

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41025
Summary Calendar

EMMIT BRAGER,

Plaintiff-Appellant,

VERSUS

T.D. CROW, Warden, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

(6:94-CV-498)

(January 17, 1995)

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

PER CURIAM:*

Appellant Emmit Brager, an inmate of the Texas Department of Criminal Justice, Institutional Division (TDCJ), proceeding *pro se* and *in forma pauperis*, filed a civil rights lawsuit under 42 U.S.C. § 1983 complaining of alleged violations of his constitutional rights during his confinement in TDCJ. The district court

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

dismissed the case as frivolous pursuant to 28 U.S.C. § 1915(d). We affirm.

FACTS

Brager alleged in his complaint that prior to December 17, 1989 he and another inmate, Bertrand Brown, began to have "problems between them" while housed in the same area of Administrative Segregation. On December 17, 1989, Inmate Brown threw feces and urine on Brager and an officer while the officer was escorting Brager to the shower. Additionally, Brown tormented Brager on a daily basis when he went into the dayroom, which was located in front of Brager's cell. Brager and Brown made numerous requests to the defendants to be separated from each other. When it became apparent to Brager that the defendants would not act on his request to be separated from Brown, Brager decided to attempt to put a stop to Brown's torments.

On January 8, 1990, Brager broke out of his cell and stabbed Brown several times. Brager was indicted for attempted murder, tried, found guilty, and sentenced to life in prison. According to Brager, the defendants are liable because they should have known that he would eventually be forced to do something like this. Brager therefore concludes that defendants' deliberate indifference to the problems he had with Inmate Brown was the "proximate cause" of his attempted murder conviction and life sentence.

PROCEEDINGS BELOW

The magistrate judge, in his report and recommendation which was adopted by the district court, determined that Brager's complaint was time-barred. Finding that the appropriate

limitations period is two years under Texas law, *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989), and that the deliberate indifference complained of took place before the January 1990 stabbing incident, the magistrate judge concluded that this suit, commenced on July 7, 1994, was filed outside the limitation period.

The magistrate judge also noted that Brager's claim that his assault on Brown was made necessary by the abuse which he suffered is an attempt to claim the defenses of justification and necessity under Article 9.22 of the Texas Penal Code. *January v. State*, 811 S.W.2d 631, 633-34 (Tex.App.--Tyler 1991, no pet.) The magistrate judge reasoned that because justification and necessity are defenses to criminal prosecution, Brager's claim that the deliberate indifference of the defendants forced him to stab Brown would have resulted in an acquittal had it been accepted by the jury. Thus, the magistrate judge concluded that Brager is precluded from arguing that his conviction for attempted murder resulted from the deliberate indifference of the defendants so long as his conviction, which implicitly rejects this very contention, remains valid, citing *Martin v. Delcambre*, 578 F.2d 1164 (5th Cir. 1978).

DISCUSSION

Brager attacked the findings regarding the statute of limitations both in his objections to the magistrate judge's report and on appeal. He has not appealed the holding that his case is precluded by the continued validity of his attempted murder conviction. We find it unnecessary to reach the limitation issue

because the district court's decision to dismiss the suit as frivolous was correct, without reference to the statute of limitations.

In June 1994, the Supreme Court held that:

to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Heck v. Humphrey, ___U.S.___, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383 (1994)(footnote omitted). *Heck* precludes Brager's claim so long as his attempted murder conviction remains valid.

We therefore AFFIRM the district court's order dismissing Brager's suit.