

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50737
(Summary Calendar)

CLYDE WAYNE STUART,

Plaintiff-Appellant,

versus

THOMAS LOWE, Clerk of Court,
Court of Criminal Appeals,

Defendant-Appellee.

Appeal from United States District Court
for the Western District of Texas
(A:93-CA-434-JN)

(June 2, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Clyde W. Stuart appeals the judgment of the district court dismissing his § 1983 suit against the Clerk of the Texas Court of Criminal Appeals. For the following reasons, the judgment of the district court is affirmed.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

Clyde Wayne Stuart, a TDCJ inmate, filed a complaint pursuant to 42 U.S.C. § 1983 in which he alleged that Thomas Lowe, the Clerk of the Texas Court of Criminal Appeals, refused to present Stuart's petitions for habeas corpus relief to the appellate court. Specifically, Stuart alleged the following: He filed a petition for habeas corpus in Dallas County, Texas, and received a white card from the clerk in February 1993 notifying him that his writ had been denied without a written order and without presentation to the appellate court. He also filed a petition for habeas relief in Navarro County, Texas, in March 1993, and received findings and conclusions from that court dismissing his habeas petition for abuse of the writ. He filed objections to the Navarro trial court's findings to be presented to the appellate court, and the clerk refused to submit the objections to the court. Stuart alleged that Lowe denied him access to the appellate court and prayed for compensatory and punitive damages.

The magistrate judge ordered Stuart to show cause why his complaint should not be dismissed based on absolute immunity. Stuart responded that the record did not reflect that the appellate court judges reviewed his writ and objections prior to the clerk sending him notice that his writ was denied or that Lowe acted pursuant to a court order. However, Stuart attached to his responsive pleading a letter addressed to him by Lowe, stating that on July 14, 1976, the appellate court entered an order citing Stuart for abuse of the writ and directed the clerk not to accept

any further applications from Stuart unless the petition satisfied certain conditions. Lowe advised Stuart that his writ application filed in Navarro County did not satisfy those conditions and, therefore, "the Court will take no action on this writ."

The district court, following a magistrate judge's recommendation, dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6), after it determined that Lowe was entitled to absolute immunity. This court affirmed the dismissal of Stuart's complaint regarding Lowe's refusal to present his habeas corpus petition filed in Navarro County, Texas, to the Court of Criminal Appeals. We, however, vacated the dismissal of Stuart's complaint with regard to the habeas petition filed in Dallas County, Texas, because the district court had failed to address Stuart's allegations that Lowe had refused to present the Dallas County petition to the Texas Court of Appeals.

On remand Lowe filed a motion to dismiss and/or for summary judgment in which he asserted that he was entitled to qualified immunity. He also attached an affidavit attesting to the following: The Clerk of the Texas Court of Criminal Appeals received Stuart's petition for habeas corpus relief which he had filed with the trial court in Dallas County and filed it on January 25, 1993. It was presented to the Texas Court of Criminal Appeals in the regular course of business and was denied without written order on February 17, 1993. The order of denial bears the signature of the presiding judge, Judge Michael J. McCormick.

Defendant Lowe attached to the affidavit true and correct copies of Stuart's application and the order of denial.

After Lowe filed his motion for dismissal and/or summary judgment, Stuart filed a motion for the appointment of counsel. He also filed an objection to Lowe's motion, arguing that Lowe's affidavit was not made upon personal knowledge, did not show that he is competent to testify to the matters stated therein, and did not state that the information contained in the exhibits is accurate. Stuart also argued that Lowe failed to meet his burden of establishing entitlement to immunity. The magistrate judge denied Stuart's motion for the appointment of counsel.

As to Lowe's motion to dismiss and/or for summary judgment, the magistrate judge determined that, although Stuart was notified of the denial by a white postal card, the record shows that the application was presented to the court. It was considered by the justices, and denied by Judge McCormick. Therefore, Stuart was not denied access to the courts. The magistrate judge further determined that Lowe was acting in his capacity as Clerk of the Court and was, therefore, entitled to immunity. Thus, the magistrate judge recommended that Lowe's motion to dismiss and/or for summary judgment be granted and that Stuart's complaint be dismissed.

Stuart filed a notice of appeal to this court from the magistrate judge's denial of his motion for the appointment of counsel, and a motion to stay the proceedings pending his appeal of the denial of his motion for the appointment of counsel. However,

Stuart did not file any objections to the magistrate judge's report and recommendation.

The district court reviewed the case de novo "despite the Plaintiff's failure to object to the Magistrate Judge's Report and Recommendation," and adopted the magistrate judge's recommendation that Lowe's motion for dismissal and/or summary judgment be granted and that Stuart's complaint be dismissed. Further, the district court denied Stuart's motion to stay the proceedings and dismissed any pending motions as moot.

DISCUSSION

ISSUE 1:

Stuart argues that the district court abused its discretion when it denied his motion for the appointment of counsel and when it denied his motion to stay the proceedings pending his appeal to this court from the denial of his motion for the appointment of counsel. Appeals from a magistrate judge's ruling, however, must first be made to the district court, and this court lacks jurisdiction to review a magistrate judge's ruling not so appealed. Boren v. N.L. Indus., 889 F.2d 1463, 1465 (5th Cir. 1989), cert. denied, 497 U.S. 1029 (1990). Concomitantly, this court need not review Stuart's argument that the district court erred when it denied his motion to stay the proceedings.

ISSUE 2:

Stuart contends that the district court abused its discretion when it dismissed his complaint because the court failed to address his argument that Lowe did not present to the Texas Court of

Criminal Appeals Stuart's objections to the findings, facts and conclusions of law rendered by the Dallas County trial court. Although Stuart made the same allegation with regard to his Navarro County writ application, he did not raise this argument regarding the Dallas County application in the district court.

This court need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Whether Lowe presented Stuart's objections to the state trial court's findings of fact and conclusions of law to the Texas Court of Criminal Appeals in his Dallas County writ applications is a factual question. Thus, we need not address it.

Stuart also argues that there was no statutory basis giving Lowe the authority to pass out a white postal card indicating that his habeas application was denied without an opinion. This argument also differs from the one Stuart made in the district court which was that Lowe failed to present his Dallas County habeas application to the appellate court at all. Because this issue was not presented to the district court and because no manifest injustice will result from our failure to address it, we reject Stuart's claim. See Varnado v. Lynaugh, 920 F.2d at 321.

As the district court correctly determined, as a matter of law, Stuart's claim that Lowe denied him access to the courts lacks merit. This court reviews a grant of summary judgment de novo.

Abbott v. Equity Group, 2 F.3d 613, 618 (5th Cir. 1993), cert. denied, 114 S. Ct. 1219 (1994). The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

If the moving party satisfies its burden, the non-moving party must identify specific evidence in the record demonstrating that there is a material fact issue for trial. Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). The non-moving party may not rest upon mere allegations or denials in the pleadings. However, must designate specific facts showing the existence of a genuine issue for trial. Id. at 256-57. The mere allegation of a factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id. at 248-50, 256-57. On appeal from summary judgment, this court examines the evidence in light most favorable to the non-moving party. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. Honore v. Douglas, 833 F.2d 565, 567 (5th Cir. 1987).

Lowe attached his affidavit to his motion for summary judgment in which he attested that Stuart's Dallas-County petition was presented to the Texas Court of Criminal Appeals in the regular course of business. Lowe attached verified copies of Stuart's

Dallas-County writ application filed on December 20, 1992. He also attached a document showing that the application was denied by the Texas Court of Criminal Appeals without written order on February 17, 1993, signed by Presiding Judge Michael J. McCormick.

Stuart argues that Lowe's affidavit was defective in that it was not made on personal knowledge, did not show that he was competent to testify, and did not present sworn testimony as to the accuracy of the information contained in the exhibits. Stuart's argument is unavailing. The affidavit contains the necessary predicate elements to establish Lowe's knowledge of the facts contained therein, and that he is the custodian of the records which are attached to the affidavit, for the Texas Court of Criminal Appeals. The affidavit is sworn to before a notary public. As such, it meets the requirements set forth in Fed. R. Civ. P. 56(e). See Fed. R. Evid. 803(b).

Lowe's affidavit and attached documents show Stuart's argument that Lowe failed to present his writ application to the Texas Court of Criminal Appeals lacks a factual basis and that Lowe was entitled to judgment as a matter of law. Given that the district court correctly determined that Stuart's allegations lacked a factual basis, this court need not address Stuart's argument that Lowe was not entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing Stuart's complaint is AFFIRMED.

