

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

---

No. 94-40443  
(Summary Calendar)

---

RAY COLGROVE,

Plaintiff-Appellant,

versus

ANDY COLLINS, ET AL.,

Defendants-Appellees.

---

Appeal from the United States District Court  
for the Eastern District of Texas  
(6:94-CV-175)

---

(August 17, 1994)

Before JOLLY, WIENER, and STEWART, Circuit Judges.

PER CURIAM:<sup>1</sup>

Plaintiff-appellant, Roy Colgrove, was incarcerated in the Texas Department of Criminal Justice (TDCJ). Colgrove filed this pro se, 42 U.S.C. § 1983 action against Andy Collins, Institutional Director; H. E. Kinker, Warden II; and Sergeant William Miers, for loss of property. Colgrove also moved for in forma pauperis (IFP) status. The magistrate judge recommended a dismissal, with prejudice, of Colgrove's property claim as frivolous. The district

---

<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court adopted the report and recommendation of the magistrate judge and dismissed Colgrove's complaint with prejudice. Colgrove appeals. For the following reasons, we vacate and remand.

#### FACTS

Colgrove alleges the following facts in his complaint: During a routine search of his cell, one of the defendants took some art work. His requests to view the material taken and to receive a confiscation form were denied. Colgrove then filed a grievance form, in compliance with TDCJ procedures, which Warden Kinker denied. Kinker claimed that, because the art work contained a swastika, it was Aryan Brotherhood material and was therefore contraband. Kinker also indicated the material was attached to a disciplinary report for the purpose of taking disciplinary action against Colgrove. No copy of the art work was made, and he never saw the art work again.

Colgrove asserted that the actions of the defendant constituted a direct violation of due process, part of a policy of arbitrary harassment of inmates, and theft of Colgrove's personal property. Colgrove requested as relief, \$1,000 for the loss of his property. Colgrove also requested that Sgt. Miers be discharged from his duties at TDCJ and not allowed to reapply for employment for five years.

The magistrate judge granted Colgrove's motion to proceed IFP. The magistrate judge interpreted Colgrove's claim as one for an arbitrary deprivation of property. The magistrate judge determined that because there was an adequate state post-deprivation remedy,

there was no violation of the Due Process Clause of the Fourteenth Amendment. The magistrate judge recommended dismissing Colgrove's property claim with prejudice, pursuant to 28 U.S.C. § 1915(d), as having no basis in law. Colgrove filed objections to the magistrate judge's report, contending that the destruction of his property was in retaliation to his filing legal complaints and that such retaliation was an attempt to block his access to the courts. Over Colgrove's objection, the district court adopted the magistrate judge's findings and recommendation and dismissed Colgrove's complaint with prejudice.<sup>2</sup>

Colgrove appeals, asserting that the district court erred in dismissing his complaint as frivolous, without allowing him the opportunity to further develop his action through a Spears<sup>3</sup> hearing. We agree.

#### DISCUSSION

A complaint filed in forma pauperis (IFP) can be dismissed by the court sua sponte if the complaint is frivolous. 28 U.S.C. § 1915(d). A complaint is "'frivolous where it lacks an arguable basis either in law or in fact.'" Denton v. Hernandez, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992) (citing Neitzke v. Williams, 490 U. S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)). This court reviews a § 1915(d) dismissal for abuse of

---

<sup>2</sup> Section 1915 (d) dismissals are generally without prejudice. See Fraves v. Hampton, 1 F.3d 315, 318-19 (5th Cir. 1993). However, if the allegations in the complaint are legally insufficient and cannot be cured by an amendment, a § 1915(d) dismissal may be with prejudice. Id. at 319.

<sup>3</sup>Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

discretion. Denton, 112 S.Ct. at 1734.

Pursuant to Fed. R. Civ. P. 15(a), a plaintiff may amend his pleading any time before a responsive pleading is served. Willis v. Collins, 989 F.2d 187, 189 (5th Cir. 1993). In view of the liberality accorded to the pleadings of pro se plaintiffs, where there has been no responsive pleading filed, the district court should treat a plaintiff's objections as an amendment to his complaint or an addition the nature of an amendment. McGruder v. Phelps, 608 F.2d 1023, 1025 (5th Cir. 1979).

Prior to the filing of a responsive pleading,<sup>4</sup> Colgrove raised contentions of retaliation and denial of access to the courts in his objections to the magistrate judge's report. Prison officials may not retaliate against or harass an inmate because of the inmate's exercise of his right of access to the courts. Gibbs v. King, 779 F.2d 1040, 1045 (5th Cir.), cert. denied, 476 U.S. 1117 (1986). Thus, Colgrove's objections to the magistrate judge's report and recommendation stated an independent constitutional violation, and consequently, these objections should have been construed as a timely amendment to his initial petition. See McGruder v. Phelps, 608 F.2d at 1025.

However, after reviewing Colgrove's objections de novo, the district court determined that the objections were without merit, adopted the findings and conclusions of the magistrate judge, and dismissed the action with prejudice. Accordingly, we find that the

---

<sup>4</sup> No responsive pleading was filed before the district court's § 1915(d) dismissal.

district court abused its discretion by dismissing Colgrove's complaint with prejudice. We vacate the judgment which dismissed Colgrove's complaint with prejudice, and remand the case for the district court to consider Colgrove's objections as an amendment to his complaint pursuant to Rule 15(a) and for further proceedings as necessary.

VACATED AND REMANDED.