

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60491
Summary Calendar

FRANK PHILLIPS,

Plaintiff-Appellant,

versus

JUAN GARZA and LT. GARCIA,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA L-94-108
- - - - -
(February 16, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

IT IS ORDERED that Frank Phillips's motion for leave to appeal in forma pauperis (IFP) is DENIED. The appeal lacks arguable merit and is, therefore, frivolous. Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is DISMISSED. See 5th Cir. R. 42.2.

The language of the district court's opinion indicates that Phillips's action was dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The authority of the court to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

dismiss for failure to state a claim under Rule 12(b)(6), sua sponte and prior to service of the complaint on the defendants, is not clear. See Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 618-19 (5th Cir. 1992); Holloway v. Gunnell, 685 F.2d 150, 152 (5th Cir. 1982). Nevertheless, even if the district court erred in dismissing Phillips's complaint pursuant to Rule 12(b)(6), the error was harmless if this court concludes that the underlying claim is frivolous under § 1915(d). See Holloway, 685 F.2d at 152 n.6.

An IFP complaint is frivolous if it lacks an arguable basis either in law or in fact. Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992). Phillips complains that although he did not participate in a riot which broke out in the Webb County Detention Center, defendants nevertheless deliberately withheld his personal property in the course of transferring him to another facility. His allegations indicate that the defendants were not acting pursuant to an established state procedure. The intentional deprivation of property does not implicate the Fourteenth Amendment if the deprivation is random and unauthorized and if the state provides an adequate post-deprivation remedy. Hudson v. Palmer, 468 U.S. 517, 532-33 (1984); Marshall v. Norwood, 741 F.2d 761, 764 (5th Cir. 1984). Phillips has a right of action under Texas law for any alleged negligent or intentional deprivation of property. See Thompson v. Steele, 709 F.2d 381, 383 (5th Cir.), cert. denied, 464 U.S. 897 (1983); Meyers v. Adams, 728 S.W.2d 771, 772 (Tex. 1987). Because there is an adequate state remedy which Phillips has not

alleged is inadequate, see Marshall, 741 F.2d at 764, any due process claim for this deprivation is frivolous.

APPEAL DISMISSED.