

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8469
Conference Calendar

VICTOR L. WESS,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, Director,
TDC, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. W-93-CV-21

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(December 15, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

BY THE COURT:

Appellant Victor L. Wess, an inmate of the Texas Department of Criminal Justice, Institutional Division, seeks leave to appeal in forma pauperis (IFP) from the dismissal of his civil rights action, 42 U.S.C. § 1983. IT IS ORDERED that leave to appeal IFP is GRANTED, the district court's judgment is VACATED, and the cause is REMANDED for further proceedings.

After a Spears hearing, the magistrate judge recommended dismissal of Wess's action as frivolous. See Spears v. McCotter, 766 F.2d 179, 181-82 (5th Cir. 1985). The report informed the parties that their objections had to be filed within 10 days. The district court, after finding that no objections had been

filed to the report, adopted it and dismissed the action as frivolous. The court also revoked Wess's IFP status.

Wess, who was pro se, timely filed a notice of appeal. On the same date, he filed a motion for leave to appeal IFP, alleging that he had timely filed objections to the magistrate judge's report, which he could show by documents he had received from the Clerk's Office of the district court. The district court denied leave to appeal IFP, noting that the court could have reconsidered its dismissal order had Wess not filed a notice of appeal. Cf. Lairsey v. Advance Abrasives Co., 542 F.2d 928, 932 (5th Cir. 1976) (if a Rule 60(b) motion is filed after notice of appeal and the district court is inclined to grant the motion, it should so indicate, and the appellate court can remand).

In its final order, the district court held that Wess was not entitled to de novo review, on grounds that he had failed to file objections to the magistrate judge's report. Failure to file objections also bars a "party from attacking on appeal factual findings accepted or adopted by the district court except upon grounds of plain error or manifest injustice." Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. Unit B 1982)(en banc).

Accordingly, the district court should determine whether Wess can substantiate his claim that he timely sent his objections to that court for filing. If the district court finds that he did, then that court shall determine de novo all issues properly raised in Wess's objections. Nettles, id.

VACATED and REMANDED.