

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40507

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DANNY RAY CLINE,

Plaintiff-Appellant,

versus

WAYNE SCOTT, 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 Eastern District of Texas  
USDC No. 6:93-CV-531  
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(October 20, 1994)

Before SMITH, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:\*

Danny Ray Cline is not entitled to proceed in forma pauperis (IFP) on appeal of the dismissal of his civil rights suit because his appeal does not present a nonfrivolous legal issue. Jackson v. Dallas Police Dep't, 811 F.2d 260, 261 (5th Cir. 1986).

The district court dismissed Cline's claim because he failed to raise a non-frivolous issue. On appeal, Cline argues that the magistrate judge violated procedural due process by not serving the defendants, by showing bias in favor of the defendants, and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

by making credibility determinations following a Spears hearing. His contentions are without merit. A district court may dismiss an IFP suit at any time pursuant to § 1915(d), including prior to service of process, if it is satisfied that the action is frivolous. Cay v. Estelle, 789 F.2d 318, 324 (5th Cir. 1986). Cline's challenge to the application of § 1915(d) to his case is without merit. The Supreme Court has approved of the application of § 1915(d) in cases that lack an arguable basis in law or in fact. Denton v. Hernandez, \_\_\_ U.S. \_\_\_, 112 S. Ct. 1728, 1733-34, 118 L. Ed. 2d 340 (1992) (citations omitted).

The transcript of Cline's Spears\*\* hearing does not reveal any evidence of misconduct or bias by the magistrate judge. A Spears hearing serves the purpose of "flesh[ing] out the substance of a prisoner's claims" and is "in the nature of a motion for more definite statement." Wesson v. Oglesby, 910 F.2d 278, 281 (5th Cir. 1990) (citation and internal quotation omitted). The purpose of the Spears hearing is not to address the merits of the complaint but to focus on the legal viability of the allegations. Id. (citations omitted). The transcript reveals that the magistrate judge performed her duty in sifting through Cline's allegations in an effort to unearth genuine constitutional claims.

Cline's contention that the magistrate judge abused her discretion by making credibility determination during the Spears hearing is likewise without merit. The Spears hearing "serve[s]

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\*\* Spears v. McCotter, 766 F.2d 179, 181-82 (5th Cir. 1985).

as a vehicle by which limited credibility determinations can be made." Wilson v. Barrientos, 926 F.2d 480, 482 (5th Cir. 1991). These limited determinations allow the measurement of the "inherent plausibility of a prisoner's allegations based on objective factors, rather than the demeanor of witnesses." Id. (internal quotations and citation omitted). At the hearing, the magistrate judge, a representative of the Texas Attorney General's office, and Cline himself asked a prison warden and a nurse questions regarding TDCJ-ID policies and Cline's work, discipline, and medical records. The attorney general's representative also asked Cline questions regarding his work, medical, and disciplinary records.

Cline fails to identify any of the alleged credibility determinations. A review of the magistrate judge's report and the apposite sections of the Spears transcript indicates that the magistrate judge heard testimony from Cline and two prison officials; however, there is no indication that the magistrate judge made any impermissible credibility determinations. See Wilson, 926 F.2d at 482.

Cline argues that the district court abused its discretion in dismissing his suit. A § 1915(d) dismissal is reviewed for abuse of discretion. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992). A complaint is frivolous if it lacks an arguable basis in law or in fact. Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994) (citing Denton, 112 S. Ct. at 1733-34).

Cline contends that Major Dondie Posten discriminated against him by denying him his former job in the butcher shop and

that the defendants violated state law by mixing prisoners of different classifications.\*\*\* Cline's argument regarding his employment in the butcher shop of the Michael Unit fails to raise a claim of constitutional dimension. "[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." O'Lone v. Estate of Shabazz, 482 U.S. 342, 348, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) (citation omitted). Cline does not have a constitutional right to the prison job of his choosing.

Cline's allegations that he was improperly mixed with prisoners of other classifications also fails. He alleged that the Major Posten violated TEX. GOV'T CODE ANN. § 501.112 (West Supp. 1994) by mixing him, a Class 1 inmate, with Class 2 and Class 3 inmates. A violation of state law or prison regulations does not establish a constitutional violation. Jackson v. Cain, 864 F.2d 1235, 1251-51 (5th Cir. 1989). Cline has not alleged that his right to be protected from violence was encroached by the mixing of classifications. See Stokes v. Delcambre, 710 F.2d 1120, 1125 (5th Cir. 1983). Nor has he alleged any other constitutional deprivation as a result of the mixing. At the Spears hearing, Cline stated that he had assaulted another prisoner while in close custody. A prison warden testified that

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\*\*\* Cline has abandoned his claim that Dr. Raspberry violated his rights by classifying him as able to work in the fields because Cline has failed to raise this issue on appeal. See Price v. Digital Equip. Corp., 846 F.2d 1026, 1027-28 (5th Cir. 1988).

Cline was originally placed on close custody for assaulting a member of the prison staff. Cline alludes to a violation of due process arising from the alleged mixing of classifications, but he does not indicate what process was withheld or abused by the defendants.

Finally, Cline argues that his right to equal protection was violated when a black inmate with no culinary skills was given a job in the butcher shop. "[A] violation of equal protection occurs only when the government treats someone differently than others similarly situated. . . ." Brennan v. Stewart, 834 F.2d 1248, 1257 (5th Cir. 1988). Cline was denied a job in the butcher shop because of his medical classification. No constitutional claim is implicated.

Cline's motion for IFP presents no issue of arguable merit and is frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); FIFTH CIR. RULE 42.2. Cline's motion to appeal IFP is DENIED and the appeal is DISMISSED.