IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20214
Summary Calendar

WILLIAM BIGGS, JR.,

Plaintiff-Appellant,

VERSUS

JAMES COLLINS,
Director, Texas Department of Criminal Justice,
Institutional Division,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-3309)

(July 8, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

William Biggs, Jr., appeals the dismissal, as frivolous under 28 U.S.C. § 1915(d), of his prisoner's civil rights complaint filed pursuant to 42 U.S.C. § 1983. Finding no reversible error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Biggs, an inmate of the Texas Department of Criminal Justice (TDCJ), filed a pro se complaint asserting that his due process rights were violated when he was disciplined for soliciting sexual intercourse from Ms. Sirkle, a female prison employee. Biggs asserted that Sirkle's accusation that he soliticted sex from her was false and that the prison disciplinary committee wrongly sentenced him to two weeks of solitary confinement and removed him from his job as an outside trustee as a result of the accusation. He further argued that the state had created a liberty interest in requiring that disciplinary charges be brought within thirty days of discovery and that TDCJ officials violated that interest by punishing him for a rule infraction that allegedly had occurred nine months before.

The district court determined that the disciplinary proceedings "were accompanied by more than the minimal procedural safeguards constitutionally mandated." Concluding that Biggs's claim had no realistic chance of ultimate success and no arguable basis in fact, the court dismissed the claim as frivolous.

II.

A district court may dismiss an in forma pauperis complaint that it determines to be frivolous because it lacks an arguable basis in law or fact. Booker v. Koonce, 2 F.3d 114, 115 (5th Cir. 1993). A factual claim that is not irrational or wholly incredible, however, may no longer be dismissed as frivolous merely

because the court concludes that its "realistic chance of ultimate success is slight." The dismissal here need not be disturbed, however, as Biggs's claim lacks an arguable basis in law. See Sojourner T. v. Edwards, 974 F.2d 27, 30 (5th Cir. 1992) (holding that a court may affirm a judgment on any basis supported by the record), cert. denied, 113 S. Ct. 1414 (1993).

Because of the nature of Biggs's punishment, he was entitled to the procedural protections espoused in Wolff v. McDonnell, 418 U.S. 539 (1974): (1) written notice of the charges against him at least twenty-four hours before the hearing; (2) a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken; and (3) the opportunity to call witnesses and present documentary evidence in his defense, unless these procedures would create a security risk in the particular case.

Biggs acknowledges that he received notice of the charges on May 18, 1993, and that the disciplinary hearing was held on May 21, 1993. He does not argue that he was not given a sufficient explantion of the disciplinary action taken; he states, however, that Sirkle did not testify at the hearing, although he had requested her presence.

Construing Biggs's statement as an assertion that he was not afforded an opportunity to call witnesses in his defense, Biggs has not shown a denial of Wolff procedural protections. In Wolff, the Court declined to extend the right to call witnesses to allow an inmate to confront and cross-examine an accuser. 418 U.S. at 567-

69. The Court noted that allowing such would result in lengthy and unmanageable disciplinary proceedings and concluded that the decision whether to allow such confrontation was left to the sound discretion of prison officials. Further, although those officials may, in some instances, be required to explain the reasons why a witness was not allowed to testify, see Ponte v. Real, 471 U.S. 491, 497 (1985), the probable reason in this case is provided by Biggs himself, who acknowledged that Sirkle resigned her position as a TDCJ employee prior to Biggs's being served with the disciplinary report. The disciplinary committee had no authority to require Sirkle's presence as a witness at the hearing, and given the circumstances surrounding Sirkle's resignation,[1] it is highly unlikely that Sirkle would have voluntarily consented to testify.

Biggs also argues that the TDCJ disciplinary rules mandate that an inmate receive notice of a disciplinary hearing within thirty days of the discovery of the alleged violation. He argues that Sirkle was a TDCJ employee at the time he allegedly solicited sex from her in August 1992; therefore, the rule infraction was "discovered" on that date. He further argues that, because of the mandatory nature of the TDCJ provision, he has a liberty interest in receiving such notice within thirty days and that TDCJ officials violated that interest by not notifying him of the disciplinary infraction until nine months after the alleged infraction.[2]

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[1] According to Biggs, Sirkle resigned after being questioned about her personal relationship with another inmate.

[2] On May 18, 1993, TDCJ officials questioned Sirkle about her alleged (continued...)

A violation of prison regulations, without more, does not give rise to a federal constitutional violation. Hernandez v. Estelle, 788 F.2d 1154, 1158 (5th Cir. 1986). A prisoner may show, however, that a state has created a liberty interest which may not be interfered with, absent procedural due process protections, by showing that the state has placed substantive limitations on official discretion. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989); Olim v. Wakinekona, 461 U.S. 238, 249 (1983). To make such a showing, a prisoner must show that particularized standards or criteria guide the state's decisionmakers. Id. The term "shall" can be indicative of mandatory language. Board of Pardons v. Allen, 482 U.S. 369, 377-78 (1987).

Although the TDCJ regulation at issue uses the word "shall," it initiates only a formal procedural requirement, not a substantive limit on official discretion. A liberty interest protected by the Due Process Clause "cannot be the right to demand needless formality." Olim, 461 U.S. at 250 (internal quotations and citation omitted). Process is not an end in itself, and its purpose is to protect substantive interests. Id. An inmate alleging a violation of a formal procedural infirmity under prison regulations, but not a substantive defect, does not establish a protected liberty interest. See Easley v. Martin, No. 93-4444 (5th

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(...continued)
personal relationship with another inmate. Sirkle denied any relationship but informed the assistant warden that Biggs had solicited sex from her in August 1992. Biggs received the disciplinary infraction report on May 18, 1993.

Cir. March 14, 1994) (dismissing as frivolous prisoner's claim that prison officials had violated protected liberty interests by not following procedural requirements of disciplinary hearing) (unpublished); see also Hughes v. Lee County Dist. Court, 9 F.3d 1366, 1367 (8th Cir. 1993) (holding that prisoner's claim that officials had failed to provide him with notice of disciplinary actions within twenty-four hours after incident report was filed does not create protected liberty interest).

Biggs has not established that prison officials have violated a protected liberty interest; therefore, he cannot establish a due process violation. See Thompson, 490 U.S. at 460. Accordingly, the district court did not abuse its discretion in dismissing Biggs's complaint as frivolous.

AFFIRMED.