

United States Court of Appeals

TENTH CIRCUIT
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DENVER, COLORADO 80294

ROBERT L. HOECKER
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August 15, 1991

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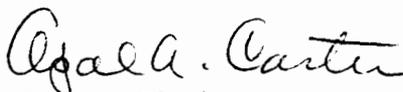
TO: ALL RECIPIENTS OF THE CAPTIONED OPINION
(Filed 7/19/91 by Judge Baldock)

Re: No. 91-6099 Richards v. Bellmon
(D.C. No. CIV-90-1849-P)

Attached is a new page 7 which should be substituted for page 7 in the
opinion filed July 19, 1991, in the captioned case.

Sincerely,

ROBERT L. HOECKER, Clerk

By: 
Deputy Clerk

RLH:oac

Enclosure

requirement of § 2254,² and we are reluctant to interfere with plaintiff's tactical choice and impose a requirement that he also must proceed under § 2254.³ The Second Circuit has recognized the possibility of a subsequent § 1983 suit for damages based upon a

² See Harper v. Jeffries, 808 F.2d 281, 285 (3rd Cir. 1986); Parkhurst v. Wyoming, 641 F.2d 775, 777-78 (10th Cir. 1981). See generally P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, The Federal Courts & The Federal System, 1649-51 (3rd ed. 1988).

³ We recognize that plaintiff is proceeding pro se and as a nonlawyer is entitled to liberal construction of his complaint. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). We recently elaborated on this rule:

We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements. At the same time, we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant.

Hall v. Bellmon, No. 90-6326, slip op. at 6 (10th Cir. June 3, 1990) [1991 WL 90172] (footnote omitted). We carefully have reviewed the pleadings in this matter and nowhere does plaintiff question the constitutionality of his physical confinement based upon the delay in presenting his direct criminal appeal. Such a claim would constitute a challenge to his confinement and habeas would be the exclusive remedy. Preiser, 411 U.S. at 489. In light of Manous, 797 P.2d 1005, and because the record discloses plaintiff's attempted exhaustion by virtue of his delayed direct appeal, we could liberally construe plaintiff's complaint to encompass a claim for relief under § 2254. See Goodwin v. Oklahoma, 923 F.2d 156, 158 (10th Cir. 1991) (exhaustion); Smith v. Maschner, 899 F.2d 940, 951 (10th Cir. 1990) (liberal construction). A single complaint may seek relief partly under § 2254 and partly under § 1983. Wiggins v. New Mexico State Supreme Ct. Clerk, 664 F.2d 812, 816 (10th Cir. 1981), cert. denied, 459 U.S. 840 (1982); Parkhurst, 641 F.2d at 776. See also Preiser, 411 U.S. at 499 n.1 (habeas and § 1983 claims may be litigated simultaneously). But to construe this complaint as arising under § 1983 and § 2254 borders on advocacy and could interfere with a possible tactical choice by the plaintiff. We decline to do so.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

ROBERT L. HOECKER
CLERK

July 24, 1991

(303) 844-3157
FTS 564-3157

TO: ALL RECIPIENTS OF THE CAPTIONED OPINION
Filed July 19, 1991, by Judge Baldock

Re: 91-6099, Richards v. Bellmon
(Lower docket: CIV-90-1849-P,)

The attached opinion corrects the footnote on page 2 of the opinion filed in the captioned case on July 19, 1991, by Judge Baldock. Please substitute this opinion for the one sent to you previously.

Sincerely,

ROBERT L. HOECKER
Clerk

By: *Opal A. Carter*
Deputy Clerk

RLH:oac
Enclosure

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

JUL 19 1991

ROBERT L. HOECKER
Clerk

ROBERT RICHARDS,)
)
 Plaintiff-Appellant,)
)
 vs.)
)
 HENRY BELLMON, Executive Chief)
 of the Oklahoma Legislature)
 and E. ALVIN SCHAY, Chief)
 Appellate Public Defender of)
 Oklahoma,)
)
 Defendants-Appellees.)

No. 91-6099

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-90-1849-P)

Robert Richards, pro se.

Robert H. Henry, Attorney General, and Gay Abston Tudor, Assistant
Attorney General, State of Oklahoma, Oklahoma City, Oklahoma for
Defendants-Appellees.

Before LOGAN, MOORE and BALDOCK, Circuit Judges.*

BALDOCK, Circuit Judge.

* Defendants-appellees notified the court that they would not file a response brief. After examining the brief submitted by plaintiff-appellant and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.2. The case therefore is submitted without oral argument.

Plaintiff-appellant Robert Richards, a prisoner in the custody of the Oklahoma Department of Corrections, appeals the dismissal of his civil rights action under 42 U.S.C. § 1983. He seeks declaratory and injunctive relief, claiming that the failure of the Oklahoma Legislature to provide sufficient funds for the Oklahoma Appellate Public Defender System deprives him, and others who must rely on the services of the appellate public defender, of due process of law and equal protection. He claims that if he could afford a lawyer, his brief would be filed with the Oklahoma Court of Criminal Appeals within months rather than years. According to the plaintiff, the State's failure to fund the Oklahoma Appellate Public Defender System results in an appellate review process which discriminates against him on account of his poverty. I R. doc. 2 at 3a (citing Williams v. Oklahoma City, 395 U.S. 458, 459-60 (1969); Douglas v. California, 372 U.S. 353, 356-58 (1963); Griffin v. Illinois, 351 U.S. 12, 19 (1956)). Plaintiff finally claims that the delay violates art. II, § 6 of the Oklahoma Constitution.¹

¹ Art. II, § 6 of the Oklahoma Constitution provides:

**Courts of justice open--Remedies for wrongs--Sale,
denial or delay**

The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.

Okla. Stat. Ann. (West 1981).

Plaintiff was convicted in state court for the unlawful delivery of a narcotic and sentenced on April 18, 1990, to fifty-years imprisonment. A petition in error was filed in the Oklahoma Court of Criminal Appeals on October 17, 1990. Court-appointed appellate counsel received (1) a thirty-day extension to file the original record and transcripts and thereafter, (2) a 360-day extension, until November 13, 1991, to file his opening brief. To date, eight months has elapsed since counsel was to perfect the appeal by filing the original record and transcripts. See Okla. Ct. Crim. App. R. 2.1(C) & 3.2. On October 17, 1990, defendant was informed by the Oklahoma Appellate Public Defender System that it had only five full-time lawyers trying to handle all Oklahoma noncapital appeals and that "it may be 3 years or more before your brief can be filed in the Court of Criminal Appeals." I R. doc. 2, ex. 2.

The district court determined that plaintiff lacked article III standing because of an insufficient likelihood of substantial and immediate irreparable injury. I R. doc. 17 at 5. The prediction by the Oklahoma Appellate Public Defender System of a three-or-more-year delay in filing plaintiff's brief was considered "speculative" by the district court, notwithstanding that the Oklahoma Court of Criminal Appeals had noticed such delay. See Manous v. State, 797 P.2d 1005 (Okla. Crim. App. 1990). The Oklahoma Court of Criminal Appeals briefly discussed the State and federal constitutional implications of the problem, but concluded that it was powerless to effect a cure and it

declined to order the appellate public defender to prepare and file briefs without further delay. Id. at 1005.

This Court is aware of the delay relative to the handling of appeals by the Appellate Public Defender's office. It is obvious that the office is understaffed to handle the number of appeals that are presently being handled by the office but due to a lack of funding by the State, the office is apparently doing the best that they [sic] can under the circumstances. We are powerless to cure this problem. It can only be cured by the legislature through the use of its budgetary powers. Petitioner is not entitled to have his appeal handled prior to others who are in similar circumstances and have been delayed even longer.

Id. at 1005-06. Relying upon the fact that plaintiff is serving a fifty-year sentence and the supposition that "no further delays are anticipated [past the November 1991 extension]" the district court found no injury or prejudice which would confer standing. In the alternative, if the plaintiff had standing, the district court determined that the lack of funding and the backlog of appeals in the Oklahoma Appellate Public Defender System justified some delay, and the delay could not be presumed prejudicial given the length of plaintiff's sentence. Finally, the district court found plaintiff's complaint wanting because he failed to allege "that non-indigent defendants are not granted extensions of time to file their appeals." Id. at 6. According to the district court, plaintiff had merely alleged "that if he could afford to retain counsel his appeal brief might be filed sooner," and that was not enough. Id.

From a procedural standpoint, the district court utilized an incorrect legal standard in dismissing the complaint. "[A] complaint should not be dismissed for failure to state a claim

unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Here, the district court dismissed the complaint after weighing the evidence concerning delay. Yet the allegations concerning the likelihood of delay must be construed favorably to the plaintiff and accepted as true. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); C. Wright & A. Miller, Federal Practice and Procedure § 1357 at 304 (1990).

The district court also erred in light of supervening authority. The substantive portion of the district court's analysis must be reevaluated in light of Harris v. Champion, Nos. 90-5223 & 90-5224, slip op. (June 17, 1991) [1991 WL 102074], on reh'g, pub. order (10th Cir. July 19, 1991). In Harris, we considered claims of inordinate delay in the Oklahoma appellate system with reference to federally protected rights and remanded the case to the district court (Northern District of Oklahoma) for a hearing on the delay. Harris, slip. op. at 19-20 (June 17, 1991). We also remanded two habeas cases on appeal from the Western District of Oklahoma for reconsideration in light of Harris. See Bunton v. Cowley, No. 90-6316, unpub. order at 2 (10th Cir. June 17, 1991) & Hacker v. Saffle, No. 91-6042, unpub. order at 2 (10th Cir. June 17, 1991).

We conclude that this case also should be remanded to the Western District of Oklahoma in light of Harris even though plaintiff seeks only declaratory and injunctive relief under § 1983 and Harris involved a habeas petition under 28 U.S.C.

§ 2254. As a general rule, a challenge to the fact of conviction or confinement, or the duration of confinement, is cognizable only under the habeas statute with its requirement of exhaustion of state remedies. Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973); 28 U.S.C. § 2254(b). On the other hand, a challenge to the conditions of confinement is cognizable under § 1983, which does not have a similar exhaustion requirement. Id. Thus, although § 1983 is not available when a state prisoner seeks a release from or reduction of confinement, it is available when a prisoner seeks (1) to challenge the conditions of his confinement or (2) a declaratory judgment as a predicate to (a) an award of money damages or (b) prospective injunctive relief. Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974); Preiser, 411 U.S. at 494, 498-99; Wilwording v. Swenson, 404 U.S. 249, 251 (1971) (per curiam); Slayton v. Willingham, 726 F.2d 631, 635 (10th Cir. 1984); Henderson v. Secretary of Corrections, 518 F.2d 694, 695 (10th Cir. 1975); Gregory v. Wyse, 512 F.2d 378, 381 (10th Cir. 1975).

Plaintiff's claim is simple and straightforward; he did not ask for release from state custody, and his complaint may properly proceed under § 1983. See Gerstein v. Pugh, 420 U.S. 103, 107 n.6. See also Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 3 (1979) (§ 1983 due process challenge to parole procedures). He seeks only a prompt determination of his appeal. This is not a case in which plaintiff's selection of § 1983 would undermine the exhaustion

requirement of § 2254,² and we are reluctant to interfere with plaintiff's tactical choice and impose a requirement that he also must proceed under § 2254.³ The Second Circuit has recognized the possibility of a subsequent § 1983 suit for damages based upon a

² See Harper v. Jeffries, 808 F.2d 281, 285 (3rd Cir. 1986); Parkhurst v. Wyoming, 641 F.2d 775, 777-78 (10th Cir. 1981). See generally P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, The Federal Courts & The Federal System, 1649-51 (3rd ed. 1988).

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constitutional violation associated with an untimely (and ultimately unsuccessful) appeal. Simmons v. Reynolds, 898 F.2d 865, 869 (2d Cir. 1990). In this case, plaintiff seeks prospective equitable relief beyond the scope of habeas. See Harris, Nos. 90-5223 & 90-5224, slip op. at 16-17 (June 17, 1991) (discussing habeas relief) ; Simmons, 898 F.2d at 868-69 (discussing relief under § 1983 as appropriate under 28 U.S.C. § 2243 in unusual circumstances).

On remand, defendants may answer the complaint and assert any applicable defenses. When considering the proper course on remand, the district court should be mindful of the statements contained in our order on rehearing in Harris. See id. Nos. 90-5223 & 90-5224, pub. order. at 4 (July 19, 1991).

Accordingly, we REVERSE and REMAND this case for proceedings consistent with this opinion.

FILED
United States Court of Appeals
Tenth Circuit

JUL 19 1991

ROBERT L. HOECKER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROBERT RICHARDS,)
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Plaintiff-Appellant,)
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vs.)
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of the Oklahoma Legislature)
and E. ALVIN SCHAY, Chief)
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No. 91-6099

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Defendants-Appellees.

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On remand, defendants may answer the complaint and assert any applicable defenses. When considering the proper course on remand, the district court should be mindful of the statements contained in our order on rehearing in Harris. See id. Nos. 90-5223 & 90-5224, pub. order. at 4 (July 19, 1991).

Accordingly, we REVERSE and REMAND this case for proceedings consistent with this opinion.