IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60517
Conference Calendar

STEPHEN BONNER WILLIAMS
and ROBERT E. TUBWELL,

Plaintiffs-Appellants,

versus

EDWARD HARGETT, Superintendent,
Mississippi State Penitentiary,

Defendant-Appellee.

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Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 4:93-CV-302-D-D

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(November 17, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:[*]

Stephen Bonner Williams and Robert E. Tubwell argue that the district court abused its discretion in dismissing as frivolous their complaint that the defendant prison official violated the district court's order in the prisoner class action Gates v. Collier, 454 F.Supp. 579 (N.D. Miss. 1978), aff'd, 606 F.2d 115 (5th Cir. 1979) by changing the prison mail policy regarding the dispatch and delivery of mail on Saturday.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

A district court may dismiss an in forma pauperis complaint as frivolous if it lacks an arguable basis in law or in fact. Denton v. Hernandez, ___ U.S. ___, 112 S. Ct. 1728, 1733, 118 L. Ed. 2d 340 (1992). The dismissal is reviewed for an abuse of discretion. Id. at 1734. "[R]emedial decrees are the means by which unconstitutional conditions are corrected but they do not create or enlarge constitutional rights." Green v. McKaskle, 788 F.2d 1116, 1123 (5th Cir. 1986). Even assuming that the policy change amounts to a violation of the Gates decree, it cannot serve as a basis for a § 1983 suit. Under the principle announced in Gillespie v. Crawford, 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc), the plaintiffs are required to bring equitable and declaratory claims by urging further action through the class representative and attorney or by intervention in the ongoing class action. The plaintiffs have not raised an arguable § 1983 claim under the Gates decree.

The plaintiffs also argue that the change in the mail policy violated their First Amendment right of free speech and impeded their access to the courts. "A prison official's interference with a prisoner's legal mail may violate the prisoner's constitutional right of access to the courts . . . . [and/or] the prisoner's First Amendment right to free speech - - i.e., the right to be free from unjustified governmental interference with communication." Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994).

Prisoners have a constitutionally protected right of access to the courts. Bounds v. Smith, 430 U.S. 817, 821, 97 S. Ct.

1491, 52 L. Ed. 2d 72 (1977). "While the precise contours of a prisoner's right of access to the courts remain somewhat obscure, the Supreme Court has not extended this right to apply further than the ability of an inmate to prepare and transmit a necessary legal document to a court." Brewer, 3 F.2d at 821 (footnote omitted). To prevail on a denial-of-access-to-the-courts claim, the claimant must show that his legal position was prejudiced by the alleged violation. Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.), cert. denied, 112 S. Ct. 2974 (1992). The plaintiffs have not asserted that the change in mail policy has prejudiced their legal position in a particular case. Thus, the plaintiffs' rights of access to the courts have not been implicated. Id.

"[I]n determining the constitutional validity of prison practices that impinge upon a prisoner's rights [to free speech] with respect to mail, the appropriate inquiry is whether the practice is reasonably related to a legitimate penological interest." Brewer, 3 F.3d at 824. The plaintiffs attached to their complaint the defendant's response to his grievance concerning the change in mail policy. The Superintendent explained that as a result of rising operational costs and staff shortages, the work days of the prison Post Office and the Mail Inspection staff were changed to Monday through Friday, thus eliminating Saturday service. Id.

The attachment to plaintiffs' complaint reflects that the reduction in work hours of the Post Office staff was reasonably related to a legitimate response by prison officials to rising operational costs. An attachment to a complaint is considered

part of the complaint. See Fed. R. Civ. P. 10(c); Neville v. American Republic Ins. Co., 912 F.2d 813, 814 n.1 (5th Cir. 1990). Thus, the plaintiffs have not alleged an arguable First Amendment violation under Brewer.

The plaintiffs argue that their rights to due process have been violated because they enjoy a protected liberty interest in the original mail policy based on the federal mandate in Gates and on the longstanding prison practice and policy of having mail delivered on Monday through Saturday. The plaintiffs cannot rely on the Gates decree to support a separate constitutional claim under § 1983. Green, 788 F.2d at 1123.

The plaintiffs argue for the first time on appeal that the prison's longstanding policy and practice of delivering mail on Saturdays independently created a liberty interest. 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 [C]ourt 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). This claim which would require the resolution of factual issues is not subject to review on appeal. The plaintiffs' complaint does not raise an arguable claim that they have been deprived of a liberty interest protected by the Due Process clause. The district court did not abuse its discretion in dismissing the complaint as frivolous.

We warn the plaintiffs that the filing of frivolous lawsuits and appeals in the future could result in the imposition of

sanctions. See e.g. Jackson v. Carpenter, 921 F.2d 68, 69 (5th Cir. 1991).

AFFIRMED.