UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5000
Summary Calendar

ELIJAH ALFRED ALEXANDER, JR.,

Plaintiff-Appellant,

VERSUS

KELLY WARD,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(5:93-CV-876)

(September 23, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Elijah Alfred Alexander, Jr., challenges the dismissal with prejudice, pursuant to 28 U.S.C. § 1915(d), of his *pro se*, *in forma pauperis* civil rights action. We **VACATE** and **REMAND**.

I.

Alexander, who is incarcerated at Wade Correctional Center in Homer, Louisiana, asserts that he is the "endtime prophet, Elijah". As such, he declares "Religious Immunity" from the wearing of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

shoes. He also claims such immunity from "other matters" required by his "prophetic duty", though those other matters are not specified.

Correctional officials, apparently unmoved by a letter Alexander alleges to have sent proclaiming his immunity from any requirement that he wear shoes, ordered plaintiff to do so. Declaring that his religion requires "barefootedness", Alexander filed suit under 42 U.S.C. § 1983 against the correctional facility and its warden, contending, *inter alia*, that his First Amendment free exercise of religion right is being violated.[2]

Alexander proceeded *in forma pauperis* before the district court; the court referred the matter to a magistrate judge to issue a report and recommendation (report) regarding Alexander's claims. The magistrate judge, after stating that "[p]rison officials apparently ordered [Alexander] to wear shoes for sanitary reasons", found that the order requiring the wearing of shoes related to a "legitimate penological interest, which outweighs the vague and unsubstantiated claim of a religious practice to the contrary." Applying § 1915(d), the magistrate judge recommended that the complaint be deemed frivolous and dismissed with prejudice. Following Alexander filing objections to the report, the district court, based upon its independent review of the record, found the

[2] Alexander's complaint and brief on appeal contain other claims, such as a due process claim, which were not addressed by the district court. In light of this matter being remanded, we do not need to address those claims.

report's findings correct, and dismissed the complaint with prejudice.

II.

A district court may dismiss an *in forma pauperis* action if the complaint is frivolous. 28 U.S.C. § 1915(d). A complaint is frivolous if "it lacks an arguable basis either in law or in fact." ***Neitzke v. Williams***, 490 U.S. 319, 325 (1989); *see also* ***Denton v. Hernandez***, ___ U.S. ___, ___, 112 S.Ct. 1728, 1733 (1992). Such a *sua sponte* dismissal is made within the discretion of the trial court; this court will reverse a § 1915(d) dismissal only upon finding that such discretion has been abused. ***Denton***, ___ U.S. at ___, 112 S.Ct. at 1734; ***Smith v. Aldingers***, No. 93-8081, slip op. 6025, at 6026 (5th Cir. Aug. 17, 1993).

When reviewing a § 1915(d) dismissal, several factors have been identified which should guide an appeals court in its inquiry into whether there has been an abuse of discretion, including:

> whether the plaintiff was proceeding *pro se*; whether the court inappropriately resolved genuine issues of disputed fact; whether the court applied erroneous legal conclusions; whether the court has provided a statement explaining the dismissal that facilitates "intelligent appellate review"; and, whether the dismissal was with or without prejudice.

Denton, 112 S.Ct. at 1734 (citations omitted); *see also* ***Moore v. Mabus***, 976 F.2d 268, 270 (5th Cir. 1992).

The magistrate judge correctly recognized that free exercise rights are not entirely lost upon incarceration. ***O'Lone v. Estate of Shabazz***, 482 U.S. 342, 348 (1987). Moreover, he also set forth the appropriate test by which penological interests are balanced

with such a constitutional right. Specifically, a prison regulation that infringes the free exercise of religion may be valid if: (1) there is a rational relationship between the prison regulation and the legitimate government interest advanced; (2) there are alternative means by which the prisoner may exercise any religious rights the inmate may hold; and, (3) an accommodation in favor of the inmate would adversely impact various penological interests, including prison staff and other inmates. ***Muhammad v. Lynaugh***, 966 F.2d 901, 902 (5th Cir. 1992); *see also* ***Turner v. Safley***, 482 U.S. 78, 89-91 (1987).

Although the district court did not apply erroneous legal standards to the instant matter, it erred in its search for the state's legitimate penological interest. Specifically, it found correct the magistrate judge's findings that the prison authorities ordered appellant to wear shoes "apparently ... for sanitary reasons", and that "[t]he wearing of shoes is a sanitary practice protecting not only the health of the plaintiff but the health of other inmates as well."

This court has identified lack of adequate record development as a factor favoring vacation of a § 1915(d) dismissal. *See* ***Moore***, 976 F.2d at 270-71. There is no basis in the record for concluding that "sanitary reasons" led prison authorities to order appellant to wear shoes, however logical such a supposition may be. In fact, nowhere in the record is there any evidence concerning the government's interests in requiring the wearing of shoes. Section 1915(d) authorizes district courts to "pierce the veil of the

complaint's factual allegations", ***Neitzke***, 490 U.S. at 327; but, the exercise of such power must be consistent both with the Supreme Court's command that the initial assessment of an *in forma pauperis* plaintiff's factual allegations be "weighted in favor of the plaintiff" and the Court's admonition that a § 1915(d) dismissal determination not be used as "a factfinding process for the resolution of disputed facts." ***Denton***, ___ U.S. at ____, 112 S.Ct. at 1733.

Of course, we intimate no view as to whether this complaint could have been dismissed under § 1915(d) if there were a factual basis for finding sanitary or health reasons for the order of the prison authorities. Perhaps a ***Spears*** hearing[3] would have been a useful tool in adducing the government's interest in Alexander's wearing shoes. But, as the record stands now, a colorable claim that Alexander's free exercise of religion right has been infringed exists, and there is no evidentiary basis for judicially determining the penological interest that might countervail Alexander's right to freely exercise his religion.

IV.

For the foregoing reasons, the order dismissing the complaint with prejudice is **VACATED** and the case is **REMANDED** for further proceedings consistent with this opinion.

VACATED and REMANDED

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[3] ***Spears v. McCotter***, 766 F.2d 179 (5th Cir. 1985). For a discussion of ***Spears*** hearings in light of ***Neitzke*** and ***Denton***, *see* ***Moore***, 976 F.2d at 269-70.