UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60692
Summary Calendar

ERWIN J. SMITH,

Plaintiff-Appellant,

versus

CITY OF PICAYUNE,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi
(93-CV-480)

(May 24, 1995)

Before POLITZ, Chief Judge, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:[*]

Erwin J. Smith appeals a judgment dismissing his action seeking declaratory and injunctive relief based on his claim that the Mississippi disorderly conduct statute violates the first, fifth, and fourteenth amendments to the Constitution. Concluding that the district court properly declined to exercise jurisdiction,

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

we affirm.

Background

On April 2, 1993 Smith, owner and operator of an arcade in Picayune, Mississippi, was told of a disturbance on the parking lot and joined a small crowd gathered there. Two members of the local police force arrived and one ordered Smith to return to his arcade. When Smith refused he was placed under arrest for disobeying a command of a law enforcement official.

Smith was charged with violating Miss. Code Anno. § 97-35-7 (1972)[1] and was convicted in Picayune Municipal Court. He received a suspended 60-day sentence plus a fine of $300 or 30 days imprisonment. Smith appealed the conviction to the Circuit Court of Pearl River County contending that the statute was

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[1]Mississippi Code Annotated § 97-35-7 (1972) provides in pertinent part:

> **Disorderly conduct -- failure to comply with requests or commands of law enforcement officers -- penalties.**
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> (1) Whoever, with intent to provoke a breach of the peace, or under such circumstances as may lead to a breach of the peace, or which may cause or occasion a breach of the peace, fails or refuses to promptly comply with or obey a request, command, or order of a law enforcement officer, having the authority to then and there arrest any person for a violation of the law, to:
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> . . .
>
> (i) Act or do or refrain from acting or doing as ordered, requested or commanded by said officer to avoid any breach of the peace at or near the place of issuance of such order, request or command, shall be guilty of disorderly conduct, which is made a misdemeanor . . . .

unconstitutionally vague and overbroad.[2] While this appeal was pending Smith filed the instant complaint. In addition to the declaratory and injunctive relief, Smith sought a judgment for attorney's fees and expenses under 42 U.S.C. §§ 1983 and 1988.

The district court partially dismissed Smith's complaint because of the pending state court criminal proceeding, maintaining jurisdiction over the claim for attorney's fees and expenses pending culmination of the state court action.

Analysis

We review the decision of the court *a` quo* to abstain under the abuse of discretion standard.[3] Acting to protect the interests of equity, comity, and federalism, in **Younger v. Harris**[4] the Supreme Court directed federal courts to refrain from enjoining pending state court criminal proceedings[5] absent "exceedingly rare and extraordinary circumstances."[6] In **Samuels v. Mackell**,[7] a

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[2]According to Smith's brief, the constitutional challenge was presented to the court upon a motion for summary judgment. It is not clear whether the challenge was based upon the Mississippi Constitution or only the United States Constitution. Nor is it clear whether Smith raised any other issues in his appeal.

[3]See **American Bank and Trust Co. of Opelousas v. Dent**, 982 F.2d 917 (5th Cir. 1993).

[4]401 U.S. 37 (1971).

[5]The original scope of the doctrine has been extended to certain state civil and administratiave actions. See **Ohio Civil Rights Comm'n v. Dayton Christian Schools**, 477 U.S. 619 (1986); **Trainor v. Hernandez**, 431 U.S. 434 (1977); **Juidice v. Vail**, 430 U.S. 327 (1977).

[6]See **Ballard v. Wilson**, 856 F.2d 1568, 1569-70 (5th Cir. 1988).

[7]401 U.S. 66 (1971).

companion case to **Younger**, the Court made clear that requests for declaratory relief fall within the reach of **Younger** abstention.

Smith's complaint is squarely within the reach of **Younger**/ **Samuels**. As we have noted previously, this is a case where an injunction would notify the state courts "that an adverse declaratory judgment could be expected and a declaratory judgment as to the constitutionality of the [statute] would actually resolve an issue central to the pending state proceedings. This is precisely the sort of interference condemned by the Supreme Court in **Younger** and **Samuels**."[8] The record does not demonstrate that Smith has exhausted his state appellate remedies.[9] Nor does Smith point to extraordinary circumstances -- such as bad faith prosecution -- to justify an exception to the general rules. Abstention was proper.

Smith's motion to supplement the record with the ruling of the Pearl River County Circuit Court is granted.[10]

For the foregoing reasons, the decision of the district court is AFFIRMED.

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[8]**Ballard**, 856 F.2d at 1570 (internal citation omitted).

[9]See **Huffman v. Pursue, Ltd.**, 420 U.S. 592 (1975); **Ballard**. Although the supplement to the record reveals that the circuit court recently rejected Smith's constitutional challenge, there has been no suggestion or proof that this order cannot be appealed.

[10]We ordinarily will not enlarge the record on appeal beyond that before the district court. See **United States v. Flores**, 887 F.2d 543 (5th Cir. 1989). We do so here in the interest of justice.