IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1653
Summary Calendar

ROBERT L. RICH,

Plaintiff-Appellant,

VERSUS

CRAIG HOPPER, et al.,

Defendants,

CRAIG HOPPER,

Defendant-Appellee.

No. 92-1824
Summary Calendar

ROBERT L. RICH,

Plaintiff-Appellant,

VERSUS

CRAIG HOPPER, et al.,

Defendants,

UNKNOWN NAME GOVERNMENT AGENTS,
FORT WORTH, TEXAS, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas
(4:91-CV-491-A)

January 29, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

In these two appeals that we consolidate sua sponte, Robert Rich challenges the district court's dismissal of his prisoner's Bivens action against agents of the Drug Enforcement Administration (DEA). Finding no error, we dismiss the appeals as frivolous.

I.

In 1989, Fort Worth attorney Toby Goldsmith represented Rich and Melanie Hooper, who were indicted in the United States District Court for the Eastern District of Louisiana on drug charges. On July 13 or 14, 1989, Goldsmith informed New Orleans DEA Special Agent Wayne Enders that Rich and Hooper had deposited a package with him. Enders asked the Fort Worth DEA Resident Agent in Charge, Dannie P. West, to have someone take delivery of the package from Goldsmith. At West's direction, DEA Task Force Officer and Deputy United States Marshal Craig Hopper took delivery of the package and shipped it, unopened, to the DEA office in New Orleans; Enders received the package on July 19, 1989.

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

On July 31, 1989, Enders applied for a warrant to search the package. On that same day, the warrant issued and was executed, yielding seven items of gold and diamond jewelry.

On October 13, 1989, Rich was convicted on sixteen drug counts, including operating a continuing criminal enterprise that produced and sold amphetamines in five states. According to the government, trial testimony showed that Rich had purchased large amounts of jewelry with drug proceeds and used the jewelry to entice others to join in the enterprise.

Evidence of the seized jewelry, however, was excluded from trial on the grounds that the seizure was warrantless and that, even if the warrant problems were cured, the prejudicial effect of the evidence outweighed its probative value. Furthermore, the evidence was found to be cumulative.

On complaint of the government, the jewelry was ordered seized and held subject to court order. Through an attorney other than Goldsmith, Rich and Hooper filed a claim and answer in response to the seizure order. The district court rejected the claim and ordered the jewelry forfeited. On Rich's motion to appeal in forma pauperis, this court, on April 12, 1991, dismissed his appeal of the forfeiture order.

By amended complaint, Rich sued Hopper, Enders, and West, alleging that they had seized the jewelry from Goldsmith without warrant or probable cause, violating the Fourth Amendment. He sought declaratory and injunctive relief and damages in the amount of $50,000, the alleged value of the jewelry. As Rich alleged a

constitutional violation by federal officers, his action was brought pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971).

The original complaint had been filed July 12, 1991. After the defense of qualified immunity was raised, the court instructed Rich to plead more specific facts. The amended complaint was Rich's response.

Hopper moved to dismiss or, alternatively, for summary judgment, raising, among other things, qualified immunity. Rich filed no response. Holding that Rich's complaint did not plead facts sufficient to overcome the qualified immunity defense, the district court dismissed the claims against Hopper. Having determined that there was no just reason for delay, the district court entered a final judgment as to Hopper. Rich noticed an appeal, No. 92-1653.

Then, Enders and West moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or, alternatively, for summary judgment, raising, among other things, qualified immunity. Rich opposed the motion. Holding that Rich's complaint did not plead facts sufficient to overcome the qualified immunity defense, the district court dismissed the claims against Enders and West. The district court entered a final judgment. Rich noticed an appeal, No. 92-1824.

II.

A.

Rich argues that his complaint was sufficient. Under the

doctrine of qualified immunity, an official enjoys immunity from suit for damages for actions taken in his official capacity and within the scope of his authority so long as his actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982). The party seeking to recover damages from an official asserting qualified immunity bears the heightened burden of pleading specific facts that, if proven, would overcome the immunity defense. Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 620 (5th Cir. 1992); Elliott v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985). "Mere conclusory allegations and bold assertions are insufficient to meet this heightened standard." Streetman v. Jordan, 918 F.2d 555, 557 (5th Cir. 1990).

The immunity defense applies to federal officials as it does to state officials. Barker v. Norman, 651 F.2d 1107, 1122 (5th Cir. Unit A July 1981). Review of a dismissal for failure to meet the heightened pleading requirement is de novo. Streetman, 918 F.2d at 556-57; Jackson, 958 F.2d at 618. The amended complaint alleged only the following facts:

> 1. In July, 1989, without warrant or probable cause Wayne Enders; [sic] DEA New Orleans, contacted Craig Hopper; [sic] DEA Forth Worth, to seize plaintiff's property ($50,000.00 in Jewelry) from Toby Goldsmith.
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> 2. On July 13, 1989; [sic] without warrant or probable cause, Danny [sic] West directed Craig Hopper to seize plaintiff's property from Toby Goldsmith.
>
> 3. Craig Hopper seized plaintiff's property and sent it to Wayne Enders.
>
> 4. Wayne Enders received plaintiff's property on July 19, 1989.

> 5. By seizing plaintiff's property without warrant or probable cause, Enders, West, and Hopper deprived plaintiff of his right and protection to be free from illegal seizure' [sic] as guaranteed to him by the Fourth Amendment to the United States Constitution.

In Streetman, 918 F.2d at 557, we analyzed facts pleaded in a suit alleging an illegal search. We provided an illustrative list of allegations that are too broad to survive dismissal under Elliott. The list includes assertions that a confidential informant did not exist, that the officer obtaining the search warrant lied in the probable cause affidavit, that the defendants conspired against the plaintiff, and that the affidavit did not establish probable cause. Id.

The basis of Rich's claim is that the package was taken without warrant or probable cause. A warrant did not exist when Hopper took delivery of the package from Goldsmith and shipped it to Enders. Rich states no facts to support his conclusional allegation that probable cause did not exist or even that probable cause was required. Rich proposes conclusions as facts.

B.

Rich argues that the district court incorrectly held that he could prove no set of facts that would entitle him to relief. The Hopper dismissal made no reference to proof but was based entirely upon Rich's failure to plead facts specific enough to overcome a qualified immunity defense.

The Enders and West dismissal was based upon the same defect. The district court added the following:

> The court need not reach the alternative motion for summary judgment, but notes that defendants' affidavits reflect that they were acting within the course and scope of their employment and did not violate any clearly established right of plaintiff during the proceedings here in question. Plaintiff has failed to file any controverting evidence or otherwise attempt to raise a genuine issue of material fact with regard to defendants' actions.

The court granted the motion to dismiss, not the motion for summary judgment. This alternative ground that the court did not reach was not the basis of the dismissal. This argument is frivolous.

Rich also argues that the district court erroneously held that the defendants had successfully made a qualified immunity defense. The district court stated no such holding.

C.

Rich argues that the suppression of the evidence at his criminal trial established that the seizure violated the Fourth Amendment and compels a judgment in his favor. He calls it the "law of the case." This argument is unavailing for at least four reasons.

1.

The dismissal for failure to plead facts sufficient to overcome an immunity defense was based upon the face of the amended complaint. Jackson, 958 F.2d at 621. In a pleading filed before the amended complaint, Rich claimed that the result of the suppression hearing was binding. The amended complaint did not refer to this claim.

2.

Even if a plaintiff could use the suppression of evidence as an offense, Rich has not provided enough information. He has supplied only twenty-one pages of a 138-page suppression hearing transcript. That excerpt covers Goldsmith's testimony, the judge's ruling, and exchanges with the attorneys. We cannot determine the substance of what was actually litigated.

3.

Even if we were to accept that those twenty-one pages contain all material that is relevant to Rich's argument, the trial court was equivocal on whether its finding that the agents acted unconstitutionally was necessary and critical. The court's first ground for suppressing the evidence was its view that the agents had violated the Fourth Amendment. The court continued by stating that, even if the Fourth Amendment defects were remedied, the prejudicial effect of the evidence outweighed its probative value. The court also found the evidence cumulative.

4.

Even if we could accept the transcript excerpt as if it were complete and could conclude that the Fourth Amendment issue was critical and necessary to the holding, the transcript indicates that the Fourth Amendment issue was not actually litigated. Immediately after the district court announced its decision to suppress, the government attorney protested that he had not

addressed the Fourth Amendment issue and had limited his presentation to the attorney-client privilege. He told the court that he did that because, at a pre-trial conference, the judge had stated that the evidence would be admitted. The court did not address this protest, which, however, raises a serious question of whether the issue was actually litigated.

We need not address the government's argument that Rich seeks to re-litigate the forfeiture. The transcript of the civil forfeiture trial is not in the record of these appeals.

III.

Arguing that these appeals are frivolous, the government seeks sanctions against Rich. An appeal is frivolous if the claim advanced is unreasonable or is not brought with a reasonably good faith belief that it is justified. Clark v. Green, 814 F.2d 221, 223 (5th Cir. 1987). An appeal is also frivolous if the result is obvious or the arguments of error are wholly without merit. Coghlan v. Starkey, 852 F.2d 806, 811 (5th Cir. 1988) (per curiam). We do not lightly impose sanctions at any time, but it is particularly cautious in doing so when the appellant appears pro se. Clark, 814 F.2d at 223. Pro se litigants are not held to the standard of professionals, yet they are not granted unrestrained license to pursue totally frivolous appeals. Id.

Generally, a warning precedes the imposition of sanctions against a pro se litigant. When a litigant's conduct is especially egregious, however, a warning is not a pre-requisite. Cf. Moody v.

Baker, 857 F.2d 256, 258 (5th Cir.), cert. denied, 488 U.S. 985 (1988) (a Fed. R. Civ. P. 11 sanction is generally preceded by a warning but may be imposed when litigant's conduct is especially egregious).

This appeal is frivolous, but Rich's conduct has not been egregious beyond that point. Instead of imposing sanctions, we warn Rich that the filing of frivolous appeals in the future very likely will result in sanctions.

The appeal is DISMISSED as frivolous. See Fifth Cir. Loc. R. 42.2.