PUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

EDWARD M. CORNETT,	)	
Plaintiff	)	Civil Action No. 1:05cv00101
	)	
v.	)	**REPORT AND**
	)	**RECOMMENDATION**
SHERIFF JACK WEISENBURGER,	)	
et al.,	)	By: PAMELA MEADE SARGENT
Defendants	)	United States Magistrate Judge
	)	

Edward M. Cornett, ("Cornett"), brought this suit against defendant Jack Weisenburger, ("Weisenburger"), the sheriff of Bristol, Virginia, and six individual employees of the Bristol, Virginia, Sheriff's Department, who are identified only as John Does I-VI and who worked at the Bristol City Jail in Bristol, Virginia, during Cornett's incarceration there on November 7, 2003, alleging violations of 42 U.S.C. § 1983. This matter is currently before the court on Defendants' Motion To Dismiss, (Docket Item No. 9), ("Motion"), filed on February 6, 2006, and the plaintiff's response to the Motion, (Docket Item No. 11), ("Plaintiff's Brief"), filed February 27, 2006. The court has jurisdiction in this case pursuant to 28 U.S.C. §§ 1331 and 1343. These motions are before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). The matter was heard before the undersigned on March 24, 2006. As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

I. Facts

For purposes of the court's consideration of the Motion, the facts as alleged in the Plaintiff's Brief will be accepted as true. On November 7, 2005, the last day the applicable statute of limitations for this case, plaintiff's counsel attempted to electronically file Cornett's complaint through the court's electronic case filing system. However, plaintiff's counsel could not file the pleading electronically because he did not have a current credit card authorization on file. Plaintiff's counsel proceeded to transmit the complaint by facsimile to the clerk's Abingdon Division office on that same day. On November 8, 2005, the clerk's office notified plaintiff's counsel that it was returning the complaint for failure to remit the filing fee. Plaintiff's counsel immediately arranged for payment that morning. After the filing fee was paid, the clerk's office marked Cornett's complaint "filed" as of November 8, 2005.

II. Analysis

Defendants argue that Cornett's claims are barred by the applicable statute of limitations. (Motion at 1-2.) Cornett, on the other hand, argues that his complaint was timely filed because it was submitted to the court within the applicable statute of limitations. (Plaintiff's Brief at 1-7.)

In ruling on a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), the court should accept as true all well-pleaded allegations and view the complaint in the light most favorable to the plaintiff. *See De Sole v. U.S.*, 947

F.2d 1169, 1171 (4th Cir. 1991) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)). "[A] rule 12(b)(6) motion should be granted only in very limited circumstances." *Rogers v. Jefferson-Pilot Life Ins. Co*., 883 F.2d 324, 325 (4th Cir. 1989). The court may not dismiss a complaint unless the plaintiff can prove no set of facts that would entitle the plaintiff to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

There is no federal statute of limitations for actions brought under 42 U.S.C. § 1983. *See Wilson v. Garcia*, 471 U.S. 261, 266 (1985). Instead, § 1983 actions are governed by the statute of limitations applicable for general personal injury cases in the state where the alleged violations occurred. *See Owens v. Okure*, 488 U.S. 235, 239-50 (1989). Since the attack on Cornett occurred in Bristol, Virginia, Virginia's two-year statute of limitations for general personal injury claims applies. *See* VA. CODE ANN. § 8.01-243 (2000 Repl. Vol.). Cornett claims the attack occurred on November 7, 2003. In Virginia, the statute of limitations begins to run as of the date of the injury. *See Smith v. Danek Med., Inc.*, 47 F. Supp. 2d 698, 701 (W.D. Va. 1998). Therefore, Cornett's complaint must have been filed by November 7, 2005, in order to have been timely for statute of limitations purposes.

The issue before the court is whether Cornett's complaint was timely filed on November 7, 2005, when the complaint was received by the clerk's office but was not accompanied by the required filing fee. This court previously addressed this issue in *Wells v. Apfel*, 103 F. Supp. 2d 893, 898-99 (W.D. Va. 2000). In *Wells*, I found no

local rule or standing order of this court elevating the remittance of a filing fee to a jurisdictional requirement. *See Wells*, 103 F. Supp. 2d at 899. Following in line with courts from both the Eleventh Circuit and the Ninth Circuit, I held that, in the absence of such a local rule or standing order, the prepayment of a filing fee is not a prerequisite to filing a complaint, and a complaint, for statute of limitations purposes, is filed on the date it is received by the clerk's office, regardless of payment. *See Wells*, 103 F. Supp. 2d at 899 (adopting the reasoning of *Rodgers v. Bowen*, 790 F.2d 1550 (11th Cir. 1986) and *Cintron v. Union Pac. R.R. Co.*, 813 F.2d 917 (9th Cir. 1987)).[1]

I note that since the *Wells* decision, however, this court, by standing order entered February 2, 2004, authorized the Clerk to implement Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means, ("Administrative Procedures"). These Administrative Procedures were implemented by the Clerk effective February 9, 2004. The Administrative Procedures state: "New cases are deemed filed the day the Clerk's Office receives the Complaint and any required filing fee." (Administrative Procedures at 6.) Thus, with the existence of this local rule, the court must now decide whether the timely payment of the required filing fee is a jurisdictional requirement.

As recited in *Wells*, Rule 3 of the Federal Rules of Civil Procedure states that a

[1]The *Cintron* and *Rodgers* opinions do not address whether a local rule required advance payment of the filing fee. *See Cintron*, 813 F.2d at 920-21; *Rodgers*, 790 F.2d at 1551-52. Furthermore, in *Cintron*, a check for the filing fee was tendered to the clerk with the filing of the complaint. *See* 813 F.2d at 919. The amount of the check, however, was for more than the $60.00 filing fee required at the time, and, therefore, the check was returned to plaintiff's counsel. *See Cintron*, 813 F.2d at 919.

"civil action is *commenced* by filing a complaint with the court." FED. R. CIV. P. 3 (emphasis added). "Filing" is defined in Rule 5(e), which states: "The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court...." FED. R. CIV. P. 5(e). Rule 5(e) also states: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices." FED. R. CIV. P. 5(e). Unfortunately, the rules do not specify what requirements must be met before a document is to be considered "filed" with the clerk of court.

By statute, Congress has given each district court the authority, by rule or standing order, to require the advance payment of fees, including filing fees. *See* 28 U.S.C.A. § 1914(c) (West 1994). At least two courts, which have adopted such a local rule or a standing order, have held that the advance payment of the $150.00 filing fee is required before a civil complaint will be considered "filed" or an action "commenced." *See Wanamaker v. Columbian Rope Co.*, 713 F. Supp. 533, 537-39 (N.D.N.Y. 1989); *Keith v. Heckler*, 603 F. Supp. 150, 155-56 (E.D.Va. 1985). Another court has held, similar to this court's holding in *Wells*, that, without such a local rule or standing order, clerks cannot require the advance payment of fees, and, therefore, a complaint was "filed" as of the date received by the clerk's office. *See Bolduc v. U.S.*, 189 F. Supp. 640, 642 (D. Me. 1960). While I cannot find that the Supreme Court has ever considered the specific issue involved in this case, the Court has held that untimely payment of a filing fee did not "vitiate the validity" of a notice of appeal, which was delivered to the clerk's office within the required 30-day period but not marked "filed" until after payment of the proper fee. *Parissi v. Telechron, Inc.*, 349 U.S. 46, 47 (1955).

I also cannot find that this district or the Fourth Circuit has ever considered the specific issue involved here. I have found two unpublished cases in which the Fourth Circuit has held that – for statute of limitations purposes – a complaint should be deemed filed on the date that the district court clerk received it. *See Hunt v. Stone*, 39 F.3d 1177, 1994 WL 633379 (4th Cir. 1994); *Robinson v. Yellow Freight Sys.*, 892 F.2d 74, 1989 WL 152510 (4th Cir. 1989). In *Robinson*, a pro se litigant tendered a Title VII race discrimination claim to the district court clerk within the required 90 days after receiving his right-to-sue letter from the Equal Employment Opportunity Commission without the required fee or a petition to proceed in forma pauperis. *See Robinson*, 1989 WL 152510 at *1. Approximately six months later, the litigant filed a petition to proceed in forma pauperis. *See Robinson*, 1989 WL 152510 at *1. The court eventually granted the litigant in forma paueris status, and the clerk then formally filed the complaint. *See Robinson*, 1989 WL 152510 at *1. The court granted the defendant's motion to dismiss that complaint as being time-barred because it was filed after the 90-day limitations period had expired. *See Robinson*, 1989 WL 152510 at *1. In its unpublished per curiam opinion, the Fourth Circuit reversed the district court's decision dismissing the Title VII claim holding that the litigant's complaint was filed for purposes of the limitations period when it was delivered to the court. *See Robinson*, 1989 WL 152510 at *2. Likewise in *Hunt*, the Fourth Circuit held that a petition for review was filed for limitations period purposes when it was received by the district court clerk along with what the litigant reasonably believed was the proper filing fee. *See* 1994 WL 633379 at *1. Neither of these cases, however, addressed the issue of whether a local rule or standing order of the court required the advance payment of the filing fee.

It appears that the facts of this case are most analogous to those found in *Keith*, 603 F. Supp. 150, and in *Wanamaker*, 713 F. Supp. 533. In each of those cases, the district court had adopted local rules requiring advance payment of filing fees.

In *Keith*, Judge Doumar found critical to his decision the fact that the Eastern District of Virginia's local rules of practice required advance payment of filing fees. *See* 603 F. Supp. at 156. The Eastern District's local rule states:

> (B) Payment in Advance: All fees and costs due the Clerk shall be paid in advance except (1) in actions brought on behalf of seamen, (2) where a party has been authorized to proceed in forma pauperis, or (3) where a party is otherwise exempt by law.

(E.D. Va. R. 16(B)). Based on this, Judge Doumar held that "the complaint must be accompanied by the filing fee to achieve filed status, with the exceptions noted in Local Rule 16(B)." *Keith*, 603 F. Supp. at 157. Judge Doumar also noted that "significant policy considerations" played a part in his decision. *Keith*, 603 F. Supp. at 157.

> Authorizing the commencement of the district court action without the required fee would breed countless administrative and procedural woes, and give to the Clerk's Office an element of discretion where none was intended. The Clerk's Office could be converted into a part-time credit institution, spending significant energy collecting fees as well as extending credit.

Keith, 603 F. Supp. at 157.

In *Wanamaker*, the court noted that the district's local rules stated:

> The clerk shall not be required to render any service for which a fee is prescribed by statute or by the Judicial Conference of the United States unless the fee for the particular service is paid to him in advance.

713 F. Supp. at 537 n. 2 (quoting N.D.N.Y. R. 5.2). Based on this local rule, the court adopted the reasoning of *Keith* and held that a complaint was not filed for statute of limitations purposes when it was tendered to the court without the required filing fee. *See Wanamaker,* 713 F. Supp. at 538-39.

I, too, find the legal reasoning and policy considerations cited by Judge Doumar in *Keith* persuasive. More importantly, however, this court, by standing order, has now addressed the specific question at issue. In particular, this court's administrative procedures now state: "New cases are deemed filed the day the Clerk's Office receives the Complaint and any required fee." Also, the plain language of 28 U.S.C. § 1914(c) clearly gives the court the authority to require the advance payment of the filing fee. Therefore, I hold that a complaint not accompanied by an application to proceed in forma pauperis is not "filed" for any purpose until the required filing fee is tendered to the Clerk's Office.

Thus, I find that the complaint in this case was not filed until November 8, 2005, when the Clerk's Office received the required filing fee. That being the case, I also find that this case should be dismissed because the plaintiff's claim was not filed within the applicable two-year limitations period. While I am mindful of the harsh result brought upon the plaintiff by this ruling, there are, however, equally compelling policy reasons for dismissing this and any claim not brought within the applicable limitations period.

> Statutes of limitation ... in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944).

While neither party has addressed the issue, there appears to be another problem with the complaint which was received by the Clerk's Office on November 7, 2005. The undersigned knows of no rule or standing order of the court which would allow filing of a complaint by facsimile. In fact, the Administrative Procedures clearly state that "faxing a document to the Clerk's Office ... will not constitute 'electronic submission' of the document for filing." (Administrative Procedures at 5.) Federal Rule of Civil Procedure 11 requires every pleading to contain the signature of at least one counsel or a pro se litigant. The complaint in this case contains neither. The complaint in this case contains only the attorneys' names typed as follows: "/s/Gregory D. Edwards" and "/s/ H. Ronnie Montgomery." While the Administrative Procedures provide that an attorney's name typed as set out above is a sufficient signature on electronically submitted pleadings, as stated above, this complaint was not electronically submitted. I do not find it necessary to address this issue any further, however, based on my ruling requiring the advance payment of the filing fee.

PROPOSED FINDINGS OF FACT

As supplemented by the above summary and analysis, the undersigned now

submits the following formal findings, conclusions and recommendations:

1. Title 28 U.S.C. §1914(c) gives district courts the authority to require advance payment of fees by rule or standing order;
2. By Standing Order dated February 2, 2004, this court gave the Clerk the authority to implement Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means;
3. These Administrative Procedures state that new cases are "deemed filed" the day that the Clerk's Office receives the complaint and the required filing fee;
4. While the complaint in this case was received by the Clerk's Office on November 7, 2005, the required filing fee was not received until November 8, 2005;
5. Therefore, the complaint was not filed until November 8, 2005;
6. Virginia's two-year statute of limitations on personal injury claims is applicable to plaintiff's civil rights claim;
7. Plaintiff's complaint is based on an assault which he alleges occurred on November 7, 2003; and
8. The plaintiff did not file his complaint within the applicable limitations period.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, I recommend that the court grant defendants' Motion, (Docket Item No. 9), and dismiss the plaintiff's claim.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(c)(West 1993 & Supp. 2006):

> Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written

> objections to such proposed findings and recommendations as provided by rules of court. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the Honorable Glen M. Williams, Senior United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record.

DATED: June 26, 2006.

/s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE