

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41126
(Summary Calendar)

BENJAMIN DAVIDSON, JR.,
Plaintiff-Appellant,
versus
JIMMIE R. PACE, Captain, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(9:93-CV-201)

(January 24, 1995)
Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Benjamin Davidson, Jr. appeals the judgment of the district court dismissing his in forma pauperis complaint. For the following reasons, the judgment of the district court is affirmed.

FACTS

Texas prisoner Benjamin Davidson, Jr. sued prison officials alleging the following: (1) During a "major shake-down" of his cell block in November 1993, officers ransacked his cell and destroyed and damaged four of his law books. (2) Two books were missing, and two were torn. (3) The deprivation restricted his

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

access to the courts. Officials rejected his grievance in retaliation for previous legal action that he had taken against them for himself and as a writ writer for others. The retaliation also motivated disciplinary action against him, as well as other incidents of harassment.

On November 2, 1993, Davidson filed a § 1983 complaint in the Eastern District of Texas against various prison officials, alleging a deprivation of property and denial of access to the courts. He also filed a motion to proceed in forma pauperis (IFP) which was granted. The magistrate judge recommended that the suit be dismissed as frivolous. The magistrate judge noted that this was Davidson's second frivolous lawsuit and recommended that Davidson be warned about sanctions. Over Davidson's objections, the district court adopted the magistrate judge's recommendations, dismissed the action as frivolous, and warned Davidson about future sanctions.

DISCUSSION

An IFP plaintiff's claim that has no arguable basis in law or fact may be dismissed as frivolous. 28 U.S.C. § 1915(d); Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994). Review is for abuse of discretion. Eason, 14 F.3d at 9.

Issue 1

Davidson argues that the federal court should hear his claim of property deprivation because he was deprived of due process by an intentional disregard for his constitutional rights. The Supreme Court, however, has stated, "An unauthorized intentional

deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available." Hudson v. Palmer, 468 U.S. 517, 533, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). Texas recognizes such a remedy. Myers v. Adams, 728 S.W.2d 771, 772 (Tex. 1987). We find this contention to be without merit.

Issue 2

Davidson argues that the property deprivation is constitutionally actionable because it prevented him from adequately litigating a state habeas corpus application that he filed in March 1993 and that was denied in October 1993. A prisoner's right of access to the courts is denied when he is deprived of the opportunity to file a legally sufficient claim. Mann v. Smith, 796 F.2d 79, 84 (5th Cir. 1986). Delay of access also implicates this right. Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994). To state a constitutional violation, a prisoner must show that his access to the courts has been prejudiced. Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 2974 119 L.Ed.2d 593 (1992); Richardson v. McDonnell, 841 F.2d 120, 122 (5th Cir. 1988).

The magistrate judge determined that Davidson had access to a full law library in his prison unit. Davidson did not dispute that determination but merely asserted that he was deprived of the opportunity to adequately litigate from his cell. As he had use of a law library, any inconvenience that he suffered from not having

use of his own few books did not deprive him of access to the courts. Additionally, Davidson alleges that the cell search of which he complains occurred in November 1992. He gives no indication of how a deprivation in November 1992 had anything to do with a case that he filed in March 1993. We find this contention to be without merit.

Issue 3

Davidson also argues that the search and other adverse actions were retaliation for his work as a writ writer. He complains of being discouraged from filing a grievance and of being subjected to a disciplinary hearing conducted by a biased officer. A claim of retaliation may be constitutionally actionable. Gibbs v. King, 779 F.2d 1040, 1046 (5th Cir.), cert. denied, 476 U.S. 1117, 106 S.Ct. 1975, 90 L.Ed.2d 959 (1986).

Davidson's allegations of retaliation fall into three categories. First, he alleged that he was deprived of his law books out of retaliation. Davidson has a state remedy for the property deprivation claim, as stated under Issue 1 above. Even intentional deprivation comes within that state remedy.

Second, he provided a laundry list of alleged acts of retaliation. He alleged that he was intentionally denied treatment and a proper diet for his diabetes, that he was occasionally denied the opportunity to visit the law library at the exact time and for the entire duration that he desired, that he was subjected to corporal punishment, and that his mail was intentionally delayed. On appeal, however, he does not argue that the dismissal of any of

these listed claims was improper. Issues not raised on appeal are abandoned. See Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838, 106 S.Ct. 117, 88 L.Ed.2d 95 (1985).

Third, he alleged briefly that Lt. Raymond Lipscomb, acting out of retaliation, subjected him to an improper minor disciplinary hearing. He alleged that no evidence existed to support the charges. He does argue this issue on appeal. Given that the hearing was for a minor offense, the process that Davidson was due consisted of notice and an opportunity to present a statement. Hewitt v. Helms, 459 U.S. 460, 476, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983); Cooper v. Sheriff, Lubbock County, 929 F.2d 1078, 1083 (5th Cir. 1991).

In neither his complaint nor his appellate brief does Davidson indicate that he was deprived of notice or an opportunity to make a statement. Thus, he has not provided a factual or legal basis for his claim regarding the disciplinary hearing. In sum, Davidson has not shown that the dismissal of any of the claims of retaliation was erroneous. We therefore find this contention to be without merit.

Issue 4

Davidson argues that the district court should have considered his supplemental complaint. No such complaint is in the district court record, and a motion for leave to file a supplemental complaint is stricken from the district court docket sheet without explanation. Davidson has supplied to this Court a document that apparently is the stricken motion for leave to supplement. In it,

Davidson alleges events that occurred after the filing of the original complaint. The events allegedly occurred in a period from November 1993, two weeks after the filing of the original complaint, until May 1994, two months before the magistrate judge's report recommending that the complaint be dismissed as frivolous.

A supplement that a plaintiff files with undue delay or in bad faith, however, need not be considered. Cooper, 929 F.2d at 1081; Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 598 (5th Cir. 1981). As the motion to supplement was not accepted for filing, there is no finding as to Davidson's reason for his delay in attempting to supplement. The chronology, however, reveals that he waited to submit the supplement almost a year after the earliest events alleged therein and four months after the latest events alleged. He attempted to file the motion on the same date that he filed his objections to the magistrate judge's report. In short, Davidson waited to supplement until he knew that the case was going against him. This sequence of events indicates that the delay was undue and undertaken in bad faith.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED. As did the district court, we warn plaintiff that any subsequent frivolous filings could subject him to sanctions.