IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10885
Summary Calendar

ERNIE R. RODRIGUEZ

Plaintiff-Appellant,

v.

MRS. JONES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:93 CV 2376 X)

March 20, 1995

Before KING, JOLLY, and DEMOSS, Circuit Judges.

PER CURIAM:[*]

Ernie Rodriguez appeals from the district court's dismissal of his *in forma pauperis* § 1983 complaint on "frivolous" grounds. Because Rodriguez's complaint, liberally construed, alleges that three of the defendants deprived him of a substantive right, we vacate part of the district court's judgment and we remand for further proceedings.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

In August of 1991, Rodriguez was arrested and was placed in the Dallas County jail for theft by check and for violations of his parole conditions. Rodriguez pleaded guilty to the charge of theft by check, and he was sentenced to a one-year term of probation. Because of the parole violation charge, however, Rodriguez remained incarcerated until October of 1991. At that time, Rodriguez's parole officer, Francis Imycup, visited him in jail and informed him that he was to be released the following day. Unfortunately, Rodriguez was not released. After further inquiries to various other defendant parole officers ("Doe," Jones, and Halman), Rodriguez was still not released, even though he was told by the Texas Board of Pardons and Paroles that he was not being detained by the Board.

At some point, an attorney and a state court judge who were contacted by Rodriguez discovered that the jail had a "hold for TDC" directive on Rodriguez's record. That hold was apparently withdrawn on November 19, 1991, and Rodriguez was again led to believe that release was imminent. Nevertheless, Rodriguez was not released from the county jail until December 31, 1991. After his release, defendant parole officers Cauffield and Williams were assigned to Rodriguez, and he alleges that they both refused to provide him with information from his file.

Rodriguez filed a § 1983 complaint in which he named "Doe," Jones, Halman, Cauffield, and Williams as defendants. The magistrate judge dismissed the complaint as frivolous pursuant to

28 U.S.C. § 1915(d),[1] apparently finding that Rodriguez's claims amounted to a denial of procedural due process which failed to give rise to a cause of action under § 1983 because adequate state remedies existed for the violation.[2] Rodriguez appeals from this determination.

II. STANDARD OF REVIEW

Dismissal of an *in forma pauperis* complaint is appropriate if the district court determines that it is frivolous, i.e., that "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). A complaint is legally frivolous under 28 U.S.C. § 1915(d) if it is premised on an "indisputably meritless legal theory." Id. at 327. We review a district court's § 1915(d) dismissal using an abuse of discretion standard. Denton v. Hernandez, 112 S. Ct. 1728, 1734 (1992).

III. ANALYSIS AND DISCUSSION

A. Illegal Incarceration

Rodriguez contends that the parole officers violated his due process rights by causing him to remain in jail for 43 days (November 19 - December 31) after he should have been released. Similarly, in Martin v. Dallas County, Texas, 822 F.2d 553, 554-55 (5th Cir. 1987), plaintiff Martin alleged that he was held in jail

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[1] The statute provides that "[t]he court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d).

[2] Despite Rodriguez's contentions, his complaint was not treated as a writ of habeas corpus, and the district court did not dismiss his complaint on habeas grounds.

for 3.5 weeks longer than his DWI sentence, and Martin complained that his wrongful incarceration constituted a deprivation of liberty without due process of law. As we wrote in Martin:

> Whether such deprivation came about intentionally or negligently, both of which allegations are found in the complaint, this aspect of the case falls within the ambit of Parratt v. Taylor and Hudson v. Palmer. Parratt and Hudson hold that no constitutional claim may be asserted by a plaintiff who was deprived of his liberty or property by negligent or intentional conduct of public officials, unless the state procedures under which those officials acted are unconstitutional or state law fails to afford an adequate post-deprivation remedy for their conduct.

Id. at 555 (citations omitted). In Martin, we held that no constitutional claim could be asserted because adequate post-deprivation remedies were available:

> Texas law afforded Martin remedies against his illegal detention both while it was underway and for post-deprivation compensatory relief. Martin could have sought habeas corpus relief pursuant to Tex.Crim.Proc.Code Ann. art. 11.01 or tort recovery for false imprisonment.

Id.

In Rodriguez's case, his due process contention seems to suggest that the parole officers failed to comply with state procedures, leading to Rodriguez's improper incarceration. Rodriguez does not allege that the state procedures themselves are invalid. Just as we noted in Martin, Texas law provides adequate remedies for procedural due process violations stemming from the detention of an individual beyond the proper date of release. See Martin, 822 F.2d at 555. Thus, because Rodriguez may obtain relief under state law, the district court did not abuse its discretion in

characterizing his procedural due process claim as frivolous and without a legal basis.

Liberally construed,[3] however, Rodriguez's complaint also gives rise to a plausible claim that "Doe," Jones, and Halman deprived him of his ***substantive*** rights because of his illegal imprisonment, in violation of the Fourth and Fourteenth Amendments. In paragraph 25 of his complaint, Rodriguez states that he "was detained illegally in the Dallas County Jail . . . from November 19, 1991 until December 31, 1991; with out [sic] charges pending against him." In paragraph 27, he realleges that "he was held illegally in jail with no charges." Such allegations can raise a plausible claim of a denial of a substantive right. See, e.g., Martin, 822 F.2d at 555 ("Martin's complaint, fairly read, also includes allegations that he was deprived of his substantive right to be free from illegal incarceration by the state, as guaranteed by the fourth, fifth, and fourteenth amendments."); Thomas v. Kippermann, 846 F.2d 1009, 1011 (5th Cir. 1988) ("Claims of false arrest, false imprisonment, and malicious prosecution involve the guarantees of the fourth and fourteenth amendments when the individual complains of an arrest, detention, and prosecution without probable cause."); Wheeler v. Cosden Oil & Chem. Co., 734 F.2d 254, 260 (5th Cir. 1984) ("[W]e conclude that the allegations in plaintiffs' complaint state a claim for arrest and imprisonment

[3] Rodriguez proceeded pro se in the district court and on appeal. As we have repeatedly stated, the allegations of a pro se litigant are to be liberally construed. See, e.g., Securities and Exch. Comm'n v. AMX, Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993).

without probable cause in violation of plaintiff's Fourth Amendment rights. We have repeatedly recognized such claims as actionable under § 1983.").

As we stated in Martin, the "[v]iolation of a substantive, as opposed to a procedural due process, constitutional right does not fall within the limitations of Parratt/Hudson," and as a consequence, the availability of adequate state-law remedies is not relevant to the judicial analysis. See Martin, 822 F.2d at 555. If "Doe," Jones, and Halman acted negligently in causing Rodriguez's extended incarceration, Rodriguez cannot recover. See id. (citing Davidson v. Cannon, 474 U.S. 344 (1986)). Because it is conceivable that these parole officers acted intentionally, however, Rodriguez's substantive illegal imprisonment claim is not frivolous, and the district court abused its discretion in dismissing it as such.[4]

As we have alluded to, Rodriguez's substantive illegal imprisonment claim is only directed against "Doe," Jones, and Halman. With respect to Cauffield and Williams, Rodriguez only

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[4] We note that the magistrate judge did recognize the potential for a violation of a substantive right:

> The Court does note that in Martin, the Fifth Circuit Court of Appeals did state that the complaint was also capable of being construed to state claims under the fourth, fifth and fourteenth amendments and that such claims were not subject to disposition under Parratt.

The magistrate judge then stated, however, that "[t]he Court has scrutinized the complaint in the instant case . . . and can find no allegations which it believes to state a claim of that nature." As mentioned, we disagree, because a liberal construction of Rodriguez's pro se complaint does give rise to a substantive claim of false imprisonment/illegal incarceration.

alleges that they refused to provide him with information from his parole file ***after*** his release; there are no allegations that Cauffield and Williams were responsible for Rodriguez's delayed release from jail or for any substantive constitutional violations. Rodriguez maintains this position on appeal. Thus, as to Cauffield and Williams, the district court was correct in dismissing Rodriguez's illegal imprisonment claim, but as to "Doe," Jones, and Halman, Rodriguez has a substantive illegal imprisonment claim that survives a § 1915(d) dismissal.[5]

B. Equal Protection

Rodriguez also contends that the actions of the parole officers violated his right to equal protection. In addition, he seems to argue that he is challenging an unnamed state parole statute on equal protection grounds.

Rodriguez's district court pleadings and appellate arguments do not give rise to any equal protection violation, as he fails to allege any unfair or illegitimate classification, and we do not see any upon our own review. See, e.g., Brennan v. Stewart, 834 F.2d 1248, 1257 (5th Cir. 1988) ("[A] violation of equal protection

[5] The claims against Cauffield and Williams relating to their refusal to provide Rodriguez with information from his parole file and to Williams making an alleged false statement about Rodriguez have been waived on appeal. Rodriguez simply does not repeat his allegations against Cauffield and Williams in his appellate brief, and, as mentioned, he does not contend that they were responsible for any constitutional violations. Simply put, even a pro se litigant must brief issues on appeal, see Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993), and the "[f]ailure to prosecute an issue on appeal constitutes a waiver of the issue." United States v. Green, 964 F.2d 365, 371 (5th Cir. 1992).

occurs only when the government treats someone differently than others similarly situated; if the challenged government action does not appear to classify or distinguish between two or more relevant persons or groups, then the action -- even if irrational -- does not deny them equal protection of the laws."). Moreover, Rodriguez does not indicate which parole statute he wishes to challenge, and he did not raise a challenge to any state statute in his district court pleadings. Thus, Rodriguez's equal protection claim against the parole officers is frivolous and without merit.

C. Objections to the Findings of the Magistrate Judge

Rodriguez alleges that the district court did not provide him with a copy of the magistrate judge's report and recommendations, thus depriving him of the opportunity to object to the report. He contends that the district court erred by dismissing his complaint without considering any objections.

The docket sheet indicates that the district court sent a copy of the magistrate judge's report to Rodriguez. Even if the district court did not send a copy, however, the court's failure to send the report amounts to harmless error. Typically, "the failure of a party to file written objections to proposed findings and recommendations in a magistrate's report . . . shall bar the party from a de novo determination by the district judge of an issue covered in the report and shall bar the party from attacking on appeal factual findings accepted or adopted by the district court except upon grounds of plain error or manifest injustice." Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. Unit B 1982).

Nevertheless, the district court's order adopting the findings of the magistrate judge stated that the district court had made "an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge" -- indicating that the district court had conducted a de novo review of the case. Moreover, we have considered Rodriguez's arguments on appeal and we have not barred him from attacking any findings adopted by the district court. Finally, Rodriguez does not indicate how the opportunity to object to the report would have affected the outcome of his case. Simply put, Rodriguez's case was not affected by any alleged error in the transmittal of the magistrate's findings.[6]

IV. CONCLUSION

For the foregoing reasons, as to defendants "Doe," Jones, and Halman, we VACATE the district court's judgment of dismissal on Rodriguez's substantive illegal incarceration claim, and we REMAND that claim to the district court for further proceedings. In all other respects, the judgment of the district court is AFFIRMED.

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[6] Rodriguez requests appointment of counsel to represent him in the district court. There is no automatic right to appointment of counsel in a § 1983 lawsuit. See Cupit v. Jones, 835 F.2d 82, 86 (5th Cir. 1987). Furthermore, a district court is not required to appoint counsel in the absence of "exceptional circumstances," which are dependent on the type and complexity of the case and the abilities of the individual pursuing that case. See id. Because Rodriguez did not ask the district court to appoint him counsel, we have no determination to review. Cf. id. ("We will overturn a decision of the district court on the appointment of counsel only if a clear abuse of discretion is shown."). On remand, Rodriguez will have another opportunity to request the appointment of counsel from the district court.