

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20030

FAVIS C. MARTIN,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director
Texas Department of Criminal
Justice, Institutional Division,
and Texas Department of Corrections,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 92 2810)

March 23, 1995

Before JONES, DUHÉ and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:*

Favis C. Martin appeals the judgment of the district court dismissing his complaint against parole board officials who allegedly refused to give him parole in retaliation for his testimony in a criminal trial. For the following reasons, the judgment of the district court is affirmed.

BACKGROUND

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Favis C. Martin was convicted of first degree murder in June 1970 and was sentenced to life imprisonment. Martin's conviction was affirmed on appeal. See Martin v. State, 475 S.W.2d 265 (Tex. Crim. App.), cert. denied, 409 U.S. 1021, 93 S.Ct. 469, 34 L.Ed.2d 312 (1972). Martin is presently incarcerated in a federal facility in Tennessee as a result of his participation in a class action entitled Brown v. Estelle, CA H-82-401 (S.D. Tex). Brown was instituted to address alleged acts of retaliation by prison officials against prisoners following their participation in the criminal trial of Eroy Brown, a prisoner who allegedly murdered a warden and prison farm manager. The Brown litigation was concluded by an arbitration agreement between a class of prisoners and officials with the Texas Department of Criminal Justice (TDCJ). Martin, although still under the custody of the TDCJ, was transferred to a federal prison for security purposes because he testified on behalf of the defense at Brown's criminal trial.

Martin filed a pleading entitled "MOTION FOR CONTEMPT OF COURT" in the Brown proceeding against several members of his parole board. The magistrate judge construed the pleading as a petition for habeas corpus relief. Martin alleged in the pleading that the defendants are in contempt of the Brown arbitration agreement because they continue to deny him parole in retaliation for his testimony at Eroy Brown's criminal trial.

Ruling upon a summary judgment motion filed by the defendants, a magistrate judge recommended that the respondent's motion for summary judgment be granted because Martin's claim that he was

denied parole did not present a constitutional issue. The magistrate judge further determined that Martin has failed to allege sufficient facts to support his claim that he is being denied equal protection in retaliation for his involvement in the civil rights case. The district court adopted the magistrate judge's recommendation over Martin's objections and granted the respondent's motion for summary judgment. Martin appeals the judgment of the district court.¹

DISCUSSION

This Court reviews a district court's grant of summary judgment de novo. Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). Summary judgment under Fed. R. Civ. P. 56(c) is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Neither habeas nor civil rights relief can be had absent the allegation by a plaintiff that he or she has been deprived of some right secured to him by the United States Constitution or the law of the United States. Hillard v. Board of Pardons and Paroles, 759 F.2d 1190, 1192 (5th Cir. 1985).

¹Although his motion to appeal in forma pauperis was denied at the district court level, we gave him leave to proceed in forma pauperis.

Favis Martin contends that he is being denied parole because he testified in Eroy Brown's murder trial. He argues that this retaliatory action violates the Equal Protection Clause. This Court has not determined whether an inmate has a constitutional right to be free from retaliation for his legal activities on behalf of fellow inmates. After examining the record and the allegations made by the Martin, we find that, even if such a right exists, Martin has produced no proof to defeat summary judgment.

Although Martin alleges that he is being denied parol because of his participation in the Brown litigation, the only evidence that he has produced in support of his allegations are the minutes of the parole board that considered his parole. There is nothing within these minutes from which one could infer that Martin is being denied parole because of his participation in the Brown litigation. Thus, the district court did not err in granting summary judgment.

Martin has filed a motion for the "reappointment" of counsel who represented the prisoner class in the Brown litigation "to enforce the provisions of the Arbitration agreement." This case does not present exceptional circumstances, and Martin's pleadings demonstrate his ability to provide himself with adequate representation. See Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). The motion for appointment of counsel is denied.

Martin has also filed a motion for leave to supplement the record with a document which was not submitted in the district court. This court will not consider evidence which is presented

for the first time on appeal. See U.S. v. Flores, 887 F.2d 543, 546 (5th Cir. 1989)(holding that this Court ordinarily will not enlarge the record on appeal to include factual matters not presented to the district court). This motion is also denied.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED and motions filed by Martin are DENIED.