UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20110
Summary Calendar

RORY KEITH JONES,

Plaintiff-Appellant,

VERSUS

CITY OF HOUSTON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

(CA H 87 0912)

(October 14, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

On March 23, 1987, Texas prisoner Rory Keith Jones filed a civil rights suit against the City of Houston, its mayor, and its police chief. He alleged that on November 3, 1982, officer Wayne Wendell and other police officers seized his automobile unlawfully.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

He proceeded IFP. Without giving Jones an opportunity to amend his complaint, the district court dismissed the case as frivolous pursuant to 28 U.S.C. § 1915(d). Holding that the district court must give Jones an opportunity to amend his complaint, this Court vacated and remanded.

On remand, the district court held a hearing pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). Jones alleged that, on November 3, 1982, in the course of arresting him for an unrelated crime, officers seized an automobile, asserting that it was stolen. Jones alleged that the car belonged to him. The police kept the car. Jones sued the mayor and the police chief because he believed them to be responsible for the acts of the police officers. No theft charges were ever filed against Jones regarding the automobile seized by the arresting officer. After the Spears hearing, the district court appointed counsel to represent Jones and ordered an amended complaint alleging facts to support the claims of municipal and supervisory liability and overcoming qualified immunity and joining additional parties, such as officer Wendell and any other officers who participated in the search and seizure.

Instead of an amended complaint, appointed counsel filed a report to the district court under seal requesting to withdraw. The district court granted counsel's motion to withdraw and appointed substitute counsel. Substitute counsel likewise moved to withdraw and the district court granted that motion. The

defendants were never served. Based upon the reports of both counsel, which concluded that Jones' claims were probably time-barred, the district court dismissed the action.

Jones, acting pro se, then filed an amended complaint that the district court never addressed. In that complaint, he named officer Wendell and the members of the Houston City Council, which allegedly voted to deny him compensation for the car. This Court dismissed Jones' appeal for the omission of a separate judgment. The district court thereafter entered a separate judgment. Jones filed a timely notice of appeal from that judgment.

OPINION

The district court did not state a basis in statute or rule for the dismissal on remand. When a district court does not expressly rely on a particular procedural vehicle but dismisses an IFP complaint before service of process, this Court assumes that the dismissal was based on frivolousness pursuant to 28 U.S.C. § 1915(d). Rourke v. Thompson, 11 F.3d 47, 49 (5th Cir. 1993); Spears v. McCotter, 766 F.2d 179, 181 (5th Cir. 1985). Such a dismissal is proper if the claims have no arguable basis in law or fact. 28 U.S.C. § 1915(d); Booker v. Koonce, 2 F.3d 114, 115 (5th Cir. 1993). Review is for abuse of discretion. Booker, 2 F.3d at 115.

Statute of Limitations

Jones argues that his action is not time-barred. There is no federal statute of limitations for actions brought pursuant to 42 U.S.C. § 1983. Federal courts borrow the forum state's general

personal injury limitations period. Owens v. Okure, 488 U.S. 235, 249-50, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989); Ali v. Higgs, 892 F.2d 438, 439 (5th Cir. 1990). In Texas, the applicable period is two years. Tex. Civ. Prac. & Rem. Code §16.003(a) (West 1986); Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989).

A federal court applies state tolling provisions that apply to prisoners. Pete v. Metcalfe, 8 F.3d 214, 217 (5th Cir. 1993). Before September 1, 1987, imprisonment tolled the Texas limitations periods. Id. Release from custody, even if followed by a return to prison, ended the tolling. Id. For any individual who was continuously imprisoned since the accrual of the action, a state statutory change resulted in the limitations period beginning to run on September 1, 1987. Id. at 217-18.

Jones claims that on the date of the seizure of the automobile, November 3, 1982, officers first took Jones into custody and then found and seized the car. Jones has apparently remained in custody continuously since the night of his arrest. Arrest qualifies as imprisonment for the purpose of the tolling provision. Glover v. Johnson, 831 F.2d 99, 100 (5th Cir. 1987).

Appellees imply that Jones was not under arrest at the time the car was seized, yet they concede that both Jones' arrest and the car's seizure occurred on November 3, 1982. If Jones was arrested after the car was seized, then the action technically would accrue before Jones' imprisonment. Assuming that to be the case, a decision would have to made as to whether a continuous imprisonment commencing on the same date as the occurrence of the

complained-of act tolled the statute of limitations.

The district court made no findings as to when Jones' cause of action accrued, when he was arrested or whether any tolling period under Texas law commenced. Even if the appellees' facts are correct, however, it seems unlikely that the few moments between Jones' arrest and the car's seizure would prevent the tolling period from beginning. Nevertheless, this Court cannot determine from the record the sequence of events which in fact occurred.

The Amended Complaint

Federal Rule of Civil Procedure 15(c) allows a party to "amend an operative pleading despite an applicable statute of limitations in situations where the parties to litigation have been sufficiently put on notice of facts and claims which may give rise to future, related claims." Kansa Reins. Co. v. Congressional Mortgage Corp., 20 F.3d 1362, 1367 (5th Cir. 1994). "[T]he best touchstone for determining when an amended pleading relates back to the original pleading is the language of Rule 15(c): whether the claim asserted in the amended pleading arises `out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.'" FDIC v. Conner, 20 F.3d 1376, 1386 (5th Cir. 1994).

"[W]hen new or distinct conduct, transactions, or occurrences are alleged as grounds for recovery, there is no relation back, and recovery under the amended complaint is barred by limitations if it was untimely filed." Holmes v. Greyhound Lines, Inc., 757 F.2d 1563, 1566 (5th Cir. 1985). "The fact that an amendment changes

the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading." FDIC v. Bennett, 898 F.2d 477, 480 (5th Cir. 1990).

Jones' claims against the city, mayor, and police chief probably survived the amendment naming them because they were named in the original complaint as actors in the facts alleged. A claim against officer Wendell would present a problem for Jones. He identified Wendell in the original complaint but did not name him as a defendant. The district court should resolve these questions regarding amendments to the pleadings.

Jones' original complaint, however, was dismissed eight days after its filing and without service of process. Arguably, an amendment naming Wendell as a defendant would be permitted and would not prejudice Wendell because, as no defendant was served, he would stand in the same position as any other defendant. Additionally, he likely would be represented by the attorney for the city, which was named originally. When an original party and a party sought to be added use the same mailing address and same counsel and are located in the same complex, this Court imputes notice to the added defendant through counsel. Hendrix v. Memorial Hosp., 776 F.2d 1255, 1257-58 (5th Cir. 1985).

In sum, it is likely that Jones' amended complaint would not be time-barred. If the persons who would likely be defendants in such a complaint could be liable if the amended complaint is

timely, a remand would be appropriate.

Possible Liability

Jones argues that the City of Houston, its mayor, its police chief, and the officer who allegedly seized the automobile are liable. A suit against a government official in his official capacity is properly treated as a suit against the governmental entity. Hafer v. Melo, 502 U.S. 21, ___, 112 S. Ct. 358, 361, 116 L. Ed. 2d 301 (1991). A municipality may be liable only if official policy or governmental custom caused the deprivation of constitutional rights. Fraire v. City of Arlington, 957 F.2d 1268, 1277 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992); Monell v. New York City Dep't of Social Serv., 436 U.S. 658, 690-94, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Liability is incurred only when the municipality "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or when "constitutional deprivations [occurred] pursuant to governmental `custom' even though such a custom has not received formal approval through the body's official decision-making channels." Monell, 436 U.S. at 690-91. An official who is sued in his personal capacity cannot be liable under § 1983 on the theory of respondeat superior; liability requires that he was personally involved in the plaintiff's injury. Williams v. Luna, 909 F.2d 121, 123 (5th Cir. 1990).

It seems unlikely that Jones will be able to make out a case of personal involvement of the part of the mayor and police chief. Accordingly, claims against the city officials should be treated as

claims against the city.

Jones has a cause of action against the city if its policy violated his federal constitutional rights. He says that the City Council voted to deny him relief. No findings have been made about the alleged vote at this point. Consequently, it is unclear whether the city had any policy applicable to this case.

Claims against the officer or officers who seized the car would be subject to the defense of qualified immunity. Under the doctrine of qualified immunity, a state official enjoys immunity from suit for damages for actions taken in his official capacity and within the scope of his authority so long as his actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Whether such a defense would be available to the officer or officers cannot be determined from the record because the district court has not entertained the amended complaint.

Jones's first counsel determined in 1990 that the evidence of the ownership of the seized car was inconclusive. He stated that proving ownership would be difficult for Jones. A dismissal under § 1915(d), however, depends on the frivolity or malice of the allegations, not on the quality of the evidence. Denton v. Hernandez, ___ U.S. ___, 112 S. Ct. 1728, 1733, 118 L. Ed. 2d 340 (1992).

The record does not reflect that Jones's claim, if properly amended, would not have an arguable basis in law and fact. The

record tends to support the conclusion that his claims are not time-barred. In addition, his claims against the city might be viable, and the quality of any qualified immunity defense has not yet been determined. In short, the § 1915(d) dismissal without consideration of an amended complaint was premature.

We VACATE the decision of the trial court and REMAND the case for further proceedings consistent with this opinion.