In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00366-CV

PHILIP J. POHL, Appellant

V.

HAROLD HASTY, TERSIA BROWN, VENITA COLE, JOHN CYR JR., LISA DANIELS, STEPHANIE HORN, PAULINE LUCE, MARK MIKULEC, LARRY MORGAN, CHARLES ROBERTS, BOBBY WATSON, AND JEFFERY WELCH, Appellees

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On Appeal from the 258th District Court
Polk County, Texas
Trial Cause No. CIV 25,044

MEMORANDUM OPINION

Philip J. Pohl, an indigent inmate, appeals the dismissal of his suit. The trial court ruled that the suit is frivolous and dismissed the suit without prejudice. Pohl raises ten issues in his appeal. We hold that the trial did not abuse its discretion. Accordingly, we affirm the judgment of the trial court.

Pohl combines the argument for his first two issues, which contend:

> [Issue one:] Appellant POHL (hereon POHL) contends the complaint and its procedural documents were sufficiently plead to create subtantial standing sufficient to hold a constitutional protected interest that may not be upset by procedural deficiecy as prohibited in Texas Government Code § 22.004 (a) exception.
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> [Issue two:] Minor easily corrective errors, in auxillary document does not warrant **harsh dismissal** and loss of work product and standing and the Texas nor The U.S. constitutions were amended to accomodate the Texas Civ. Prac. and Rem. Code § 14.001 et. seq.[1]

We review the dismissal of an indigent inmate's lawsuit as frivolous under an abuse of discretion standard. *Jackson v. Tex. Dep't of Criminal Justice--Inst'l Div.,* 28 S.W.3d 811, 813 (Tex. App.--Corpus Christi 2000, pet. denied). The trial court abuses its discretion if it acts without reference to any guiding rules or principles. *Id.* In determining whether a claim is frivolous, the trial court may consider whether the claim has no arguable basis in law. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(b)(2) (Vernon 2002). In reviewing whether the trial court properly determined that there is no arguable basis in law for the claims alleged in the inmate's petition, "we examine the types of relief and causes of action appellant pleaded in his petition to determine whether, as a matter of law, the petition stated a cause of action that would authorize relief." *Jackson,* 28 S.W.3d at 813. We review the petition

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[1] Throughout this Opinion, we will retain the words, grammar, and spelling used by the appellant.

de novo to determine whether a suit is based upon an indisputably meritless theory. *Scott v. Gallagher,* 209 S.W.3d 262, 266 (Tex. App.--Houston [1st Dist.] 2006, no pet.).

Pohl filed a lawsuit titled "Original Petition for Relief from Harms and Losses Caused by Official's Willful Gross Duty-Failure to Supervise and Protect" in which he sued Harold Hasty, Tersia Brown, Venita Cole, John Cyr Jr., Lisa Daniels, Stephanie Horn, Pauline Luce, Mark Mikulec, Larry Morgan, Charles Roberts, Bobby Watson, and Jeffery Welch "individually in their personal capacity acting in official capacity under color of law[.]" The petition recited that the defendants are state-employed correctional officials. The petition alleged that "[o]ver half of the 2900 Polunsky Unit general population are being denied, 'cheated' out-of their proper nutrient needs[.]" Pohl's petition alleged that inmates steal food and that "each of the named defendants are aware of each of the above schemes and **choozes to allow it, instigates it, knows of it and knowingly fails to report .. all felonies..**" The petition alleged the defendants violated Sections 39.02, 39.04, and 71.02 of the Texas Penal Code, Section 41.003 of the Texas Civil Practice and Remedies Code, and Article 1, Section 30 of the Texas Constitution. The petition prayed for damages for "nutritional damge due to deficiecies not entirely measurable and the fear for-life threats while being locked in the same room with those who threat -- the anguish and emotional damage of willfull failure of the grievance system to react properly for their own personal reason not to and, the damage to sleep loss, hunger caused by protein deprivations" for which Pohl asked the court to fine

each defendant $600. Pohl also asked the trial court to garnish or fine the Polunsky Unit Recreation-Party fund for $20,000.00 "for litigation and corrective costs[.]"

On appeal, Pohl argues that his petition states a prima facie cause of action, and that "Defendants duty breach is a **taking from POHL AND hundreds of others**."[2] Pohl's petition alleged the violation of three penal statutes. *See* TEX. PEN. CODE ANN. § 39.02 (Vernon Supp. 2009) (abuse of official capacity); TEX. PEN. CODE ANN. § 39.04 (Vernon Supp. 2009) (violations of the civil rights of person in custody); TEX. PEN. CODE ANN. § 71.02 (Vernon Supp. 2009) (engaging in organized criminal activity). The Texas Penal Code does not provide a private cause of action. *Spurlock v. Johnson,* 94 S.W.3d 655, 658 (Tex. App.--San Antonio 2002, no pet.). Pohl's petition alleged the violation of a civil statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon Supp. 2009) (standards for recovery of exemplary damages). This statute does not authorize a cause of action, but merely describes those circumstances under which a plaintiff may recover exemplary damages. *Id.* Pohl's petition also alleges a violation of a crime victim's right to restitution under the Texas Constitution. *See* TEX. CONST. art. I, § 30. Restitution is authorized only

[2] Pohl's affidavit of previously filed litigation states that he has on several prior occasions filed civil rights suits pursuant to 42 U.S.C.A. § 1983. In this petition, however, Pohl does not mention Section 1983. Likewise, Pohl does not argue that he stated a claim pursuant to Section 1983 in his appellate argument for these issues. Considering Pohl's extensive prior filings, we presume that this time he elected not to pursue a Section 1983 claim for reasons of his own.

upon conviction for a criminal offense. *See* TEX. CODE CRIM. PROC. ANN. art. 42.037 (Vernon Supp. 2009). Thus, the petition is based upon an indisputably meritless theory and the trial court could determine from the pleadings that Pohl's claims lacked an arguable basis in law. *Spurlock,* 94 S.W.3d at 658. We overrule issues one and two.

Pohl combines the argument for his next two issues, which contend:

> [Issue three:] Mere mentioning a statute's wording in making a claim is insufficient without showing what was the problem, and the ambiguity of "discretion" is hid behind the word "may" in the C.P.& R. CODE§ 14.001 et. seq. POHL SATISFIED all requirements he was "allowed to satisfy that was not blocked or denied".
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> [Issue four:] Controlling law set aside because even though passed by the people as their power of the legislature, it voided the vague capacity of "may" this court took into agreement with defense.

In his argument under these two issues, Pohl suggests that the filing requirements that apply to suits filed by indigent inmates are exploited by prison officials and their representatives. In particular, Pohl appears to contend that he should be excused from showing exhaustion of administrative remedies because of abuses in the handling of inmate grievances. Pohl refers to three previous suits he filed and complains that in each of those suits the appellate court affirmed the dismissal. *See Pohl v. Simmons,* No. 13-09-00406-CV, 2009 WL 3922018 (Tex. App.--Corpus Christi Nov. 19, 2009, no pet.); *Pohl v. Polunsky Unit,* No. 09-08-00367-CV, 2009 WL 3199766 (Tex. App.--Beaumont Oct. 8, 2009, no pet.); *Pohl v. Chavers,* No. 09-07-00285-CV, 2007 WL 3393430 (Tex. App.--Beaumont Nov. 15,

2007, no pet.). Pohl suggests that the requirements placed on confined litigators encourages abuse by prison officials.

An inmate who files a claim that is subject to the grievance system must file an affidavit or unsworn declaration stating the date that the grievance was filed and the date the written decision was received by the inmate and attach a copy of the written decision. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.005 (Vernon 2002). Because noncompliance with the time requirements of Section 14.005 cannot be cured, the failure to timely exhaust administrative remedies results in a dismissal with prejudice. *Leachman v. Dretke,* 261 S.W.3d 297, 312 (Tex. App.--Fort Worth 2008, no pet.).

On May 26, 2009, Pohl filed two grievance forms that he claimed demonstrated the exhaustion of his administrative remedies. The motion to dismiss argued that the grievance forms submitted by Pohl did not concern the claims raised in his petition, and suggested that the suit should be dismissed for failure to exhaust administrative remedies. They also moved for dismissal on the grounds that Pohl failed to state a claim. The trial court dismissed the suit without prejudice as frivolous. Because a dismissal pursuant to Section 14.005 would have entitled the appellees to a dismissal with prejudice, rather than the dismissal without prejudice ordered by the trial court, the appellate record supports the conclusion that the trial court did not dismiss the case for Pohl's failure to properly exhaust his remedies under the grievance system. We overrule issues three and four.

Pohl provides no argument in support of his fifth and sixth issues, which state:

> [Issue five:] Record and preponderance of the evidence submitted by res ipsa laquture doctrine the state is **"having it both ways" by;**
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> > (a) Requireing the exhaustion of the grievance procedure and then ; tolling, witholding, altering disposing, and even **fabricating** documents capriciously with knowing results. Then have the state's law firm pounce on that malfeasnce and knowingly make a claim on it for dismissal and get it.
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> > (b) Require pauper to pass "prejudiced, strick ambiguous screening criterial [not required of others who pay up front] **then** garnish his meager gifts of survival heigein, health, and communication materials as if the state paid the filing fee where the record shows POHL paid the fee out of gifts.
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> [Issue six:] Record in this 258th District court of this and other cases in argument show a prejudicial "pattern precedent to " stop any redress concerning the **public nuisance** in its jurisdiction that is exposed public record and Senator John whitmires abuse by cell phones brought in by the same "above the law" attitude that in this and others discussed in argument.

To some extent, these issues overlap issues three and four, and to the extent they do the same reasoning would apply to them. Pohl has not adequately briefed the remainder of these issues. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."); *Leachman,* 261 S.W.3d at 305, n.2. We overrule issues five and six.

Pohl groups his argument for his final four issues, which contend:

> [Issue seven:] Settled "well established" law **forbids** the acts in the complaint that are being allowed to proceed due to the acts to dismiss such

suits. This is severe loss to the public to know by means of their courts, as well as the **murder** I am promised-threatened now after submitting explicit facts that sufficed to **"show proof"** that was the courts **responsibility to consider, not dismiss arbitrarily.**

[Issue eight:] Record of a "pattern and practice" in CIV-23,642, CIV-24,362, CIV-25,015, CIV-25,044 (this case) and CIV-25,079 now removed to the 13th Court of Appeals indicate an absence of a nutral position from the court, as is its intent and purpose set forth in the constitution. I ask the court to view for venue change.

[Issue nine:] U.S.C.A. 42§ 1997 et seq. was not designed to dismiss any suit but those frivolous or malicious. The word "frivolus" has become "overbroad" in use using the T.C.P.& REM. Codes §§14.001 et. seq. with its words of **"may"** to derive a "discretionary shield" for arbitrary acts to dismiss "cases that expose government malfeasanc". That was not the intent and purpose of §1997. U.S.C.A. 42§ 1983 strictly forbids the acts complained of on the Unit and in the Court. Texas has removed a viable **checks and balances** of "states power" AND it is abused.

[Issue ten:] In argument POHL sets forth his argument for "overbreath" use of Texas Civil Practice and Remedies Codes §§14.001 et. seq.

In determining whether a claim is frivolous or malicious, the court may consider whether the claim is substantially similar to a previous claim filed by the inmate because the claim arises from the same operative facts. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(b)(4) (Vernon 2002). In his argument under issues seven through ten, Pohl argues that under the principles of res judicata only a final judgment on the merits will bar a subsequent suit based upon the same facts. *See Amstadt v. United States Brass Corp.,* 919 S.W.2d 644, 652 (Tex. 1996).

The United States Supreme Court noted that the dismissal without prejudice of a suit filed *in forma pauperis* may bar the filing of future *in forma pauperis* petitions. *Denton v. Hernandez,* 504 U.S. 25, 34, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992). We do not decide whether any of the cases described in Pohl's affidavit of previous filings is based upon the same operative facts as this case. The motion to dismiss argued that the suit was subject to dismissal for failure to exhaust administrative remedies and for failure to state a claim, but did not suggest that the claims raised in Pohl's petition arise out of the same operative facts as one of his other suits. As discussed in our review of Pohl's first two issues, a different subsection of Section 14.003(b) authorizes the trial court's order dismissing Pohl's suit without prejudice. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(b)(2). Accordingly, we do not decide whether the trial court could have also dismissed the suit because it is based upon the same operative facts as a suit previously dismissed as frivolous.

Pohl asks this Court to consider another one of his appeals with the appeal now before the Court. We affirmed the trial court's order of dismissal in that appeal. *See Pohl v. Hirsch,* No. 09-09-00299-CV, *5, 2010 WL 546420 (Tex. App.--Beaumont, Feb. 18, 2010, no pet. h.). We decline to address the issues raised in that appeal at this time.

Pohl also asks this Court to consider in this appeal the claims Pohl asserted in Cause No. 25,079. The Corpus Christi Court of Appeals affirmed the order of dismissal in Cause No. 25,079. *See Pohl v. Simmons,* 2009 WL 3922018 at *2. A party dissatisfied with a

Court of Appeals' decision may seek redress through petition for review to the Supreme Court. *See* TEX. R. APP. P. 53. We overrule issues seven through ten and affirm the trial court's order of dismissal without prejudice.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on February 9, 2010
Opinion Delivered April 22, 2010

Before McKeithen, C.J., Gaultney and Horton, JJ.