

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-30615  
(Summary Calendar)

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ROBERT J. CLARK,

Plaintiff-Appellant,

versus

CHARLES C. FOTI, JR.,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CA-94-2787-L)

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(March 8, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

In this prisoner's civil rights complaint under 42 U.S.C. § 1983, Plaintiff-Appellant Robert J. Clark appeals the district court's dismissal of his action pursuant to 28 U.S.C. § 1915(d) as

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

frivolous. For the reasons set forth below, we affirm the rulings of the district court in large part but vacate and remand for further development in connection with the ruling dismissing Clark's Eighth Amendment claims implicating conditions of confinement.

## I

### FACTS AND PROCEEDINGS

As a state prisoner sentenced to the custody of the Louisiana Department of Public Safety and Corrections but currently housed in the Orleans Parish Prison (OPP), Clark filed a pro se, in forma pauperis (IFP) civil rights complaint, 42 U.S.C. § 1983, challenging the conditions of his confinement. Without conducting a Spears<sup>1</sup> hearing or otherwise permitting Clark to develop the factual basis of his claims, the magistrate judge concluded that the complaint was frivolous and recommended dismissal. The district court adopted the report and recommendation of the magistrate judge and dismissed the complaint as frivolous.

## II

### ANALYSIS

#### Objections to the Magistrate Judge's Report

Clark argues that the district court improperly dismissed his complaint without considering his timely objections to the magistrate judge's report. A party is entitled to a de novo review of the record by the district court if such party files objections to the magistrate judge's report. See Longmire v. Guste, 921 F.2d

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<sup>1</sup>Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

620, 623 (5th Cir. 1991). The magistrate judge's report and recommendation was entered on September 7, 1994, and Clark timely filed his objections on September 20, the tenth day following entry of the report and recommendation. See Fed. R. Civ. P. 6(a) (computation of time); 72(b) (time for filing objections to magistrate judge's report and recommendation). The district court clearly erred in finding that Clark had failed to file any objections.

Failure to consider the timely objections, however, is subject to a harmless error analysis. Smith v. Collins, 964 F.2d 483, 485 (5th Cir. 1992). Clark's objections merely re-urged the claims raised in his complaint, and the district court conducted a de novo review of the complaint and record. We are convinced that any error in failing to consider the objections was harmless here. Smith, 964 F.2d at 485 (failure to consider written objections which do not challenge the magistrate judge's factual findings but merely re-urge legal arguments is harmless error).

A complaint filed IFP can be dismissed sua sponte if the complaint is frivolous. 28 U.S.C. § 1915(d); Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986). A complaint is frivolous if it lacks an arguable basis in law or fact. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992). We review the district court's dismissal for an abuse of discretion.

A. Place of Confinement

Clark posits that he is improperly housed at OPP and is entitled to a transfer to a state-run facility. Generally, an

inmate has no constitutional right to be imprisoned in a particular institution, even if life in the one institution is significantly less desirable than in another. Maddox v. Thomas, 671 F.2d 949, 950 (5th Cir. 1982). Under Louisiana law, state officials have discretion to place a state prisoner in any institution, including parish prisons. See La. Rev. Stat. Ann. § 824(A), (B) (West 1992 & Supp. 1995). Clark does not have a liberty interest in being confined in a state-run institution. See Olim v. Wakinekona, 461 U.S. 238, 249, 103 S. Ct. 1741, 75 L.Ed.2d 813 (1983) (state statute or regulation creates protected liberty interest for prisoner when it uses mandatory language to place substantive limit on official discretion). The district court did not abuse its discretion in dismissing this claim as frivolous.

B. Equal Protection

Clark also claims that he was denied equal protection because he does not receive the same benefits and privileges as inmates housed in state-run facilities. To establish an equal protection violation Clark must demonstrate, inter alia, that similarly situated individuals were treated differently. Muhammad v. Lynaugh, 966 F.2d 901, 903 (5th Cir. 1992). All of the inmates at OPP are subject to the same rules and regulations. Nothing indicates that the inmates at parish prisons are, for purposes of an equal protection analysis, similarly situated to inmates in a state facility. See id. (prisoner in one prison unit not "similarly situated" to prisoner housed in another unit). Therefore, Clark cannot establish an equal protection violation;

this claim too was properly dismissed as frivolous.

C. Access to the Courts

Clark next contends that he is being denied access to the courts because the law library and legal assistance available at OPP are insufficient. A plaintiff cannot establish a cognizable denial-of-access-to-the-courts claim unless his position was prejudiced by the alleged deprivation. Richardson v. McDonnell, 841 F.2d 120, 122 (5th Cir. 1988). Clark has not alleged that he was actually denied access to the court or that any pending litigation was prejudiced, and therefore has not stated a cognizable § 1983 claim. See Mann v. Smith, 796 F.2d 79, 84 n.5 (5th Cir. 1986). This claim too is wholly lacking in merit and thus was properly dismissed.

D. Eighth Amendment

Finally, Clark claims that the conditions of his confinement violate the Eighth Amendment. We review a prisoner's challenge of his conditions of confinement under the "deliberate indifference" standard. Wilson v. Seiter, 501 U.S. 294, 303 (1991). "To the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Conditions of confinement which do not lead to deprivations of essential food, medical care, or sanitation do not amount to an Eighth Amendment violation. Id. at 348.

Clark contends that the conditions at OPP violate the Eighth Amendment because he is permitted outdoor exercise for only one

hour per week; there is inadequate ventilation in the parish prison; and it is overcrowded. These allegations are intertwined because the degree of exercise constitutionally required is dependent on the size of the inmate's cell, the amount of time that the inmate spends in his cell, and the overall duration of the confinement. See Green v. Ferrell, 801 F.2d 765, 771 (5th Cir. 1986). As Clark was not given an opportunity to develop the factual basis of his claims in the district court, it is impossible to tell from the record whether the combination of essentially no outdoor exercise, inadequate ventilation, and overcrowding make the conditions of confinement at OPP constitutionally deficient. Therefore, the portion of the judgment dismissing this aspect of Clark's Eighth Amendment claim must be vacated and the case remanded for further proceedings consistent with this opinion.

In the same vein, Clark argues that the food served also violates the Eighth Amendment because the quantity of food is inadequate, and it is prepared and stored under unsanitary conditions. To the extent that Clark argues that the food is inadequate because he receives only two meals per day, his claim fails to rise to the level of a constitutional violation. See Green, 801 F.2d at 770-71. To the extent that Clark argues that the food is nutritionally inadequate and prepared under unsanitary conditions, however, he must be permitted to develop further the factual basis of his claims. Therefore, the portion of the judgment dismissing this aspect of his Eighth Amendment claim is

vacated and the case remanded for further proceedings consistent with this opinion.

E. Appointment of Counsel

Finally, Clark has filed a motion for appointment of counsel. But, as he has presented his case adequately to us, and has not demonstrated that his case presents such exceptional circumstances that appointment of counsel would be required as a matter of law, his motion is denied. Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982).

AFFIRMED in part and VACATED and REMANDED in part.