

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8777

KIRK WAYNE McBRIDE,

Plaintiff-Appellant,

VERSUS

CITY OF NEW BRAUNFELS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CA-288)

(December 15, 1994)

Before DAVIS, BARKSDALE and STEWART, Circuit Judges.

PER CURIAM:¹

Kirk Wayne McBride was convicted of sexual assault, aggravated sexual assault, and aggravated kidnapping. **McBride v. State**, 840 S.W.2d 111, 112 (Tex. Ct. App. 1992). After McBride's arrest, the state court authorized state officers to take blood and hair samples from him. This authorization took the form of a court order instead of a warrant. His conviction was reversed and a new trial ordered because the Texas Court of Appeals determined that

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

these samples were obtained in violation of state law. McBride is currently incarcerated awaiting retrial.

McBride filed his original Section 1983 actions against police officer Ray Douglas and the City of New Braunfels in 1992. Because these claims potentially affected the validity of his conviction, he was required to exhaust his habeas remedies before bringing these actions. **See Hernandez v. Spencer**, 780 F.2d 504, 505 (5th Cir. 1986). On February 1, 1993, McBride filed new actions against Officer Douglas, the City, and Comal County, alleging that the hair and blood samples were taken without a search warrant in violation of the Fourth Amendment. The district court granted the defendants' motions for summary judgment and dismissed the federal law claims with prejudice and the pendent state law claims without prejudice. We affirm the district court's dismissal of the actions against Officer Douglas and the City of New Braunfels but vacate the dismissal of the action against Comal County and remand for further proceedings.

I.

A.

The district court was plainly correct in granting summary judgment to the City of New Braunfels because McBride has presented no competent summary judgment evidence demonstrating an unconstitutional policy or custom. The district court also correctly granted summary judgment to Officer Daniels, who followed the court order and transported McBride to the hospital where the samples were taken. McBride has not shown that Officer Daniels

acted unreasonably in light of McBride's clearly established rights.

B.

McBride argues that the district court improperly granted summary judgment for Comal County on statute of limitations grounds. He contends that the statute of limitations was tolled because he was required to exhaust his habeas remedies before bringing this action.

Because there is no federal statute of limitations for § 1983 actions, the federal courts borrow the forum state's general personal injury limitations period. **Gartrell v. Gaylor**, 981 F.2d 254, 256 (5th Cir. 1993). Texas has a statute of limitations of two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (West 1986). McBride's cause of action accrued in January 1990, but he did not file his first action against the County until March 1993. At first glance, his claim appeared to be time-barred.

However, in applying the forum state's statute of limitations, the federal court should give effect to any applicable tolling provisions. **Gartrell** at 257. Texas has a common law tolling rule which suspends the running of the limitations period if a person is prevented from exercising his legal remedy by the pendency of legal proceedings. **Id.** at 257; **Jackson v. Johnson**, 950 F.2d 263, 265 (5th Cir. 1992).

McBride was prevented from pursuing his Section 1983 claims until his habeas action was resolved. Thus, under Texas law the limitations period was tolled. **See Gartrell**, 981 F.2d at 257-58

(tolling provision might apply to inmate who exhausted administrative remedies before bringing § 1983 claim because the district court had the discretion to require exhaustion); **Jackson**, 950 F.2d at 265-66 (tolling rule applies if prisoner is required to exhaust state remedies before proceeding in federal court). **Cf. Burge v. Parish of St. Tammany**, 996 F.2d 786, 789 (5th Cir. 1993) (applying similar Louisiana tolling provision and determining that there is no purpose in requiring a plaintiff to perform the hollow act of filing a premature claim).

Presumably, if McBride had brought his claim against Comal County earlier, that complaint also would have been dismissed pending resolution of his habeas claims. McBride was not required to perform this hollow act. Consistent with the above authorities, the statute of limitations on McBride's claim against Comal County was tolled.

For this reason, we must vacate the district court's order dismissing McBride's action against Comal County and remand this case for further proceedings against this defendant. The district court's order is affirmed in all other respects.

AFFIRMED in part, VACATED in part and REMANDED.