

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-11070
Summary Calendar

PEDRO GOMEZ,

Plaintiff-Appellant,

VERSUS

DON WILEY, Patrolman, Cisco Police Department,

Defendant-Appellee.

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

(1:94-CV-157-C)

(March 2, 1995)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:*

Facts and Prior Proceedings

Proceeding *pro se* and *in forma pauperis*, Pedro Gomez, a prisoner of the State of Texas, filed a complaint under 42 U.S.C. § 1983. This complaint was assigned cause No. 194-CV-0157C in the district court. Shortly after the filing of this complaint, the district court issued an order directing the clerk to unfile and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

return Gomez' pleading to him because the named defendants in the caption of the complaint conflicted with the named defendant in the body of the complaint. Approximately two weeks later the district court dismissed the action *without* prejudice.

In response, Gomez filed a motion for appointment of counsel because he was having difficulty filing his claim and could not obtain assistance. Gomez also filed objections to the district court's dismissal, claiming that he was having difficulty with prison mailroom personnel each time he attempted to mail all four copies of his complaint.

The district court construed the objections as a motion for reconsideration of the order unfiled Gomez' complaint and concluded that fault for incorrectly filling out the complaint forms lay with Gomez and not with the clerk or prison officials. The district court denied both the motion for reconsideration and the motion for appointment of counsel. Gomez filed a timely notice of appeal.

Discussion

After careful review of the record, we affirm the dismissal by the district court. The problem with Gomez' filings, as the district court attempted to communicate, is that the caption of the instant complaint and the named defendant inside the body of the instant complaint are not consistent. Specifically, the caption on Gomez' instant complaint reads, PEDRO GOMEZ v. RONNIE B. WHITE, SHERIFF and MS. DAWN BECKETT, DEPUTY JAIL ADMINISTRATOR. The named

defendant in the body of the complaint, however, is Don Wiley.¹ The district court's orders carry the same style as that of the instant appeal, PEDRO GOMEZ v. DON WILEY. In addition, further confusion exists because Gomez has submitted exhibits in the record of this action that are styled with a different cause number. Specifically, exhibits D & F relate to cause No. 1-94-CV-144C, styled PEDRO GOMEZ V. DON WILEY, which is the style and cause number for a prior proceeding initiated by Gomez on October 6, 1994. A quick review of page three of the instant complaint confirms that Gomez did indeed disclose that he had a pending lawsuit against Don Wiley, identified as cause No. 1-94-CV-144C.

The dismissal of Gomez' complaint was *without* prejudice, therefore he may refile his complaint in the district court.² We encourage Gomez and the district court to resolve the problems we have mentioned in this opinion.³ Because Gomez must refile his complaint, we affirm the denial of his motion for appointment of counsel at this time.

Conclusion

Based on the foregoing, we AFFIRM the district court.

¹ The problem is easily recognized by examining page one of the complaint and comparing it to page five of the complaint, section III, entitled "Parties".

² It is apparent in Gomez' brief to this Court that he does not understand why his complaint was dismissed by the district court. The dismissal was not because the complaint was missing the attached statement of facts. The dismissal was based on the failure of Gomez to identify with certainty who he was suing.

³ Gomez should also make sure that a statement of the facts forming the basis of his complaint are included with the complaint filed in district court.