UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50755
Summary Calendar

JESUS MENDEZ,

Plaintiff-Appellant,

versus

JACK KYLE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(A 93 CA 686)

June 21, 1995

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellant Mendez, a Texas prisoner, alleged in his § 1983 complaint that he has been denied equal protection because, as a result of prosecutorial discretion, he had imposed on him a deadly weapon finding, which substantially lengthened the prison time he must have served before becoming eligible for parole. See former Tex. Crim. Proc. Code ann. art. 42.12 § 3g(a)(2) (West 1979) and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

art. 42.18 § 8(b)(3) (West Supp. 1995). Some inmates who actually used a deadly weapon in committing murder, however, do not have affirmative findings in their judgments, while in some other cases, Texas appellate courts have set aside affirmative findings.

As defendants, Mendez named Chairman Jack Kyle of the Texas Board of Pardons and Paroles and Bob Owens, formerly a Division Director of that Board. Kyle and Owens filed an answer and a motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction.

The district court dismissed the action without prejudice on grounds of failure to state a claim. We affirm.

DISCUSSION

"Unless it appears `beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,' [a] complaint should not be dismissed for failure to state a claim, ..." Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284-85 (5th Cir. 1993)(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). This court "review[s] de novo the district court's dismissal of a complaint for failure to state a claim." Fernandez-Montes, 987 F.2d at 284.

Mendez contends that he has been denied equal protection of the parole law because the trial court included the affirmative finding in his judgment of conviction, but some other persons who also used a deadly weapon to commit murder do not have the affirmative finding. He complains that he is required to serve one-third of the length of his sentence or 20 years, whichever is

less, whereas some other murderers who used a deadly weapon are eligible for parole after their served time plus good-conduct time equals one-third of their sentence or 20 years, whichever is less. Mendez "concedes that the classificational statute, [former] art. 42.12 § 3g(a)(2) [West 1977], would ordinarily be presumed valid since it is rationally related to a legitimate state interest."

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." Thus, "[t]he equal protection clause mandates similar treatment of persons in similar situations." Arceneaux v. Treen, 671 F.2d 128, 131 (5th Cir. 1982).

As the district court determined, the relevant statute is to be scrutinized under a rational-basis standard rather than strictly, because it does not involve race, religion, national origin, or other "fundamental rights." See Arceneaux, id. "Rational basis scrutiny requires only that the legislative classification rationally promote a legitimate governmental objective." Id.

Mendez does not contend that the statute itself denies him equal protection. It does not, because by its terms it applies to all persons convicted of an offense as to which an affirmative finding of use of a deadly weapon is made. The state obviously has an interest in delaying the parole eligibility of such a convicted person, because he probably is a greater threat to the community than one who did not use such a weapon. As the district court

held, Mendez "does not make a case for the unconstitutionality of the Texas parole statutes simply because the statutes' inconsistent, imperfect, or different application by prosecutors and courts has resulted in different bases for parole eligibility for prisoners who committed the same crime." See Wayte v. United States, 470 U.S. 598, 607-10 (1985) (selective prosecution of draft evaders); Dandridge v. Williams, 397 U.S. 471, 485 (1970).

Mendez asserts that "this case serves as a classic example of laws that are being administered with an evil eye and an uneven and unequal hand," beyond "the constitutional limits of the prosecutor's discretion." He does not allege any facts, however, which would indicate that his prosecutor or any other prosecutor acted improperly in his case or any other specific murder case. If, as the indictment alleged and Mendez does not deny, he used a shotgun to murder his victim, the stricter parole eligibility provision of former article 42.18 § 8(b) undoubtedly is applicable to him. In Texas cases which Mendez relies on, the affirmative finding was set aside because of a legal error, with no suggestion that a prosecutor's discriminatory intent was involved. See, e.g., Ex parte Flannery, 736 S.W.2d 652, 652-53 (Tex. Crim. App. 1987) (en banc)(jury did not find defendant "guilty as charged"); Ex parte Grabow, 705 S.W.2d 150, 150-51 (Tex. Crim. App. 1986) (en banc) (indictment alleged shooting with a "gun," which is not a deadly weapon per se); Ex parte Moore, 727 S.W.2d at 579-80 (similar to Grabow). Moreover, "so long as the prosecutor has probable cause to believe that the accused committed an offense

defined by statute, the decision . . . what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). Because Mendez has not pleaded a constitutional claim, he has not stated a claim for which he can obtain § 1983 relief. See West v. Atkins, 487 U.S. 42, 48 (1988).

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.