

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-11038
Summary Calendar

RONNIE FRANK CURRY,

Plaintiff-Appellant,

VERSUS

TARRANT COUNTY, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(4:94 CV 710 A)

June 21, 1995

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:¹

Curry appeals the district court's dismissal of his pro se and in forma pauperis § 1983 suit against Tarrant County, Texas pursuant to 28 U.S.C. § 1915(d). We affirm.

I.

Ronnie Frank Curry, an inmate at the Tarrant County Corrections Center ("TCCC"), filed a 42 U.S.C. § 1983 civil rights complaint against Tarrant County alleging that the TCCC violated his First Amendment rights by tampering with his legal mail. The district court held a Spears hearing by telephone to assess the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

factual basis for Curry's claims. See Spears v. McCotter, 766 F.2d 179, 181 (5th Cir. 1985). Curry apparently mailed a notice of appeal and several duplicate copies of the notice to the state court clerk in order to perfect his appeal from a state burglary conviction. According to Curry, the envelope was later returned undelivered. The end of the envelope had been ripped open, and Curry's notice of appeal was missing. The postage stamp was also missing. The only additional mark on the envelope was a "postage due" stamp presumably placed on the envelope by the post office. Neither Curry nor the TCCC could explain the disappearance of Curry's notice of appeal. Following the hearing, the district court dismissed Curry's complaint as frivolous under § 1915(d). Curry timely appealed.

II.

Pursuant to 28 U.S.C. § 1915(d), a district court may dismiss an in forma pauperis complaint as frivolous if the complaint's realistic chance of ultimate success is slight or if the complaint has "no arguable basis in law or fact." Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986). We review a dismissal under § 1915(d) for an abuse of discretion. Id.

A.

Curry first alleges that the TCCC interfered with his right of access to the courts by tampering with his legal mail. To prevail on his denial-of-access-to-the-courts claim, Curry must prove not only that the TCCC interfered with his access to the courts, but also that the TCCC's interference actually prejudiced his state criminal appeal. Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.),

cert. denied, 112 S. Ct. 2974 (1992). During the Spears hearing, Curry conceded that he was not prejudiced by the loss of his notice of appeal because his attorney had already timely filed another notice of appeal with the state court clerk. Absent evidence that the TCCC's actions prejudiced Curry, the district court did not abuse its discretion in dismissing his denial-of-access-to-the-courts claim.

B.

Curry further contends that the TCCC's actions violated his First Amendment right to freedom of speech. Inspection or censorship of inmate mail does not violate the First Amendment if the prison's actions are "reasonably related to a legitimate penological interest." Brewer v. Wilkinson, 3 F.3d 816, 824 (5th Cir. 1993)(quoting Turner v. Safley, 482 U.S. 78, 89 (1987)). After reviewing the record, we are persuaded that Curry's allegations do not state a cognizable First Amendment claim. The inspection of incoming inmate mail for contraband generally serves a legitimate penological interest. Id. at 825. Thus, the mere fact that Curry's envelope was opened outside his presence does not give rise to a First Amendment claim. Id.²

The loss of Curry's notice of appeal similarly does not rise to the magnitude of a constitutional violation. Curry's testimony

² Curry conceded that he does not know when the envelop was opened. However, based on the presence of the "postage due" stamp on the envelope, the district court was apparently persuaded that the envelop reached the post office unopened and was later opened by the prison mailroom when it was returned by the post office. The envelope would thus have been incoming mail when it was opened. The record does not reveal any evidence that TCCC opened Curry's envelop before sending it to the post office.

during the Spears hearing failed to reveal any evidence of either intentional misconduct or a pattern of censorship by prison officials. See Eubanks v. Mullen, No. 94-10103, slip op. at 11 (5th Cir. December 14, 1994)(unpublished). Indeed, Curry conceded during the hearing that the TCCC did not prevent him from communicating with his attorney or the courts on any other occasion. Thus, the record reveals at most an isolated instance of mail mishandling that did not ultimately prevent Curry from timely filing his notice of appeal. Such an isolated incident of mail mishandling is insufficient to give rise to a First Amendment violation. See Smith v. Maschner, 899 F.2d 940, 944 (10th Cir. 1990)("Such an isolated incident, without any evidence of improper motive or resulting interference with [the inmate's] right to counsel or access to the courts, does not give rise to a constitutional violation."). We therefore conclude that the district court did not err in dismissing Curry's complaint.³

AFFIRMED.

³ Curry filed a motion with this court for appointment of counsel. There is no general right to counsel in a civil rights action. Branch v. Cole, 686 F.2d 264 (5th Cir. 1982). The facts and legal issues in this case are not complex and Curry has adequately briefed his arguments. Curry's motion for appointment of counsel is therefore denied. Curry also filed a letter to the clerk of this court opposing the clerk's order granting the defendant an extension of time to file its brief. Treating that letter as a motion for reconsideration of the clerk's order, the motion is denied.