

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 21-7082**

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KEVIN HERRIOTT,

Plaintiff - Appellant,

v.

C. BURTON, Warden; T. ROBERTSON, Associate Warden; L. GRAY, Mailroom  
Personnel,

Defendants - Appellees.

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Appeal from the United States District Court for the District of South Carolina, at  
Greenville. David C. Norton, District Judge. (6:21-cv-00941-DCN)

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Submitted: August 30, 2022

Decided: October 25, 2022

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Before RICHARDSON and QUATTLEBAUM, Circuit Judges, and MOTZ, Senior Circuit  
Judge.

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Vacated and remanded by unpublished per curiam opinion.

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Kevin Herriott, Appellant Pro Se.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kevin E. Herriott appeals the district court's order accepting the recommendation of the magistrate judge and dismissing Herriott's 42 U.S.C. § 1983 action under Fed. R. Civ. P. 41(b) for failure to follow a court order. We vacate and remand.

Upon screening Herriott's complaint, the magistrate judge issued an order on April 28, 2021, warning that the complaint was subject to summary dismissal and advising that Herriott could attempt to address certain pleading deficiencies by filing an amended complaint within 14 days. Herriott did not file an amended complaint by the deadline, prompting the magistrate judge to issue a report recommending that the action be dismissed under Rule 41(b) while also finding the legal merits of Herriott's complaint warranted summary dismissal. Herriott objected, complaining that he had never received the April 28 order and disputing the magistrate judge's determination that summary dismissal of his claims was warranted. The district court noted Herriott's objections, agreed with the magistrate judge's interpretation of the law as applied to this case, and then dismissed it on the magistrate judge's recommended ground that Herriott had failed to comply with the magistrate judge's order. *See* Fed. R. Civ. P. 41(b).

Because the district court did not resolve the factual question of whether Herriott received timely notice of the April 28 order, we are unable to determine whether the court properly exercised its discretion in dismissing the action under Rule 41(b). *See Ballard v. Carlson*, 882 F.2d 93, 95–96 (4th Cir. 1989) (providing standard of review); *Herbert v. Saffell*, 877 F.2d 267, 270 (4th Cir. 1989) (listing factors relevant to Rule 41(b) dismissal). And while the court expressed its agreement with the magistrate judge's legal analysis on

the merits, it did not expressly base the dismissal on those grounds. Accordingly, we vacate the district court's order and remand.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*VACATED AND REMANDED*