

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40164
Summary Calendar

SHERMAN DARNELL,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division;
WAYNE SCOTT; CALDWELL PREJEAN;
WILLIAM MCCRAY; TEXAS CORRECTIONAL
INDUSTRY PRIVATE PRISON, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE;
CALVIN LANGFORD; JANIE THOMAS,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. C-96-CV-580
- - - - -

December 23, 1997

Before JOLLY, JONES, and SMITH, Circuit Judges.

PER CURIAM:*

Sherman Darnell, Texas state prisoner # 593265, argues that the district court abused its discretion in dismissing his civil rights complaint based on his failure to pay the filing fee or to file timely an in forma pauperis application. We have reviewed

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the record and the brief filed by Darnell and find that the district court abused its discretion in dismissing Darnell's complaint pursuant to FED. R. CIV. P. 41(b). Although the court dismissed the complaint without prejudice, it appears that Darnell may be barred by the applicable limitations period from filing a new complaint. Therefore, the dismissal is reviewed as a dismissal with prejudice. See Berry v. CIGNA/RSI-CIGNA, 975 F.2d 1188, 1192 (5th Cir. 1992).

The record does not reflect that Darnell intentionally delayed the proceeding or engaged in any contumacious conduct. Rather, the record reflects that Darnell had attempted to cure the noted deficiency prior to the entry of the order of dismissal. The district court did not state that it had considered whether a lesser sanction would have served the interest of justice. The court abused its discretion in effectively dismissing the complaint with prejudice. See id. at 1191-92 & n.6.

The order of dismissal is VACATED, and the case is REMANDED for further proceedings. We express no view on the merits.