**Affirmed and Majority and Dissenting Opinions filed June 17, 2010.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-08-00734-CV**

**ROBERT KING CONWAY JR., Appellant**

**V.**

**RAYNALDO CASTRO, WARDEN II, RICHARD THOMPSON III, ASST. WARDEN, JASON JEATON, ASST. WARDEN, RONALD FOX, MAJOR OF CORRECTIONAL OFFICERS, NELDA SANDERS, CORRECTIONAL OFFICER IV, MARTINA CORDELL, CORRECTIONAL OFFICER V OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE--INSTITUTIONAL DIVISION, MICHAEL UNIT, Appellees**

**On Appeal from the 349th District Court**
**Anderson County, Texas**
**Trial Court Cause No. 349-5253**

## DISSENTING OPINION

Conway's equal-protection claim is not frivolous. The trial court abused its discretion in dismissing that claim with prejudice, and this court should reverse and remand. Because it does not, I respectfully dissent.

Following the hearing on August 30, 2005, the trial court originally ruled that Conway's claim under 42 U.S.C. § 1983 based on an alleged equal-protection violation ("equal-protection claim") was not frivolous and should proceed. However, in the process of discovery, the appellees moved to dismiss Conway's equal-protection claim, asserting Conway's claim had no arguable basis in law or fact. Without holding another hearing, the trial court granted appellees' motion and dismissed Conway's equal-protection claim with prejudice.

Whether a claim has an arguable basis in law is a legal question to be reviewed de novo. *In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1993); *Retzlaff v. Tex. Dep't of Crim. J.*, 94 S.W.3d 650, 653 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). A reviewing court must take the allegations in the inmate's petition as true and determine whether the inmate has alleged a claim that would authorize relief. For a claim to have no arguable basis in law, it must be based on an indisputably meritless legal theory or be based on wholly incredible or irrational factual allegations. *See Nabelek v. Dist. Attorney of Harris County*, 290 S.W.3d 222, 228 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); *Minix v. Gonzalez*, 162 S.W.3d 635, 637 (Tex. App.—Houston [14th Dist.] 2005, no pet.). An inmate's cause of action may not be dismissed merely because the court considers the allegations "unlikely." *See Nabelek*, 290 S.W.3d at 228. If Conway's petition has an arguable basis in law and fact, then the trial court erred in dismissing it as frivolous. *See Retzlaff*, 94 S.W.2d at 654.

Because the trial court did not sustain any special exceptions against Conway's petition, this court must construe the petition liberally in Conway's favor. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000). In his petition, Conway alleges a section 1983 claim based on the appellees' alleged deprivation, under color of state law, of Conway's constitutional right to equal protection. To prove a violation of his constitutional right to equal protection, Conway must show: (1) that he was treated differently than other similarly situated parties, and (2) that he was treated

differently without a reasonable basis. *See Conway v. Castro*, No. 12-03-00373-CV, 2004 WL 1103584, at *3 (Tex. App.—Tyler May 12, 2004, no pet.) (mem. op.); *Sanders v. Palunsky*, 36 S.W.3d 222, 225 (Tex. App.—Houston [14th Dist.] 2001, no pet.). As relevant in this case, Conway alleges that he was forced to give up his craft-shop tools when his craft-shop privileges were revoked after he received a major disciplinary case. Conway alleges that similarly situated inmates at the same unit and inmates at other units in the Texas Department of Criminal Justice-Institutional Division ("TDCJ-ID") were not forced to dispose of their tools when their craft-shop privileges were revoked after a major disciplinary case.

According to Conway's testimony at the hearing on August 30, 2005, he does not dispute that his privileges to the craft shop were revoked by Warden Castro after he received a major disciplinary case. However, he asserts that, because he was forced to dispose of his tools as a result of the revoked craft-shop privileges, he was treated differently than other inmates in the same unit and differently than inmates at other units in TDCJ-ID, none of whom Conway claims had to dispose of their tools when they similarly received major disciplinary cases. Conway testified that (1) the tools would be considered contraband in any other part of the unit except the craft shop; (2) at other units where he has had his craft-shop privileges revoked, he was allowed to recover his tools when those privileges were reinstated; and (3) at the same Michael Unit where he was housed in the previous two years, other inmates had received major disciplinary cases and lost their privileges to work in the craft shop; those inmates, however, were not required to dispose of their tools and subsequently were able to use their tools when they had their craft-shop privileges reinstated. Conway's privilege to work in the craft shop was reinstated when Warden Moore became warden of the Michael Unit. Conway testified that upon reinstatement of these privileges, he could not bring in tools from outside the unit and would have to buy new tools.

Conway's claims are not based on wholly incredible or irrational factual allegations, and the majority has not stated or shown otherwise. Furthermore, Conway's claims are not based on an indisputably meritless legal theory.[1] Regardless of whether Conway would succeed on the merits, it is not indisputably meritless to claim, based on Conway's allegations, that appellees treated Conway differently than other similarly situated inmates without a reasonable basis for doing so. The majority does not assert otherwise; rather, the majority concludes that Conway failed to plead or prove a valid right that was violated. The majority states that Conway has not shown that he has a right of access to the craft shop or to his tools in the craft shop. The majority concludes that Conway does not have any constitutional right arising out of Administrative Directive 3.72. Presuming that the foregoing is correct, Conway still has a constitutional right to equal protection, and he claims that appellees have deprived him of this right. *See Conway*, 2004 WL 1103584, at *3. The appellees have not asserted that Conway was treated the same as similarly situated inmates, and the appellees have not asserted any alleged reasonable basis for treating Conway differently. Instead, the appellees argue that Conway has failed to meet his burden of demonstrating that he was treated differently without a reasonable basis. This argument might be valid in a summary-judgment context. However, the trial court did not grant summary judgment; it dismissed the equal-protection claim as frivolous.[2]

The majority's analysis conflicts with the applicable legal standard. The only issue before this court is whether the claims asserted in Conway's petition are based on an indisputably meritless legal theory or on wholly incredible or irrational factual

[1] The majority relies on *Sandin v. Conner*, 515 U.S. 472, 481–82, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). *Sandin* holds that prison regulations do not give rise to due process rights. *Id.* at 483, 115 S. Ct. at 2300. However, the case at hand involves an equal-protection claim, not an alleged deprivation of due process.

[2] The majority also bases its decision on Conway's alleged failure "to ***present evidence*** that the appellees' actions deprived him of a right, privilege, or immunity secured by the Constitution or laws of the United States." *See ante* at p.7 (emphasis added). Conway did not have to raise a fact issue on the essential elements of his claim to avoid a finding of frivolousness. *See Nabelek*, 290 S.W.3d at 228; *Minix*, 162 S.W.3d at 637.

allegations. *See Nabelek*, 290 S.W.3d at 228; *Minix*, 162 S.W.3d at 637. Because Conway's claims are not so based, this court errs in affirming the trial court's dismissal of these claims as frivolous under section 14.003(a)(2) of the Texas Civil Practice and Remedies Code. *See Elias v. DeLeon*, No. 12-04-00143-CV, 2005 WL 2404113, at *2 (Tex. App.—Tyler Sept. 30, 2005, no pet.) (mem. op.) (holding that prison inmate's petition asserting conversion claim had an arguable basis in law); *Minix*, 162 S.W.3d at 639 (holding that prison inmate's petition asserting Theft Liability Act claim against two correctional officers in their individual capacities had an arguable basis in law); *Retzlaff*, 94 S.W.3d at 654 (holding that prison inmate's petition for judicial review of prison disciplinary proceeding had arguable basis in law).

This court should reverse the trial court's order dismissing Conway's equal-protection claim as frivolous under section 14.003(a)(2) of the Texas Civil Practice and Remedies Code, and remand for further proceedings.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Yates, Frost, and Brown. (Brown, J., majority)