



NUMBER 13-19-00301-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

GERALD ALLEN PERRY,

Appellant,

v.

**LORI SMYTH, SGT., ELLIOT RUIZ, CAPT.,
ASST. WARDEN CHRISTOFOR S. LACOX,
DALE WAINWRIGHT, CHAIRMAN, TEXAS
CRIMINAL JUSTICE BOARD,**

Appellees.

**On appeal from the 278th District Court
of Walker County, Texas.**

MEMORANDUM OPINION¹

**Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Hinojosa**

Appellant Gerald Allen Perry, a Texas prison inmate, appeals the trial court's

¹ This case was transferred to this Court from the Tenth Court of Appeals in Waco pursuant to a docket equalization order issued by the Texas Supreme Court. See TEX. GOV'T CODE ANN. § 73.001.

judgment dismissing his suit against multiple employees of the Texas Department of Criminal Justice—Institutional Division (TDCJ–ID) and the former chairman of the Texas Board of Criminal Justice.² See TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.001–.014. In three issues, which we have reordered, Perry argues that: (1) Chapter 14 of the Texas Civil Practice and Remedies Code violates the Supremacy Clause of the United States Constitution when applied to dismiss federal claims; (2) the thirty-one-day limitations period found in Chapter 14 violates the Texas Constitution’s prohibition of certain special and local laws; and (3) the trial court violated Perry’s due process rights when it dismissed his claims with prejudice without a merits hearing. We affirm.

I. BACKGROUND

Perry, an inmate at the O.B. Ellis Unit in Walker County, Texas, filed this action pro se and *in forma pauperis* under Texas Civil Practice and Remedies Code Chapter 14. See *id.* In his live pleading, Perry alleged that correctional officer Lori Smyth took “89 stamps from [Perry’s] possession without giving [Perry] a chance to dispute her characterization of them as contraband[.]” Perry further alleged that correctional officer Elliott Ruiz, who presided over the resulting disciplinary proceeding, found him guilty of possessing contraband without any supporting evidence. Perry also claimed that assistant warden Christofer Lacox failed to take proper remedial actions in response to Perry’s appeal of the disciplinary infraction. Perry alleged causes of action for conversion and violation of his due process rights. Perry also alleged that the law requiring withdrawal of money from his inmate trust fund account to pay an annual health care service fee

² Appellees are Lori Smyth, Christofer Lacox, Elliott Ruiz, and Dale Wainwright.

violated the constitutional prohibition against ex post facto laws.

The Office of the Texas Attorney General (OAG) filed an amicus curiae advisory and motion to dismiss arguing that Perry's suit should be dismissed as frivolous due to Perry's failure to comply with certain Chapter 14 requirements. See *id.* In particular, the OAG argued that Perry failed to: (1) properly identify all prior pro se lawsuits that he has filed; (2) file a certified copy of his inmate trust account; (3) identify the date he received the written grievance decisions; and (4) file the instant lawsuit within thirty-one days of receiving the decision for his step two grievance. The trial court signed a final judgment dismissing Perry's suit for failing to comply with Chapter 14. Perry filed a motion for reinstatement, which the trial court denied. Perry now appeals.

II. CHAPTER 14 REQUIREMENTS

To control frivolous, malicious, and excessive inmate litigation, the Legislature enacted Chapter 14 of the civil practice and remedies code. See *id.* Chapter 14 governs inmate litigation in which an affidavit or unsworn declaration of inability to pay costs is filed by the inmate. See *id.* An inmate proceeding pro se and *in forma pauperis* must comply with the statutory requirements outlined in Chapter 14. *Douglas v. Moffett*, 418 S.W.3d 336, 339 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Should the inmate fail to do so, his suit will be dismissed. See *Lilly v. Northrep*, 100 S.W.3d 335, 336 (Tex. App.—San Antonio 2002, no pet.). We review the dismissal of inmate lawsuits for an abuse of discretion. *Thomas v. Knight*, 52 S.W.3d 292, 294 (Tex. App.—Corpus Christi—Edinburg 2001, pet. denied).

An indigent inmate must file a certified copy of the inmate's "trust account

statement.” TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.004(c), 14.006(f). The trust account statement “must reflect the balance of the account at the time the claim is filed and activity in the account during the six months preceding the date on which the claim is filed.” *Id.* § 14.006(f); see *McLean v. Livingston*, 486 S.W.3d 561, 562 (Tex. 2016) (per curiam). When an inmate fails to file the required inmate trust account statement, the court is entitled to assume that the allegation of indigency is false and may dismiss the suit without notice or a hearing. See *Moffett*, 418 S.W.3d at 340; *Douglas v. Turner*, 441 S.W.3d 337, 339 (Tex. App.—Waco 2013, no pet.).

Further, “Chapter 14 requires the inmate to file an additional affidavit or declaration setting forth specific details on all previous actions filed pro se, other than a suit brought under the Texas Family Code.” *Moffett*, 418 S.W.3d at 339 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 14.004(a)). When the inmate fails to comply with the affidavit requirements, the court may assume that the current action is substantially similar to one previously filed by the inmate and is frivolous. See *id.*

Chapter 14 further requires that a pro se inmate exhaust his administrative remedies and sets a thirty-one-day deadline to file suit following the date the inmate receives the written decision from the prison grievance system. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.005(a), (b). If the inmate does not file his suit within the time period, the trial court is required to dismiss the suit. *Id.*

III. CONSTITUTIONAL CHALLENGES TO CHAPTER 14

By his first two issues, Perry argues that Chapter 14 is unconstitutional because its application to federal claims violates the Supremacy Clause of the United States

Constitution, see U.S. CONST. art. VI, cl. 2. and because its thirty-one-day limitations period violates the Texas Constitution's prohibition against certain special and local laws. See TEX. CONST. art. III, § 56.

Texas Rule of Appellate Procedure 33.1(a)(1)(A) requires a party, as a prerequisite for appellate review, to make his complaint to the trial court by a timely request, objection, or motion that specifically states the grounds for the ruling sought and to obtain a ruling on that complaint from the trial court. TEX. R. APP. P. 33.1(a)(1)(A). The requirement for error preservation extends to constitutional challenges, including challenges that a statute is unconstitutional on its face or as applied to the appellant. See *In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003) (applying Rule 33.1 to due process challenge); *Brewer v. Simental*, 268 S.W.3d 763, 767 (Tex. App.—Waco 2008, pet. denied) (concluding that a facial challenge to the constitutionality of Chapter 14 was not preserved for appellate review because the inmate failed to raise the argument in the trial court); *In re C.R.P.*, 192 S.W.3d 823, 826 (Tex. App.—Fort Worth 2006, no pet.) (applying error preservation requirement to an as-applied constitutional challenge). Perry raised multiple constitutional issues in his motion to reinstate; however, none of those arguments comport with the constitutional challenges raised on appeal. See *In re N.T.*, 335 S.W.3d 660, 670 (Tex. App.—El Paso 2011, no pet.) (explaining that a party's argument on appeal must comport with its argument in the trial court to preserve error). Therefore, Perry has not preserved his first two issues.

Even if Perry preserved these issues, we would reject Perry's constitutional challenges for the same reasons our sister courts have expressed in rejecting similar

challenges. See *Thomas v. Bilby*, 40 S.W.3d 166, 171 (Tex. App.—Texarkana 2001, no pet.) (concluding that Chapter 14 was not an impermissible special law because the law operated equally on all members of the class of people affected by the statute); *Thomas v. Bush*, 23 S.W.3d 215, 218 (Tex. App.—Beaumont 2000, pet. denied) (concluding that Chapter 14 dismissal procedures do not offend the Supremacy Clause because federal law imposes substantially similar requirements on inmates litigating in forma pauperis and also concluding that Chapter 14 was not an impermissible special law); *Thomas v. Wichita Gen. Hosp.*, 952 S.W.2d 936, 940 (Tex. App.—Fort Worth 1997, pet. denied) (concluding that Chapter 14 “does not operate as an obstacle” to the adjudication of meritorious federal claims and, therefore, the statute did not violate the Supremacy Clause)

We overrule Perry’s first two issues.

IV. DUE PROCESS

In his third issue, Perry argues that the trial court violated his federal and state due process rights when it dismissed his claims without affording him an opportunity to be heard “on the merits of his case[.]”

A trial court has the discretion under Chapter 14 to dismiss an inmate’s claim, and the inmate has no right to a hearing on a motion to dismiss. See *Donaldson v. Tex. Dep’t of Crim. Justice—Correctional Inst. Div.*, 355 S.W.3d 722, 725 (Tex. App.—Tyler 2011, pet. denied) (evidentiary hearing not required); *Hamilton v. Pechacek*, 319 S.W.3d 801, 808 (Tex. App.—Fort Worth 2010, no pet.) (noting that inmate had no right to a hearing or to appear at the hearing on a dismissal). Accordingly, the dismissal of Perry’s pro se claim without an evidentiary hearing does not violate his rights to due process. See

Spurlock v. Schroedter, 88 S.W.3d 733, 736 (Tex. App.—Corpus Christi—Edinburg 2002, no pet.) (concluding that an inmate’s due process rights were not violated by the trial court’s refusal to conduct a hearing); *see also* *Murphy v. Moore*, No. 13-13-00480-CV, 2015 WL 4592209, at *3 (Tex. App.—Corpus Christi—Edinburg July 30, 2015, pet. denied) (mem. op.).

As a sub-issue, Perry argues that the trial court erred in dismissing his suit with prejudice. “A dismissal with prejudice constitutes an adjudication on the merits and operates as if the case had been fully tried and decided.” *Nabelek v. Dist. Attorney of Harris Cty.*, 290 S.W.3d 222, 233 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). If an inmate’s failure to comply with Chapter 14 requirements can be remedied, then the trial court should dismiss the suit without prejudice. *Id.* On the other hand, if the inmate’s failure to comply with Chapter 14 cannot be remedied, then a dismissal with prejudice is proper. *See id.*

We note that one of the grounds on which the trial court could have dismissed Perry’s claims was his failure to file his suit within thirty-one days of receiving a written decision for his grievances from the prison grievance system. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.005. This is not a defect that Perry would be able to remedy in a subsequent suit. Therefore, we conclude that the trial court did not err in dismissing Perry’s suit with prejudice. *See* *Mason v. Wood*, 282 S.W.3d 189, 193 (Tex. App.—Beaumont 2009, no pet.) (“Although a dismissal pursuant to Chapter 14 of the Civil Practice and Remedies Code ordinarily must be without prejudice, the failure to file suit within thirty-one days of exhausting administrative remedies cannot be cured by re-filing;

accordingly, such a dismissal may be with prejudice.”).

We overrule Perry’s third issue.

V. CONCLUSION

We affirm the trial court’s judgment.

LETICIA HINOJOSA
Justice

Delivered and filed the
28th day of May, 2020.