

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4093
Summary Calendar

WILLIAM DEXTER WHITE,
Individually and on Behalf of
All Others Similarly Situated,

Plaintiff-Appellant,

VERSUS

AUBREY COLE, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
91 CV 796

(June 11, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

William White appeals the dismissal as frivolous, under 28 U.S.C. § 1915(d), of his state prisoner's civil rights action brought pursuant to 42 U.S.C. § 1983. Concluding that White's claims are not frivolous, we affirm in part and vacate and remand

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 Pursuant to that rule, the court has determined that this opinion should not be published.

in part.

I.

White filed this pro se and in forma pauperis ("IFP") suit against Jasper County, Texas, Sheriff Aubrey Cole, Jasper County head jailer Mo Johnson, and the Jasper County Jail, alleging that he had been denied access to the courts while confined in the jail because he did not have access to a law library. He amended his complaint in response to the magistrate judge's order to provide a more definitive statement. The magistrate judge recommended that the complaint be dismissed as frivolous¹ because White had been represented by attorney Pamela A. Jackson.

In detailed objections to the magistrate judge's report, White alleged that Jackson had represented him on his criminal appeal only; that his trial attorneys had provided ineffective assistance because they had no access to adequate legal research facilities; and that he had been forced to plead guilty to a life sentence because of his trial attorneys' ineffectiveness. White also alleged that he had never been able to file an unidentified tort claim because, as an inmate, he was unable to do legal research to learn how to obtain necessary affidavits from now-unavailable witnesses.

The district court overruled the objections and adopted the magistrate judge's recommendation, finding that White had been

¹ Apparently no Spears hearing was held in this case. See Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

transferred to the Texas Department of Criminal Justice, Institutional Division (TDCJ), before the expiration of the statute of limitations governing the tort claim. The court noted that, as a TDCJ inmate, White would have had access to adequate law libraries. Therefore, it determined that he had not demonstrated prejudice by any lack of library facilities at the jail.

The court further found that White had not been denied access to the courts because Jasper County had provided him with an attorney. The court noted that White's claims concerning ineffective assistance of counsel should first be pursued in a federal habeas corpus action. The court therefore dismissed the suit as frivolous, noting that the dismissal of the claim that counsel had been ineffective because of lack of a law library was without prejudice.

II.

Pro se brief must be liberally construed. Haines v. Kerner, 404 U.S. 519, 520 (1972). Holding a pro se litigant to "less stringent standards" than that to which lawyers are held allows pro se claims, "however inartfully pleaded," to be considered. Id. at 520. Nevertheless, a complaint filed IFP may be dismissed as frivolous if it lacks an arguable basis in fact and law. A section 1915(d) dismissal is reviewed for abuse of discretion. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992).

The district court should not have dismissed this suit, as it is neither legally nor factually frivolous. Id. Prisoners have a

right to access to the courts in all types of civil litigation. Jackson v. Procunier, 789 F.2d 307, 311 (5th Cir. 1986). Jails and prisons are required to supply inmates with "adequate law libraries or adequate assistance from persons trained in the law in order to comply with the prisoner's constitutional right to meaningful access to the courts." Pembroke v. Wood County, Tex., 981 F.2d 225, 229 (5th Cir. 1993) (internal quotations and citations omitted).

The unavailability of any type of access to legal research materials, described by White, falls far shore of this court's standards for adequate legal research. See Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985). The district court's holding, that the county had satisfied its obligation to White by appointing counsel instead of providing access to a law library, is incorrect if it refers to White's appointed criminal counsel. White specifically alleged that his appointed attorneys represented him only in criminal matters, which did not fulfill his right to access to the courts in civil matters. Mann v. Smith, 796 F.2d 79, 83-84 (5th Cir. 1986). If the district court's holding is based upon the fact that Jasper County provides inmates with legal representation in civil matters, such information should be included in the record.

The district court also determined that the suit was frivolous because White had not demonstrated prejudice from the lack of access to a law library during his nine-month stay in the Jasper County jail. An allegation of denial of access to the courts will

not support a claim under section 1983 if the litigant does not demonstrate that he was prejudiced by the alleged violation. Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.), cert. denied, 112 S. Ct. 2974 (1992).

White has alleged that he suffered prejudice because he could not research legal issues while he was a jail inmate. His claim that he was unable to find out how to obtain affidavits from his fellow jail inmates is somewhat specious, as he should have been able to secure this information from his appointed counsel, even if counsel did not represent him in civil matters.

In his amended brief, however, White also alleged that all defendants have been dismissed from one of his state court lawsuits because his claims were time-barred. According to White, the suit was not filed timely because he was unable to research his claims while he was incarcerated in Jasper County. For the foregoing reasons, the district court abused its discretion when it dismissed this suit, as White's claims are neither legally nor factually frivolous. Ancar, 964 F.2d at 468.

III.

White also has alleged that the court-appointed attorneys in his capital murder trial were constitutionally ineffective because, among other reasons, they had no access to adequate legal research facilities. Although this suit is styled as a civil rights action, White's claim that he did not receive effective representation could affect whether he is entitled to immediate or early release.

Such a claim must first be pursued through habeas corpus. Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1119 (5th Cir. 1987). The suit should not be dismissed pending White's exhaustion of state remedies, however. Rather, the suit should be dismissed only insofar as it states a habeas claim, but the district court should entertain White's section 1983 claim to the extent that it can be separated from his habeas claim. Id. at 1119.

IV.

On appeal, White also challenges the district court's refusal to certify this lawsuit as a class action. The district court properly declined to certify. White was no longer a Jasper County inmate when he filed the suit, and there is no evidence that Jasper County still lacks adequate law library facilities.

The judgment is AFFIRMED in part and VACATED and REMANDED in part, for further proceedings in accordance with this opinion. In vacating and remanding, we express no view as to the ultimate disposition on the merits.