

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9077
Summary Calendar

DONALD RAY TURNER,

Petitioner-Appellant,

versus

U.S. PAROLE COMMISSION,
Commissioner, U.S. Dept.
of Justice,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
3:92 CV 2217 G

March 22, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Appellant Turner filed a civil rights complaint against Victor M.F. Reyes, in his capacity as commissioner of the U.S. Parole Commission, seeking only money damages. In his complaint, Turner alleged that he was arrested for a parole violation in January 1992 and is being held in federal custody at the FCI in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Lompoc, California. Turner further alleged that he was not on parole at the time of his arrest and that there is no legal cause for his confinement.

The magistrate judge recommended that the case be construed as a Bivens action and that the complaint be dismissed for failure to exhaust administrative remedies under the Federal Tort Claims Act. see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Alternatively, as the complaint challenges the fact of confinement, the magistrate judge recommended that the complaint be construed as a petition for habeas relief under 28 U.S.C. § 2241 and that it be dismissed for lack of jurisdiction because Turner is not confined in the Northern District of Texas. The district court adopted the findings, conclusions and recommendation of the magistrate judge and dismissed the complaint without prejudice.

Turner argues on appeal that his action was brought under 42 U.S.C. § 1983. Turner's claims do not arise under § 1983. A plaintiff can recover in a § 1983 action only against a defendant who acted under color of state law. Briscoe v. LaHue, 460 U.S. 325, 329, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). The defendant in the instant action allegedly acted under color of federal law.

The magistrate judge relied on Lennon v. Hessbrook, 777 F.2d 999, 1001-03 (5th Cir. 1985), in recommending that the case be dismissed for failure to exhaust administrative remedies. Lennon has been overruled. In McCarthy v. Madigan, ___ U.S. ___, 112 S. Ct. 1081, 1088, 117 L. Ed. 2d 291 (1992), the Court held that a

petitioner seeking only money damages in a Bivens-type action need not exhaust administrative remedies pursuant to the FTCA prior to seeking relief in federal court.

Nevertheless, Turner must pursue § 2241 remedies before pursuing his claim for damages because his complaint challenges the fact of his confinement. Spina v. Aaron, 821 F.2d 1126, 1127-28 (5th Cir. 1987).

The district court dismissed the case without prejudice but did not consider whether Turner's present claims could be adversely affected by applicable state statutes of limitations. To avoid any prejudice, we vacate and remand with instructions to the court to hold this case in abeyance pending exhaustion of Turner's § 2241 remedies. Spina, 821 F.2d at 1128-29.

VACATED and REMANDED with instructions.