IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8605
Summary Calendar

ORIS M. ALEXANDER, JR.,

Plaintiff-Appellant,

VERSUS

JACK KYLE,
Chairman, Texas Board of Pardons
and Paroles, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(93-CV-3)

(April 18, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Oris Alexander appeals the dismissal of his 42 U.S.C. § 1983 complaint. We affirm.

I.

Alexander sued members of the Texas Board of Pardons and Paroles, alleging that they arbitrarily denied parole to retaliate

[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

against him for previously testifying against the parole board and because he was black. Alexander alleged that one of the defendants told him, "We and all the [board] members will keep you in prison for all your life until you died [sic]." The defendants also allegedly said, "You niggers like you that be a witness against the parole board we are going to keep him in prison all they [sic] life." Alexander alleged that the denial of parole was arbitrary because he complied with all the stated conditions for a parole date.

After Alexander filed various motions, the defendants moved to dismiss pursuant to FED. R. CIV. P. 12(b)(6), contending, inter alia, that, because Alexander's complaint challenged "the fact of his confinement and not the conditions of his confinement," he was required to pursue habeas relief and exhaust state remedies before filing a § 1983 complaint. Alexander filed a response, attaching numerous letters, diplomas, and documents. Alexander then filed a motion for summary judgment.

The magistrate judge noted that Alexander's claims "call into question the fact or duration of his confinement" and, addressing the merits, recommended that the defendants' motion to dismiss be granted and that Alexander's complaint be dismissed without prejudice for failure to exhaust state remedies. The district court, adopting the magistrate judge's report and recommendation, denied Alexander's motion for summary judgment, granted the defendants' motion to dismiss, and dismissed Alexander's § 1983 complaint without prejudice.

II.

Alexander argues pro se that the district court erred when it ruled that he failed to state a claim upon which relief could be granted. He reasons in part that the district court erred when it considered his complaint as a habeas corpus petition and then ruled that he failed to state a cognizable habeas claim.

Although it is not articulated in Alexander's summary of the issues, in the body of his argument he contends, as he did in district court, that the parole board's denial of a tentative parole date was arbitrary and was the product of racial bias and retaliation. This claim serves as a challenge to the legality of his confinement and, because it is essentially a habeas corpus petition, habeas relief is not appropriate without exhaustion of state remedies. See Irving v. Thigpen, 732 F.2d 1215, 1215-18 (5th Cir. 1984).

If a complaint contains both habeas and § 1983 claims, the district court should, if possible, separate the claims and decide the § 1983 claims. Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1119 (5th Cir. 1987). When a potential § 1983 claim is inextricably intertwined with, and not so factually distinct from, a plaintiff's other claims as to permit the district court to analyze the potential claim separately, the prisoner must first pursue habeas relief on the claim. Id.

Neither habeas nor § 1983 relief may be obtained when a plaintiff fails to allege a deprivation of a federal constitutional or statutory right. Thomas v. Torres, 717 F.2d 248, 248-49 (5th

Cir. 1983), cert. denied, 456 U.S. 1010 (1984). Therefore, if a plaintiff fails to allege such a deprivation, a district court may declare that he fails to state a claim for either habeas or § 1983 relief. Id. It follows logically, therefore, that if the complaint pleads no constitutional violation cognizable in habeas corpus or in a § 1983 suit, there is no claim to exhaust. See Colvin v. Estelle, 506 F.2d 747, 748 (5th Cir. 1975) (claims not cognizable under federal habeas law render futile the requirement of exhaustion). The district court's dismissal for failure to state a claim but without prejudice to exhaust remedies is thus a decision with mutually exclusive concepts.

Dismissal under rule 12(b)(6) is appropriate when, accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff, he can prove no set of facts that would entitle him to relief. Walter v. Torres, 917 F.2d 1379, 1383 (5th Cir. 1990). We review de novo a district court's dismissal on the pleadings. Walker v. South Cent. Bell Tel. Co., 904 F.2d 275, 276 (5th Cir. 1990).

A.

In Creel v. Keene, 928 F.2d 707, 712 (5th Cir.), cert. denied, 111 S. Ct. 2809 (1991), this court found that, as a result of the 1989 amendments to the Texas parole statute (TEX. CODE CRIM. P. ANN. art. 42.18 § 8(a)), there was no question that the Texas statute did not create a liberty interest in parole. Because the violations alleged by Alexander occurred subsequent to the 1989

amendments, Creel applies here. Alexander therefore had no constitutionally protected interest in release on parole.

According to Alexander's complaint, after he was denied a tentative parole date, the Board informed him that, as to future review, "the Board's review of your case requires you to comply with the following institutional conditions." The conditions were listed as (1) "Satisfactory institutional adjustment during your term of incarceration" and (2) "Inmate participation in psycho[logi]cal counseling." Id. The Board indicated that

> compliance with the above institutional conditions may improve the possibility of receiving a tentative parole date at the time of your next review. Prior to your next scheduled review date the Board will be verifying your compliance with the above required institutional conditions.

Id. (emphasis added).

Alexander argues that the Board denied parole on three occasions even though he satisfied the institutional conditions set forth by the Board.[1] Alexander argues further that such conditions created a liberty interest in a tentative parole date. Alexander is apparently confused.

Alexander cites no rules or policy that contains mandatory discretion-limiting language to the effect that the Board was required to give him a tentative parole date. See Olim v. Wakinekona, 461 U.S. 238, 249 (1983); Creel, 928 F.2d at 709-12. A liberty interest may be created by administrative practices.

[1] Alexander's exhibits are largely comprised of documents showing that he satisfied the institutional conditions and that he completed various courses of study.

Parker v. Cook, 642 F.2d 865, 867, 876-77 (5th Cir. Unit B Apr. 1981). The Board's statement, "may improve the possibility of receiving a tentative parole date at the time of your next review," does not, however, reflect an administrative practice that a parole date would result automatically upon a showing that the institutional conditions had been satisfied.

Because Alexander fails to state a constitutional violation, he has not stated a claim for relief under § 2254 or § 1983. See Thomas, 717 F.2d at 248-49. The dismissal therefore is affirmed as to this claim. Id.; see Colvin, 506 F.2d at 748.

B.

"Parole board members are absolutely immune from liability for their conduct in individual parole decisions." Walter v. Torres, 917 F.2d 1379, 1384 (5th Cir. 1990). Alexander's argument that the Board's repeated denial of parole was an act of retaliation for testifying against them at trial does not alter this rule of law. Alexander, accordingly, has stated no valid federal claim for damages, and the judgment of dismissal without prejudice as to the § 1983 claim is AFFIRMED.