

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60677
Summary Calendar

NORRIS HICKS,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA C-94-95)

(April 3, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Norris Hicks appeals the dismissal, as frivolous, of his pro se prisoner's civil rights suit brought pursuant to 42 U.S.C. § 1983. We affirm in part and vacate and remand in part.

I.

Hicks alleged that prison officials tampered with his legal

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

mail. The district court held a hearing pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), then dismissed the action as frivolous pursuant to 28 U.S.C. § 1915(d).

II.

An *informa pauperis* ("IFP") claim that has no arguable basis in law or fact may be dismissed as frivolous. 28 U.S.C. § 1915(d); Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994). Review is for abuse of discretion. Eason, 14 F.3d at 9.

A.

Legal prejudice is an essential element of a claim for prison officials' interference with legal mail. Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.), cert. denied, 112 S. Ct. 2974 (1992); Richardson v. McDonnell, 841 F.2d 120, 122 (5th Cir. 1988). "[I]n determining the constitutional validity of prison practices that impinge upon a prisoner's rights with respect to mail, the appropriate inquiry is whether the practice is reasonably related to a legitimate penological interest." Brewer v. Wilkinson, 3 F.3d 816, 824 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994). After Brewer, this court restated, "In order for [a plaintiff's] claim to rise to the level of a constitutional violation of his right to access to the courts, he must allege that his position as a litigant was prejudiced by the mail tampering." Walker v. Navarro County Jail, 4 F.3d 410, 413 (5th Cir. 1993). Such prejudice could be the inability to "prepare or transmit a

necessary legal document." Brewer, 3 F.3d at 824.

Hicks lists twenty-three issues attacking the judgment. All of Hicks's issues regarding his legal mail are unavailing, however, because, as in the district court, he does not adequately describe the required legal prejudice.

In the introduction to the brief, Hicks seems to attempt to show prejudice. He related that the time for requesting a rehearing before a state ethics commission ran out, though he does not argue that such a commission is a court for the purposes of a claim of interference with legal mail; that he lost opportunities to object to the truth of a record and to request a copy of an altered record, though he told the district court that he missed no deadlines in pending cases; that he had two days in which to write a response that he should have had ten days to write; that four important pieces of mail arrived at the prison on Saturdays, and he did not receive them until the following Mondays; that he has experienced much inconvenience in litigating matters as a result of mail delays and mishandling; that he was denied access to the courts, though he does not say how; and that events occurring after the Spears hearing show a pattern of intentional abuse of his mail rights, though he concedes that the facts are irrelevant to the instant appeal. None of these allegations, if true, shows prejudice to a legal position; Hicks has stated no deprivation of the ability to "prepare or transmit a necessary legal document." Brewer, 3 F.3d at 825.

Hicks argues that the Spears hearing was inadequate and that

the district court did not address all of his claims. He re-types much of the Spears hearing transcript. He says that the district court did not develop a claim that he had a state-created liberty interest in receiving his legal mail on the same day on which it arrives at the prison. He argues later that he has such a protected liberty interest. Hicks asserts that a final court decree in the Ruiz litigation gives him that protected interest.

A state statute or regulation creates a protected liberty interest for a prisoner when it explicitly uses mandatory language specifically to limit official discretion, thus requiring a particular outcome when relevant criteria are met. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 462-63 (1989); Olim v. Wakinekona, 461 U.S. 238, 249 (1983). Hicks has alleged the existence of no such statute or regulation. Additionally, violations of the Ruiz decree, without more, are not cognizable in a § 1983 cause of action. Green v. McKaskle, 788 F.2d 1116, 1122 (5th Cir. 1986).

Hicks does say that he suffered legal prejudice, but he does not state how. He argues that the district court did not give him an opportunity to show legal prejudice. The Spears hearing transcript, however, shows that the district court asked Hicks numerous questions to get him to identify some prejudice. He identified none.

Prior to the Spears hearing, the magistrate judge ordered Hicks to file a more definite statement describing, among other things, how he was denied access to the courts. Hicks filed a more

definite statement identifying inconvenience and delay but no denial of access.

Hicks recites many inconveniences that he suffered as a result of the delay and mishandling of his legal mail, and he alleges that prison officials acted intentionally. Inconvenience is not legal prejudice.

B.

Hicks also argues that he was unlawfully placed in lockdown and solitary confinement and deprived of an adequate diet. Hicks did not make these claims in the original complaint. In the more definite statement, Hicks did mention lockdown and sack lunches, but only in connection with allegations of inconvenience that he suffered as a result of the belated receipt of mail.

At the Spears hearing, Hicks referred to the allegations in the more definite statement. Apparently unaware that Hicks had mentioned sack lunches and lockdown in his more definite statement, the district court did not allow Hicks to pursue those claims at the hearing.

Hicks's reference, at the Spears hearing, to those allegations makes one question whether he was asserting them as distinct claims or simply describing events that related to his mail claims. In the motion to reconsider, however, Hicks asserted that the court failed to address his lockdown and solitary confinement claim. Hicks is correct; the court did not address such a claim. In denying the motion for reconsideration, the district court did not

remedy that omission; the court should have allowed Hicks the opportunity to flesh out the lockdown/solitary confinement claim. See Spears, 766 F.2d at 180-82.

With development of the allegation, Hicks might have presented a nonfrivolous claim. See Eason, 14 F.3d at 9. As this court stated in Eason, "Even though a lockdown rarely will require more than informal review, some process arguably was due Eason and, given the limited information before us, we cannot determine whether it was provided." Id. (footnote omitted).

Hicks did not clarify in the motion for reconsideration that he was making a claim about sack lunches. If he had wished to assert a distinct claim about such lunches, he certainly could have done so. Indeed, according to his own assertion, Hicks typed his motion for reconsideration on sacks that had contained the lunches.

Hicks may not assert for the first time on appeal that he made a distinct claim about sack lunches. "[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).

C.

Hicks argues that the district court should have allowed discovery. He asserts that discovery would have allowed him an opportunity to show that he has a right to receive mail on the day that it arrives at his unit. Whether a right exists is a legal

question, but discovery is used for the disclosure of factual matters. See FED. R. CIV. P. 26.

Hicks requests that a special prosecutor be appointed to investigate the handling of mail and other alleged crimes in his unit. He faults the district court for not appointing one. Hicks has not explained how such a request is appropriate in this case.

In sum, most of Hicks's claims have no legal basis. The district court, therefore, did not abuse its discretion in dismissing most of Hicks's action as frivolous. The district court, however, did not address the lockdown/solitary confinement claim. Hicks should be given an opportunity to flesh out that claim.

The judgment is AFFIRMED in part and VACATED and REMANDED in part. We express no view on the ultimate merits of the lockdown/solitary confinement claim.