

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10380
Summary Calendar

VAN LEE BREWER, ET AL.,

Plaintiff-Appellant,

VERSUS

B. WILKINSON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(5:91 CV 143 C)0

September 13, 1995

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:¹

This section 1983 action by Brewer is before us for the second time. Brewer and a fellow inmate, Claude Harris, initially filed a § 1983 complaint against the mailroom supervisor and a mailroom clerk at the prison. They complained of constitutional violations arising from the handling of their legal and non-legal mail. The district court concluded that the inmates had failed to produce

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sufficient summary judgment evidence to demonstrate a cognizable constitutional claim for denial of access to the courts. The district court granted the defendants' motion for summary judgment.

We affirmed the district court's summary judgment on the inmates' incoming legal mail claims, see Brewer v. Wilkinson, 3 F.3d 816, 825 (5th Cir. 1993), cert. denied, 114 S.Ct. 1081 (1994). We concluded, however, that the district court erred in granting summary judgment on Brewer's outgoing legal mail claim. We therefore reversed that portion of the district court's judgment and remanded it for further proceedings. Id. at 826. We directed the district court to consider the following claims which it had not addressed before its earlier dismissal. (1) That legal mail was withheld over seventy-two hours; (2) that incoming non-legal mail was never received; (3) that outgoing non-legal mail was never received and (4) that numerical limits were placed on outgoing mail. Id. at 826, n. 14.

On remand the district court referred the case to a magistrate judge for further proceedings. The magistrate judge conducted a Spears hearing and thereafter recommended dismissing the complaint for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6). With respect to Brewer's non-legal mail claims, the magistrate judge concluded that Brewer "offered no evidence of interference with this personal mail by any specific prison personnel." With respect to Brewer's outgoing legal mail claims, the magistrate judge determined that any alleged interference with Brewer's mail

did not prejudice his legal position.² The district court adopted the magistrate judge's report and recommendation and dismissed the inmate's complaint without prejudice for failure to state a claim. This appeal followed.

II.

A.

In Brewer's first appeal, we affirmed the district court's grant of summary judgment regarding Brewer's incoming legal mail claims. See Brewer, 3 F.3d at 826. Brewer contends that we should reconsider that holding. However, we find none of his arguments persuasive and find no justification for dispensing with the law of the case established in our earlier opinion. See Chevron v. Traillour Oil Co., 987 F.2d 1138, 1150 (5th Cir. 1993).

B.

Brewer argues that the district court erred in concluding that he failed to state a claim in his outgoing legal mail claim. We conclude that even if Brewer stated a cognizable claim for relief in his petition, the facts developed at the Spears hearing demonstrate that the claim is frivolous. The item of outgoing legal mail that allegedly was removed from Brewer's mail was a petition for writ of mandamus. At the Spears hearing, it was established that Brewer filed the petition for mandamus to force the disclosure of certain police reports relative to his state court conviction. The magistrate judge was entitled to conclude

² Brewer abandoned the seventy-two hour delay claim at the evidentiary hearing. Therefore this claim presents no issue for appeal.

that the alleged removal of the petition for mandamus did not prejudice Brewer's legal position. Thus, this claim lacks an arguable basis in law and is frivolous under 28 U.S.C § 1915(d). See Henthorn v. Swinson, 955 F.2d at 354. We therefore affirm the district court's dismissal of Brewer's outgoing legal mail claim on this alternative basis.

C.

The district court also accepted the magistrate judge's recommendation that it dismiss Brewer's claims that his incoming and outgoing non-legal mail had been censored in violation of his First Amendment rights. The magistrate judge concluded that these claims should be dismissed because Brewer offered no evidence of interference with his personal mail by any specific prison personnel. The magistrate judge found that the fact of failure to receive mail is not sufficient to support a conclusion that prison mail room employees interfered with Brewer's incoming and outgoing personal mail. Because the magistrate judge found these allegations were too conclusional to support release, he recommended dismissal. The district court accepted this recommendation.

We are persuaded that Brewer's testimony and the testimony of his wife, that their personal mail was not received or discovered as lost and that two legal motions had been removed from a letter Brewer wrote his wife, resulted in questions of fact for the factfinder. Censorship of mail implicates a prisoner's first amendment rights. McNamara v. Moody, 606 F.2d 621, 623 (5th Cir.

1979), cert. denied, 447 U.S. 929 (1980). Although censorship is allowed if it is "reasonably related to legitimate penalogical interests" Powell v. Estelle, 959 F.2d 22, 24 (5th Cir.), cert. denied, 113 S.Ct. 668 (1992), the district court's decision rested on no such interests.

The district court's dismissal pursuant to Rule 12(b)(6) following the Spears hearing could not have been based on a credibility determination in favor of the defendants. It is not the function of a Spears hearing to resolve credibility disputes. West v. Oglesby, 910 F.2d 278, 281-82 (5th Cir. 1990). Also, the magistrate judge was barred from making factual credibility determinations because Brewer promptly requested a jury trial.

Accordingly, we VACATE the district court's dismissal of Brewer's non-legal mail claims and REMAND that portion of the case to the district court for further proceedings. We AFFIRM the remainder of the judgment.

AFFIRMED in part, VACATE and REMAND in part.