

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41363
(Summary Calendar)

CECIL LEE RUSSELL,

Plaintiff-Appellant,

versus

DAVID L. CONAWAY,
Officer C.O. III, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:94-CV-308)

January 2, 1996

Before JOLLY, JONES and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff Cecil Lee Russell appeals the dismissal of his civil rights complaint by the district court. We reverse the dismissal of the retaliation claim and remand in light of the recent decision of this court that favorable termination is not an element of a retaliatory interference claim.

FACTS

Russell alleges that correctional officer David Conaway falsely charged him with possession of contraband in retaliation for Russell filing a civil rights lawsuit against other prison guards in an unrelated incident. At the time of the allegation, Russell was the subject of a disciplinary hearing for

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

threatening an officer. Following the hearing Russell was found guilty and received 30-days cell restriction and 30-days commissary restriction.

Russell filed a pro se, in forma pauperis civil rights complaint, 42 U.S.C. § 1983, alleging, inter alia, that the defendants denied him due process during the disciplinary proceedings because there was insufficient evidence to support the finding of guilt and that the disciplinary charge was filed in retaliation for his filing a civil rights complaint. Following a Spears hearing the magistrate judge recommended dismissing the complaint as frivolous under 28 U.S.C. § 1915(d). The district court adopted the magistrate judge's report and dismissed the complaint.

DISCUSSION

Procedural Issues

Russell argues that the magistrate judge exceeded the scope of the Spears hearing because she considered his disciplinary records and made credibility determinations regarding the evidence to determine that Russell's due process claim was frivolous. He also argues that he should have been permitted to amend his complaint before it was dismissed as frivolous.

The court may dismiss a complaint filed in forma pauperis if it is frivolous. 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. Russell did not attempt to amend his complaint in the district court and was permitted to develop the factual basis of his claims during the Spears hearing. Russell has failed to demonstrate that the district court acted improperly or prematurely because it dismissed the complaint following the hearing without expressly providing him with an opportunity to amend his complaint. Furthermore, because the appellees had not filed a responsive pleading, Russell could have filed an amended complaint without leave of court. Fed. R. Civ. P. 15(a).

Due Process

Russell also argues that there was insufficient evidence to support the finding of guilty because

Conaway did not produce the contraband at the hearing as required by the prison regulations. The federal courts have a narrow role in the review of prison proceedings. Stewart v. Thigpen, 730 F.2d 1002, 1005 (5th Cir. 1984). If a prisoner is provided a procedurally adequate hearing prior to the imposition of disciplinary sanctions, there is no constitutional violation. Id. at 1005-06. Federal review of the sufficiency of the evidence is limited to determining whether the finding is supported by evidence at all. Id.

To the extent that Russell argues that Conaway violated the prison regulations, this allegation is insufficient to establish a constitutional violation. Hernandez v. Estelle, 788 F.2d 1154, 1158 (5th Cir. 1986) (an alleged violation of a prison regulation without more does not give rise to a constitutional violation). By Russell's admission, the finding of guilt was based on Conaway's testimony and report; and therefore there is "some evidence" to support the finding. See McCrae v. Hankins, 720 F.2d 863, 868 (5th Cir. 1983) (the Constitution mandated due process, it does not guarantee error-free decision making). We affirm the portion of the judgment dismissing the due process claim.

Retaliation

Russell also argues that Conaway charged him with a disciplinary infraction in retaliation for his filing a civil rights complaint. Russell alleged that, in Conaway's presence, he was told that inmates do not file civil rights complaints.

Prison officials may not retaliate against a prisoner for the exercise of the right to access to the courts. Gibbs v. King, 779 F.2d 1040, 1045 (5th Cir.), cert. denied, 476 U.S. 1117 (1986). The district court adopted the magistrate judge's recommendation that Russell's retaliation claim be dismissed because Russell had failed to show a favorable termination of the disciplinary charges. We reverse and remand on this dismissal in light of this court's recent decision in Woods v. Smith, No. 94-30040 (5th Cir. Aug. 15, 1995).

Woods was a prisoner § 1983 action. Woods, an inmate at a Louisiana penitentiary, alleged that two corrections officials filed disciplinary reports in retaliation for a letter he sent to a federal

district judge presiding over his pending prison litigation and his warden. The letter reported a threat made by a corrections officer to him of repercussions for not becoming an informant. Slip op. at 5045. In affirming the district court's denial of defendants' summary judgment motion, this court refused to accept the proposition that Woods had to establish that the underlying disciplinary proceedings were ultimately terminated in his favor to win his retaliation claim. Id. at 5047-48. "An action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate." Id. at 5048. "To state a claim of retaliation an inmate must allege the violation of a specific constitutional right and be prepared to establish that but for the retaliatory motive the complained of incident . . . would not have occurred." Id. at 5049-50. Requiring a favorable termination would be unduly burdensome to the prisoner, especially where prison officials control the disciplinary proceeding. In addition, as Woods points out such a requirement would establish a more difficult exhaustion requirement for § 1983 actions than is required in habeas corpus proceedings. Id. at 5049. Pursuant to the holding in Woods, we remand to the district court for a determination of whether there has been a violation of the exercise of a constitutional right.

State Law Claims

Finally, Russell argues that the district court improperly dismissed his pendent state law claims without permitting him to amend his complaint to allege the factual and legal basis of the claim. Russell failed to allege any state law claims in his complaint or during the Spears hearing. For this reason the district court dismissed the federal claims as frivolous, so there was no error in dismissing without prejudice the undeveloped state law claims. See Rhyne v. Henderson Cty., 973 F.2d 386, 395 (5th Cir. 1992) (the district court may properly dismiss supplemental state law claims if all federal question claims that provided the court with original jurisdiction have been dismissed).