

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40910

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GLENN STEWART STITT,

Plaintiff-Appellant,

VERSUS

JAMES COLLINS,  
Director, Texas Department of Criminal Justice,  
Institutional Division,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(93 CV 488)

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August 9, 1995

Before SMITH, WIENER, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:\*

I.

Stitt, a Texas state prisoner, filed a pro se, in forma pauperis (IFP) civil rights complaint under 42 U.S.C. § 1983, alleging, inter alia, that two guards, B. Lamb and P. Carrizales, harassed him in violation of the Eighth Amendment. Specifically,

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\* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.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 claimed that after Lamb improperly discovered the nature of his "free-world" offense, which involved sexual misconduct with a minor, Lamb began verbally harassing him and informing other guards of the nature of his offense. He further alleged that Lamb informed Carrizales of the nature of Stitt's offense, and Carrizales, who is six feet four inches tall and weights 290 pounds, began sexually harassing and "stalking" him. Stitt admitted that he was never physically harmed by Lamb or Carrizales but stated that he felt "intimidated" and believed that Lamb and Carrizales might physically harm him. The district court dismissed the complaint as frivolous under 28 U.S.C. § 1915(d).

## II.

A frivolous IFP complaint can be dismissed sua sponte. 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). This court reviews the district court's dismissal for an abuse of discretion. Id.

Stitt argues that his Eighth Amendment<sup>1</sup> rights were violated because Lamb and Carrizales harassed him for seven months after they learned of the nature of his offense. Stitt argues that he felt "intimidated" and "threatened" by this harassment.

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<sup>1</sup> Stitt claims pretrial detainee status on the basis of an allegedly illegal conviction. Insofar as Stitt argues that his conviction is illegal, his appropriate federal remedy is to file a petition for a writ of habeas corpus under 28 U.S.C. § 2254.

Mere threatening language and gestures do not amount to a constitutional violation. Bender v. Brumley, 1 F.3d 271, 274 n.4 (5th Cir. 1993). It is true that this court recently remanded for consideration of whether, in the absence of any physical contact or injury, psychological harm resulting from an assault at knifepoint can violate the Eighth Amendment. See Smith v. Aldingers, 999 F.2d 109, 110 (5th Cir. 1993) (per curiam). The district court in the instant case noted the possible conflict in the law but determined that it was unnecessary to resolve it because any psychological injury Stitt suffered was de minimis.

Stitt admitted that Lamb and Carrizales never physically harmed him; the harassment was limited to "threatening language and gestures." Nor did the guards' alleged behavior rise to the level of the knifepoint assault at issue in Smith. We conclude that Stitt did not state a cognizable claim under the Eighth Amendment.

AFFIRMED.