

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60544

Summary Calendar

HARVEY F. GARLOTTE, ROGER L. HARVESTON,
and CHARLES R. PHILLIPS,

Plaintiffs-Appellants,

versus

MISSISSIPPI DEPARTMENT OF CORRECTIONS,
et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(2:93-CV-246PS)

(February 24, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Three state prisoners bring this suit pro se, challenging a new prison regulation that forbids prisoners to own word processors and typewriters with memory after a certain date. If prisoners do not dispose of these devices by that date, the prison will confiscate and dispose of the property. Prison officials submitted

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

affidavits stating that they enacted the regulation because prisoners had been using typewriters with memory to store "scam letters," gambling pool information, prison officials' phone numbers and addresses, and gang-related information. Plaintiffs seek a temporary restraining order and a preliminary injunction.

The regulation does not deny prisoners' rights of access to the courts; a typist is available to type their documents, and "a litigant's cause is not prejudiced by the filing of a handwritten brief." Tarlton v. Henderson, 467 F.2d 200, 201 (5th Cir. 1972). Likewise, the regulation does not abridge a prisoner's freedom of speech and association, because there is no content-based censorship. Sands v. Lewis, 886 F.2d 1166, 1172 (9th Cir. 1989). And plaintiffs have shown no basis for an alleged Ninth Amendment right to possess word processors and typewriters with memory.

The change in the regulation terminated plaintiffs' liberty and property interests, and no other law (such as the Mississippi statutes exhorting prisons to rehabilitate) creates a protected liberty or property interest. Thus, they had no due process right to a pre-deprivation or post-deprivation hearing. (Note that the existence of Mississippi post-deprivation remedies is irrelevant, because plaintiffs do not complain about a random and unauthorized act. See Logan v. Zimmerman Brush, 455 U.S. 422, 435-36 (1982).)

The district court should not have dismissed plaintiffs' equal protection claim. Plaintiffs' response to the motion to dismiss sets out specific allegations of discriminatory enforcement of the rule and a discriminatory motive--hindering redress of grievances.

The district court should have treated this pro se response as a motion to amend the complaint, which it should have granted. See Jackson v. Cain, 864 F.2d 1235, 1241 (5th Cir. 1989). So amended, this claim should have survived the motion to dismiss.

Plaintiffs claim that defendants' action was arbitrary, capricious, malicious, and vindictive, in violation of substantive due process. The district court erred in dismissing this claim, as the assessment of motive turns on the affidavits, which can only be considered on summary judgment after plaintiffs receive notice and an opportunity to respond. The district court likewise erred in dismissing plaintiffs' claim under the Takings Clause, because an assessment of the penological interests served by the proposed confiscation depends on the affidavits. See Turner v. Safley, 482 U.S. 78, 89-90 (1987).

Because this is not an exceptional case in which plaintiffs are nearly certain to win on the merits, we deny plaintiffs' motion for a temporary restraining order or a preliminary injunction. See Greene v. Fair, 314 F.2d 200, 202 (5th Cir. 1963).

AFFIRMED IN PART, VACATED IN PART, MOTION DENIED, AND REMANDED.