

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20052
Conference Calendar

KIRBY GARDNER,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-H-92-3301
- - - - -
(July 21, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Kirby Gardner filed a civil rights suit under 42 U.S.C. § 1983 alleging that he should have been classified as a State Approved Trustee (SAT). Gardner asserted that he was denied due process by the procedure used to determine his status. Procedural due process questions are examined in two steps: (1) whether there exists a liberty or property interest which has been interfered with by the state government; and (2) whether the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

procedures attendant upon that deprivation were constitutionally sufficient. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). The Supreme Court has held that "a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show `that particularized standards or criteria guide the State's decisionmakers.'" Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) (quoting Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 467, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981) (Brennan, J. concurring)). A statute that contains the term "shall" incorporates mandatory language. Board of Pardons v. Allen, 482 U.S. 369, 377-78, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987).

Gardner alleges that the Classification Plan Handbook mandates that inmates having no recent pattern of in-prison assaultive behavior and no pattern of free world convictions for offenses of violence or aggressive sexual misconduct be given SAT status. Even if the Classification Plan Handbook does create an interest for prisoners who do not have a pattern of free world convictions for offenses of violence or aggressive sexual misconduct, Gardner concedes that he has such convictions. Gardner argues that these convictions were not recent, but his own allegations show that a pattern of free world convictions need not be recent to preclude SAT status.

Even assuming that Gardner's classification was in violation of TDCJ-ID rules, a violation of prison regulations, without more, does not give rise to a federal constitutional violation.

Hernandez v. Estelle, 788 F.2d 1154, 1158 (5th Cir. 1986). The district court did not abuse its discretion by dismissing this complaint as frivolous because it lacked "an arguable basis either in law or in fact." Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1733-34, 118 L.Ed.2d 340 (1992) (internal quotation omitted). Given this conclusion and that Gardner has not demonstrated that he satisfied the prerequisites to a class under Fed. R. Civ. P. 23(a), the district court's denial of class action status should also be affirmed.

Gardner argues for the first time on appeal that he did not receive equal protection under the law because inmates similarly situated to himself were granted SAT status. This Court need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). This issue involves factual questions as is evidenced by Gardner's request for production. It is not reviewable by the Court. Accordingly, Gardner's motion for production of documents and motion to compel are denied.

AFFIRMED; MOTIONS DENIED.