed the complaint as frivolous.

II

ANALYSIS

A. Frivolousness

An IFP complaint may be dismissed as frivolous if it lacks an arguable basis in law or fact. Denton v. Hernandez, ___ U.S. ___, 112 S.Ct 1728, 1733, 118 L.Ed.2d 340 (1992). We review the dismissal for abuse of discretion. Id., 112 S.Ct. at 1734.

A review of the district court's order and the magistrate judge's report indicates that the dismissal was based on the prematurity of the alleged injuries, as the new telephone system had not been installed at La Tuna when Fazzini filed his complaint. This prematurity or lack of ripeness reasoning included failure to exhaust administrative remedies. "A court should dismiss a case for lack of `ripeness' when the case is abstract or hypothetical." New Orleans Public Serv., Inc. v. Council of New Orleans, 833 F.2d 583, 586-87 (5th Cir. 1987). "[T]he ripeness inquiry focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1153-54 (5th Cir. 1993).

Here, the complaint did not allege that Fazzini had suffered a denial of his constitutional rights from the future telephone system change. Further, the complaint merely speculates that an injury would actually occur. See Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946) ("Moreover, where federally

protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."); see also Bivens, 403 U.S. at 389 (holding that a violation of the Fourth Amendment gives rise to a cause of action for damages).

The district court stated that Fazzini's objections to the magistrate judge's report were filed late. We disagree. Starting with May 12, 1993, the date found next to Fazzini's signature on the filed objections, and assuming that he handed the objections to prison authorities for mailing on that date and that the magistrate judge's report was filed April 30, 1993, it appears that his objections were timely. See Thompson v. Rasberry, 993 F.2d 513, 515 (5th Cir. 1993) (holding that "a pro se prisoner's written objections to a magistrate's report and recommendations must be deemed filed and served at the moment they are forwarded to prison officials for delivery to the district court"); Fed. R. Civ. P. 6(a) (excluding weekends and legal holidays when period is less than eleven days).

Even if the district court erred in failing to consider Fazzini's objections, however, such error is harmless. See Fed. R. Civ. P. 61. In his objections, Fazzini alluded to an alleged injury caused by the new telephone system in operation at Texarkana: He was denied a collect call to his family by the new phone system there. This allegation is found within the objections under a list of items that Fazzini intended to add to the complaint when he amended it. Fazzini did not, however, amend his complaint;

neither does Fazzini's appellate brief raise this factual allegation. Therefore, any argument stemming from this allegation is deemed abandoned on appeal. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

Dismissal for lack of ripeness on the APA claims would be improper because the decision to implement a new long distance telephone system appears to be a final agency action under 5 U.S.C. § 704. Nevertheless, Fazzini's APA claim brought before the district court is frivolous. He alleged that the BOP failed to comply with 5 U.S.C. § 553 and 28 C.F.R. § 541.12. Id. Section 553 requires publication of proposed rule making in the Federal Register, with opportunity for comment; and section 541.12 gives a federal inmate "the right to be informed of the rules, procedures, and schedules concerning the operation of the institution." These provisions do not require the BOP to give prisoners a "meaningful opportunity to be heard" regarding the agency action.

On appeal Fazzini argues that other alleged improprieties existed in connection with promulgating the new long distance telephone rules, but these arguments were not brought before the district court. "[I]ssues raised for the first time on appeal `are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice.'" United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990) (citation omitted). In light of the factual nature of determining what the BOP actually did in switching to the new telephone system, we decline to address these issues.

In his appellate brief, Fazzini urges numerous issues involving facts that appear to relate to his present stay at FCI Florence and other issues that were not brought to the district court's attention. We therefore decline to address these issues. See Garcia-Pillado, 898 F.2d at 39.

To the extent that Fazzini argues that he has a RICO cause of action, nothing brought before the district court, either in the complaint or in the objections to the magistrate judge's report, indicates that he ever alleged a RICO claim. See In re Burzynski, 989 F.2d 733, 741-44 (5th Cir. 1993) (listing and explaining elements of a RICO claim); 18 U.S.C. § 1962. Fazzini raises new allegations purporting to show that the defendants' conduct amounts to RICO violations, but as these arguments were not brought before the district court they will not be reviewed here. See Garcia-Pillado, 898 F.2d at 39.

Fazzini also argues that the district court erred in finding his bill-of-attainder argument frivolous. In his complaint, Fazzini premised his bill-of-attainder argument on the alleged constitutional prohibition of treating prisoners differently from free men. The district court did not abuse its discretion in dismissing this claim as frivolous. See Wolff v. McDonnell, 418 U.S. 539, 560, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) ("it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens . . . to . . . a disciplinary proceeding in a state prison").

Fazzini argues next that the district court abused its

discretion in failing to grant leave to amend the complaint. "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served" Fed. R. Civ. P. 15(a). Although Fazzini submitted documents to the district court stating his intent to amend his complaint, he never did so. Further, the district court dismissed the complaint without stating whether the dismissal was with or without prejudice. "When a section 1915(d) dismissal is silent, [this court] will presume that the dismissal is without prejudice." Graves v. Hampton, 1 F.3d 315, 319 (5th Cir. 1993). Therefore, Fazzini is not precluded from filing his complaint in the district where an injury has allegedly occurred.

For the foregoing reasons, we conclude that the district court did not abuse its discretion in dismissing Fazzini's action as frivolous. See Denton, 112 S.Ct. at 1734.

B. Motions

Within Fazzini's list of requested relief, he includes a motion that we appoint counsel. There is no general right to counsel in a § 1983 action. Branch v. Cole, 686 F.2d 264, 266 (5th Cir. 1982). "This court may appoint counsel in civil rights suits presenting `exceptional circumstances.'" Cooper v. Sheriff, Lubbock County, Tex., 929 F.2d 1078, 1084 (5th Cir. 1991) (citation omitted). The instant case does not present "exceptional circumstances." See id. Fazzini also filed motions seeking to have this court order production of certain BOP documents, and offer long distance telephone companies the opportunity to file

amicus curiae briefs. All of these motions are meritless.

The rulings of the district court are AFFIRMED, and Fazzini's motions are DENIED.