Affirmed and Opinion filed September 21, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00874-CV

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FREDDIE LOUIS BREWER, Appellant

V.

GARY JOHNSON, MICHAEL WILSON, AND JAMES SIMPSON, Appellees

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 20,450

O P I N I O N

Freddie Louis Brewer, an inmate with the Texas Department of Criminal Justice-Institutional Division, appeals from the dismissal of his lawsuit accusing appellees of improperly punishing him for alleged violation of prison rules. Because we find the trial court did not abuse its discretion in dismissing the suit for failure to comply with section 14.004 of the Civil Practices and Remedies Code, we affirm the trial court's order.

I. Background

Appellant is an inmate at the Wynne Unit in Huntsville. The lawsuit identifies the defendants, and their positions, as Johnson, director of the institutional division; Wilson, warden at the Wynn Unit; and Simpson, disciplinary captain at the unit. In his original petition, appellant complained that he was unfairly punished in connection with certain alleged violations of prison rules. He filed suit in forma pauperis in district court, seeking, among other things, money damages and restoration of certain prison privileges.

Appellant complains the court below held an evidentiary hearing by teleconference at which the state moved to dismiss appellant's suit on grounds that he failed to provide detailed information about previous lawsuits. *See* TEX. R. APP. P. 38.1(f) (in civil case, court will accept as true facts stated in brief unless other party contradicts them). The court below dismissed appellant's suit for failure to comply with section 14.004 of the Civil Practices and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 14.004 (Vernon Supp. 2000).

II. Discussion

Reading appellant's brief generously, we find four broad complaints, as follows: (1) the trial court erred by dismissing his complaint for failure to comply with section 14.004; (2) appellant was denied the right to be heard at the evidentiary hearing; (3) the trial court erred by failing to file findings of fact and conclusions of law; and (4) the court's dismissal violated his rights of due process and due course of law.

A. Inmate Lawsuits

A court may dismiss an inmate's claim if the court finds that the claim is frivolous or malicious. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(2) (Vernon Supp. 2000). In determining whether the claim is frivolous or malicious, the court may consider whether the claim arises from the same operative facts and is, thus, substantially similar to a previous claim

filed by the inmate. *See* §14.003 (b)(4). In determining whether the claim is frivolous or malicious, the court may hold a hearing. *See* § 14.003(c).

An inmate who files an affidavit or unsworn declaration of inability to pay costs shall file a separate affidavit or declaration detailing his previous or lawsuits in which the inmate also is proceeding pro se. *See* § 14.004(a). This separate affidavit or declaration must identify each suit, other than a suit under the Family Code, previously brought by the person pro se, without regard to whether the person was an inmate at the time the suit was brought. *See* § 14.004(a)(1). The affidavit or declaration must describe each previous suit by (A) stating the operative facts for which relief was sought; (B) listing the case name, cause number, and the court in which the suit was brought; (C) identifying each party named in the suit; and (D) stating the result of the suit, including whether the suit was dismissed as frivolous or malicious under Section 13.001 or Section 14.003 or otherwise. *See* § 14.004(a)(2). If a previous suit is dismissed as frivolous or malicious, the affidavit or unsworn declaration must state the date of the final order affirming the dismissal. *See* § 14.004(b). When an inmate fails to comply with the requirements of section 14.004, the trial court is entitled to assume the suit is substantially similar to one previously filed by the inmate and is, therefore, frivolous. *See Bell v. Tex. Dep't of Criminal Justice*, 962 S.W.2d 156, 158 (Tex. App.–Houston [14th Dist.] 1998, pet. denied). Where an inmate fails to comply with section 14.004 by listing operative facts or by identifying each party to the suit, the inmate's suit is subject to dismissal. *See id.*

We review the trial court's dismissal of an inmate's lawsuit brought under Chapter 14 under an abuse of discretion standard. *See McCollum v. Mt. Ararat Baptist Church, Inc.*, 980 S.W.2d 535, 536 (Tex. App.–Houston [14th Dist.] 1998, no pet.)

Appellant filed an affidavit or unsworn declaration in which he listed some ten previous lawsuits, most of which appeared to be related to complaints about his treatment in prison. Seven of the suits, however, fail to list all of the defendants and list only the lead defendant, followed by "et al." One of the lead defendants listed was, in fact, Gary Johnson, also a

defendant here. Moreover, each entry describes the "claim," for example, "Denial of Due Process in Prison Disciplinary [sic], failure to give notice of infraction," but fails to state the operative facts.

Chapter 14's purpose is to reduce duplicative inmate litigation by requiring the inmate to identify previous litigation and its outcome. *See Bell*, 962 S.W.2d at 158. The trial court can determine, based on previous filings, whether the inmate has filed similar claims and whether the current suit is, therefore, frivolous. Here, based on appellant's failure to comply with section 14.004, the trial court was entitled to presume the current suit was frivolous or malicious and to dismiss the suit.

Further, citing the harmless error rule, appellant complains that deficiencies in his affidavit are "harmless." The so-called harmless error rule is a rule of appellate procedure for determining when it is appropriate for a reviewing court to reverse a lower court's judgment because of lower court error. *See* TEX. R. APP. P. 44.1. The rule is not applicable to determining whether appellant substantially complied with the requirements of section 14.004. When we construe appellant's argument as a complaint that appellant substantially complied with section 14.004 and that such substantial compliance was sufficient, appellant cites no authority suggesting that substantial compliance is sufficient. This court has previously held that a trial court did not abuse its discretion by dismissing an inmate's case for similar noncompliance. *See Bell*, 962 S.W.2d at 158. We see no reason here to conclude that the court below abused its discretion by dismissing the suit.

B. Right to be Heard

As for appellant's complaint that the court below erred by not allowing him to speak during the evidentiary hearing, appellant has no right to a hearing before the court. The court's determination to have a hearing is discretionary. *See Thomas v. Wichita Gen. Hosp.*, 952 S.W.2d 936, 938 (Tex. App.–Fort Worth 1997, pet. denied).

Further, for a party to complain on appeal about a matter that would not otherwise appear in the record, the party must file a formal bill of exception. *See* TEX. R. APP. 33.2. The bill need take no particular form, but the objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make the trial court aware of the complaint. *See id.* Where a party complaining about the exclusion of evidence offers no bill of exception or offer of proof indicating what evidence was excluded, the party fails to preserve the complaint for appellate review. *See Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 484 (Tex. App.–Dallas 1995, writ denied). By failing to include in the appellate record the evidence he would have presented to the trial court, appellant has failed to preserve his complaint about the trial court's failure to grant him a hearing.

Nevertheless, in the interest of justice, we will review appellant's substantive complaint. In his brief, appellant cites no evidence he would have introduced at the hearing but states only that he would have presented various legal arguments why his claim should not be dismissed despite his failure to comply with section 14.004. Because the trial court held an evidentiary hearing and appellant concedes he would have presented no evidence, the trial court did not err.

Even if we were to presume the trial court erred by failing to listen to appellant's legal arguments, any such presumed error was harmless. The presumed error did not probably cause the rendition of an improper judgment or did not probably prevent appellant from properly presenting his cause to this court. *See* TEX. R. APP. P. 44.1(a).

C. Findings and Conclusions

As for appellant's complaint that the court below failed to file findings of fact and conclusions of law upon request, a court is required to file findings and conclusions after a case is tried to the court without a jury. *See* TEX. R. CIV. P. 296; *Eichelberger v. Balette*, 841 S.W.2d 508, 510 (Tex. App.–Houston [14th Dist.] 1992, writ denied). A court need not file findings and conclusion when it dismisses a case without trial. *See id.* The court below, which dismissed appellant's suit without trial, did not err.

D. Due Process

As for appellant's complaint that the actions of the court below violated his due process rights under the 14th Amendment and his due course of law rights under article I, section 19, of the state Constitution, he has cites no authority nor raises any argument and thus has waived any complaint. *See Rauscher Pierce Refsnes, Inc. v. Great Southwest Sav., F.A.*, 923 S.W.2d 112, 116 (Tex. App.–Houston [14th Dist.] 1996, no writ). Moreover, the record before us does not show that appellant raised due process or due course of law complaints with the trial court and, thus, fails to demonstrate that appellant preserved his complaint for review. *See* TEX. R. APP. P. 33.1.

In the interest of justice, however, we will address the issues. Appellant seems to complain that the court below violated his constitutional rights by failing to grant him a hearing in which he could present his defenses and be heard to argue facts and the law.

While the state Constitution refers to "due course" rather than "due process," the terms have no meaningful distinction. *See University of Tex. Med. Sch. of Houston v. Than*, 901 S.W.2dd 926, 929 (Tex. 1995). In due process issues, Texas courts, while not bound by federal due process jurisprudence, have traditionally followed federal due process interpretations. *See id.* One federal court has found that under the Texas statute, it is malicious per se for an indigent inmate to file successive in forma pauperis suits duplicating claims made in other pending or previous suits. *See Hicks v. Brysch*, 989 F. Supp. 797, 822 (W.D. Tex. 1997). An inmate has no constitutionally protected right to file or pursue frivolous or malicious litigation. *See id.* Restrictions on the ability of inmates to proceed in forma pauperis do not implicate any constitutionally protected right per se. *See id*. Neither prisoners nor inmates constitute a suspect class. *See id.* Curtailing frivolous or malicious lawsuits, thereby protecting state judicial resources, is a legitimate state interest. *See id.*

Section 14.004 is designed to give courts the information needed to determine whether the claims the inmate seeks to litigate have previously been litigated or dismissed as frivolous.

Requiring the inmate to provide such information violates no due process rights under either the state or the federal constitutions.

III. Conclusion

Having overruled all of appellant's issues, we affirm the judgment of the court below.

PER CURIAM

Judgment rendered and Opinion filed September 21, 2000.
Panel consists of Chief Justice Murphy, and Justices Hudson and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).