

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10808
Summary Calendar

GEORGE B. RODEN,

Plaintiff-Appellant,

VERSUS

STATE OF TEXAS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

(7:94-CV-068-K)

(June 2, 1995)

Before WISDOM, KING, and GARWOOD, Circuit Judges.

PER CURIAM*:

The pro se plaintiff/appellant, George Roden, appeals from the district court order dismissing his complaint for failure to pay the partial filing fee assessed to him. We affirm.

I

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

George Roden, a patient at the state hospital in Vernon, Texas, applied to proceed in forma pauperis in his 42 U.S.C. § 1983 action against the State of Texas, the Texas Department of Mental Health and Mental Retardation, and the Texas Department of Corrections. Roden alleges that the hospital unconstitutionally deprived him of an education in the martial arts and that he has received forced injections of a prescription medication to which he is allergic. Roden asks for \$150 million in punitive damages and \$50 million exemplary damages.

A magistrate judge granted Roden leave to proceed in forma pauperis. The district court modified the magistrate's order, dismissing as frivolous one of Roden's claims and ordering Roden to pay a partial filing fee of \$8.50 in order to proceed with his cause of action. Roden filed objections to the district court's order, alleging that he was financially unable to pay the partial filing fee. After allowing Roden over five months to pay the fee, the district court dismissed with prejudice Roden's complaint. This appeal followed.

II

Roden's first argument on appeal contends that because convicted felons in Texas may not bear arms after release from prison, Roden has the constitutional right to have the state hospital at Vernon provide him with martial arts training while in prison. Roden asks this Court to award injunctive relief and order the hospital to employ a martial arts instructor and pay the instructor \$5,000 a month. In the alternative, Roden asks this

Court to reinstate his right to bear arms upon release from the state hospital. The district court concluded that this claim was frivolous, and ordered a partial dismissal in accordance with 28 U.S.C. § 1915(d).

We review a dismissal under 28 U.S.C. § 1915(d) of an in forma pauperis claim for an abuse of discretion.¹ A claim is frivolous if it "lacks an arguable basis either in law or fact".² We agree with the district court that Roden's argument is without merit. The state of Texas has no affirmative duty to provide incarcerated individuals with martial arts training.³ The district court found, and we agree, that at a minimum, the State acted for security reasons in denying Roden training in the martial arts. We find no abuse of discretion and affirm the district court's dismissal of Roden's claim.

Roden's second argument contends that he received forced injections of a prescription drug to which he is allergic. The district court posed specific questions on this issue and ordered Roden to supplement the remainder of his complaint. Roden complied, and the district court reviewed the record to determine if service of process should issue. The court concluded that if Roden wished to proceed with his action, he should pay a partial filing fee of \$8.50.

¹ Mackey v. Dickson, 47 F.3d 744, 745 (5th Cir. 1995).

² Id. (citing Neitzke v. Williams, 490 U.S. 319, 323-25 (1989)).

³ See, e.g., Green v. McKaskle, 788 F.2d 1116, 1125 (5th Cir. 1986).

Roden filed a motion to reconsider, contending that although in the affidavit accompanying his request for leave to proceed in forma pauperis he stated that he had \$17 in his prison trust account, he had at the present time only 13 cents. Roden did not explain where the money went, but stated that one of his friends told him that he would deposit \$10 in Roden's prison trust account. Roden also stated that his wife sent him \$90 "every once in a while". In January 1995, the district court dismissed Roden's complaint for failure to pay the \$8.50 partial filing fee. The issue is whether the district court abused its discretion in requiring Roden to pay an \$8.50 filing fee in order to proceed in forma pauperis.

Section 1915 is intended to provide access to the federal courts for indigent litigants who lack the resources to pay the statutory filing costs. If a litigant is financially able to pay part of the fee, however, a district court has discretion, subject to review for abuse, to order a litigant to pay a partial filing fee when the financial data suggests that the person may do so without suffering undue financial hardship.⁴

To determine whether a particular partial filing fee will cause undue financial hardship, a court must examine the financial

⁴ Prows v. Kastner, 842 F.2d 138, 140 (5th Cir.), cert. denied, 488 U.S. 941 (1988) (citing Smith v. Martinez, 706 F.2d 572, 573 (5th Cir. 1983)); Williams v. Estelle, 681 F.2d 946, 947 (5th Cir. 1982), cert. denied, 469 U.S. 1075 (1984); Green v. Estelle, 649 F.2d 298, 302 (5th Cir. 1981); Braden v. Estelle, 428 F. Supp. 595, 598 (S.D. Tex. 1977).

condition of the in forma pauperis applicant.⁵ This may entail a consideration of the applicant's present assets, reasonably contemplated periodic payments and future income,⁶ and the demands on an individual plaintiff's financial resources, including whether they are discretionary or mandatory.⁷

Considering Roden's financial condition, we find no abuse of discretion in requiring a payment of \$8.50 to cover filing and service fees. Although \$8.50 fee was equivalent to 50 percent of Roden's assets at the time he applied for leave to proceed in forma pauperis, it is clear from the record that he received money periodically from people outside the prison, enabling him to pay the \$8.50 filing fee. Roden's situation is different from that of the in forma pauperis applicant in Green v. Estelle.⁸ In Green, the in forma pauperis applicant's principal source of income was cut off completely, and the Court determined that requiring a partial filing fee equivalent to 40 percent of a litigant's present assets was an abuse of discretion.⁹ Unlike the situation in Green, the plaintiff in this case has several sources of income, and the Court has no reason to suspect that Roden will not continue to receive payments from those sources.

⁵ Prows, 842 F.2d at 140.

⁶ Smith v. Martinez, 706 F.2d 572, 573 (5th Cir. 1983).

⁷ Prows, 842 F.2d at 140.

⁸ 649 F.2d 298 (5th Cir. 1981).

⁹ Id. at 302.

In these circumstances, we are unable to say that the district court abused its discretion in requiring Roden to pay a partial filing fee of \$8.50 in order to proceed in forma pauperis under 28 U.S.C. § 1915. We further conclude that the district court did not err in dismissing with prejudice the complaint for Roden's failure to comply with this order. Roden was given over five months to pay the fee, and the record in this case justifies the sanction of dismissal with prejudice.¹⁰ We affirm the judgment of the district court.

¹⁰ Lay v. Justices-Middle Dist. Court, 811 F.2d 285, 286 (5th Cir. 1987).