

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40224
Summary Calendar

DAVID MUDGE,

Plaintiff-Appellant,

versus

RON CAWTHON, Chief Jailer;
DAVID PETRUSAITIS; Aransas County Jail,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. C-96-CV-655
- - - - -

November 25, 1997

Before DUHÉ, DeMOSS, and DENNIS, Circuit Judges.

PER CURIAM:*

David Mudge, Texas prisoner #689684, appeals from the district court's dismissal of his 42 U.S.C. § 1983 complaint for failure to comply with a court order. See Fed. R. Civ. P. 41(b). Because the district court's dismissal order was silent regarding whether the dismissal was with or without prejudice, the dismissal "operates as an adjudication upon the merits," i.e., as a dismissal with prejudice. Rule 41(b); see Nagle v.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Lee, 807 F.2d 435, 442-43 (5th Cir. 1988). "A dismissal with prejudice is appropriate only if the failure to comply with the court order was the result of purposeful delay or contumaciousness and the record reflects that the district court employed lesser sanctions before dismissing the action." Long v. Simmons, 77 F.3d 878, 880 (5th Cir. 1996).

The record does not indicate that Mudge failed to comply with the court's order to secure a delay or out of contumaciousness or that the district court employed lesser sanctions before dismissing the action. Therefore, the district court abused its discretion in dismissing the action. See id. The district court's judgment is VACATED and the case is REMANDED for further proceedings.