

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8790
Summary Calendar

DARRYL WAYNE BELL,

Plaintiff-Appellant,

versus

JACK GARNER, Warden,
and R. BURKETT, Sgt.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W-92-CA-281)

(May 3, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Darryl Wayne Bell, *pro se* and *in forma pauperis*, appeals from the adverse summary judgment on his civil rights claims against prison officials. We **AFFIRM**.

I.

In November 1992, Bell, an inmate at the Hughes Unit of the Texas Department of Criminal Justice, filed suit against Warden Jack Garner and Mailroom Supervisor Rebecca Burkett, alleging that

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

they were "useing [sic] arbitrary and discrimitory [sic] enforcement to deny [him] access to courts, correspondence, and correspondence supplies". In response to the magistrate judge's order to submit a more definite statement of the facts, including the alleged harm suffered from the appellees' actions, Bell stated that he had been denied indigent mailing supplies on many occasions, that legal letters he had sent or received had been delayed, that he had not received a response to his requests for the use of certified mail, and that his requests for extra envelopes for legal correspondence had been denied.

At a **Spears**² hearing in January 199, Bell testified that he had attempted to mail a letter to the attorney handling his direct criminal appeal, requesting a copy of the brief prepared by the attorney and expressing a desire to handle the appeal *pro se*; that the prison mailroom returned the letter to him because, according to the mailroom's address directory, Bell had used the wrong address for the attorney; that, when he resubmitted the letter, using the address provided by the mailroom, the letter was returned to him from the United States Postal Service, with the notation that the attorney's forwarding order had expired; and that he mailed the letter again, but it was delivered to the attorney after the appeal had been decided.

Bell also testified at the **Spears** hearing that prison officials refused his requests for additional envelopes for his legal correspondence; that the mailroom's records were incorrect as

² **Spears v. McCotter**, 766 F.2d 179 (5th Cir. 1985).

to the amount and type of mail he had sent; that his legal correspondence had been opened and read; and that his mail had been delayed.

In March 1993, Bell filed a supplemental complaint, in which he alleged that the appellees refused to mail his legal correspondence, opened his legal mail, and refused to provide him with more envelopes. That June, the appellees moved for dismissal, or in the alternative, summary judgment. Bell did not respond to the summary judgment motion and, in September, the magistrate judge recommended that it be granted.

Bell objected to the magistrate judge's report, asserting that he was not given notice that summary judgment could be entered against him if he did not respond.³ On October 14, the district court, "[i]n order to give [Bell] every possible opportunity to present his case", ordered Bell "to present any proof in opposition to the Defendants' Motion for Summary Judgment by November 15, 1993, specifically presenting anything to indicate what harm he has suffered". In response, Bell asserted that the dispute with the mailroom about his attorney's correct address caused him to lose his appeal. The district court adopted the magistrate judge's recommendation, and granted summary judgment for the appellees.

II.

³ The record contradicts this assertion. At the *Spears* hearing, the magistrate judge informed Bell that, after the defendants filed their answer, "they may possibly file a motion for summary judgment If they file a motion for summary judgment, you need to respond to that".

We review a summary judgment *de novo*, "applying the same standard as a district court". **Brewer v. Wilkinson**, 3 F.3d 816, 819 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1081 (1994). "Summary judgment is proper only if the record discloses that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law". **Id.** "[T]he plain language of [Fed. R. Civ. P.] 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial". **Celotex Corp. v. Catrett**, 477 U.S. 317, 322 (1986).

A.

A prison official's interference with an inmate's legal mail may violate the inmate's constitutional right of access to the courts and his "First Amendment right to free speech -- i.e., the right to be free from unjustified governmental interference with communication". **Brewer v. Wilkinson**, 3 F.3d at 820. Although "a prisoner's claim that interference with his legal mail violated his right of access to the courts is distinct from his claim that such conduct violated his right to free speech, ... the jurisprudence governing each of these claims has become inextricably intertwined". **Id.** at 821.

A prisoner's right of access to the courts has not been extended "to encompass more than the ability ... to prepare and transmit a necessary legal document to a court". **Id.** at 821. To

prevail on his denial-of-access claim, Bell must show that he was prejudiced by the alleged violation. **Henthorn v. Swinson**, 955 F.2d 351, 354 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2974 (1992).

Although "[t]he precise contours of a prisoner's right to free speech are ... obscure[,] [t]he Supreme Court has made it clear ... that prisoners retain only those First Amendment rights of speech which are not inconsistent with [their] status as prisoner[s] or with the legitimate penological objectives of the corrections system". **Brewer**, 3 F.3d at 821 (internal quotation marks and citation omitted). Accordingly, "in determining the constitutional validity of prison practices that impinge upon a prisoner's rights with respect to mail, the appropriate inquiry is whether the practice is reasonably related to a legitimate penological interest". **Id.** at 824.

A.

With respect to denial of access, the only prejudice Bell claims to have suffered as the result of the appellees' actions is the loss of his direct criminal appeal because a letter to his attorney, in which he expressed a desire to represent himself, was delayed. Bell did not identify the issues he would have raised on appeal if he had represented himself, and did not state the likelihood of success of any such issues on appeal. Moreover, he did not allege that the result of his appeal would have been different if the letter had not been delayed. Accordingly, Bell

has not demonstrated the existence of a material fact issue on this claim.

B.

The remainder of Bell's claims fall within the category of governmental interference with First Amendment communication. An inmate's freedom from censorship under the First Amendment does not prohibit prison officials from inspecting the inmate's incoming mail. *Brewer*, 3 F.3d at 825. The copies of Bell's grievances submitted by the appellees in support of their summary judgment motion reflect that Bell's letters to law students and certain organizations were opened, or were not sent as "legal mail" (sealed and uninspected) because the addressees did not qualify under prison regulations as "a[] licensed attorney or legal aid society"; that Bell was denied extra envelopes after a review of his requisition records revealed that he had been issued more envelopes than he had mailed, and prison officials refused to provide him with additional envelopes until he had used those already supplied to him; and that the mailroom did not have a record of Bell requesting to send letters by certified mail.

Bell did not produce any summary judgment evidence to rebut the facts contained in the grievance records. Moreover, he has not identified which legal correspondence, if any, was delayed because of the lack of envelopes or was opened by prison officials, and he has not demonstrated any prejudice that he suffered as the result of the appellees' alleged interference with his mail. The un rebutted summary judgment evidence produced by the appellees

shows that their conduct was reasonably related to legitimate penological interests. Accordingly, the appellees were entitled also to summary judgment on Bell's free speech claims.⁴

III.

For the foregoing reasons, the summary judgment is

AFFIRMED.

⁴ In light of our affirmance of the summary judgment, we need not address Bell's contention that he was denied the right to appeal the denial of his motion for a preliminary injunction prohibiting the defendants "from denying envelopes, postage and supplies for legal, media, and special correspondence, delaying correspondence over 72 hrs., and delivering, and forwarding mail to wrong destinations".