

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1830
Summary Calendar

RONALD D. WILSON,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

2:92 CV 0092

(June 28, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Ronald Wilson, a prisoner in the Potter County Correctional Center, filed a complaint under 42 U.S.C. § 1983 against the United

*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

States Government, United States Magistrate Judge Clinton Averitte, Attorney J. F. Howell, III, Assistant United States Attorney Christy L. Drake, the Governor of the State of Texas, District Court Clerk Nancy Doherty, and Assistant Clerk Jeanette Hetrick. Although Wilson's complaint is not always clear, the thrust of his allegations is that these defendants retaliated against him for filing earlier lawsuits. The alleged retaliation took many forms, including but not limited to, the improper docketing and disposition of his pleadings in the earlier cases, false prosecution, and imprisonment. In addition to seeking monetary damages and injunctive relief, Wilson also sought to be released from jail and to have his criminal record expunged.

The magistrate judge noted that these two requests for relief were more appropriately brought in a habeas petition and entered an order allowing Wilson to supplement his complaint to show that he had exhausted his state habeas remedies. Wilson filed several other pleadings, but did not supplement his complaint. The magistrate judge then entered his findings, conclusions and recommendation that Wilson's complaint be dismissed without prejudice for failure to exhaust state habeas remedies. The magistrate judge noted that this was a mixed petition containing allegations of both civil rights violations and habeas issues. Following this report, Wilson filed a motion to amend his complaint, adding seven defendants. Wilson also filed objections to the recommendation. The district court did not accept the recommendation of the magistrate judge, but went through Wilson's

complaint defendant by defendant and found that Wilson's claims against each of them was frivolous and subject to dismissal under 28 U.S.C. § 1915(d).

OPINION

A § 1983 action is the appropriate remedy for recovering damages for mistreatment or illegal administrative procedures. Richardson v. Fleming, 651 F.2d 366, 372 (5th Cir. 1981). The writ of habeas corpus is the appropriate federal remedy for a state prisoner challenging the fact of confinement. Preiser v. Rodriguez, 411 U.S. 475, 484, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973); see also Deters v. Collins, 985 F.2d 789, 792-96 (5th Cir. 1993). To determine which remedy a prisoner should pursue, the Court looks beyond the relief sought¹ to determine whether the claim, if proved, would factually undermine or conflict with the state court conviction. Richardson, 651 F.2d at 373. If the basis of the claim goes to the constitutionality of the conviction, a petition for habeas corpus relief is the exclusive initial federal remedy. Id. If a complaint contains both habeas and § 1983 claims, the district court should separate the claims and decide the § 1983 claims. Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1119 (5th Cir. 1987).

Wilson's claims can be broken down into two parts, those brought in his original complaint and those brought in his amended

¹ In his objections to the magistrate judge's recommendation, Wilson ostensibly abandoned his requests for release from jail; however, he has continued to complain that he is unconstitutionally incarcerated.

complaint. With respect to the original complaint, the district court made no finding that Wilson's complaint contained an attack on his conviction; however, there is no doubt that this is the case. If Wilson had been prosecuted and jailed as retaliation for prior § 1983 suits, the conviction would be unconstitutional. As a result, the claim serves as a challenge to the legality of his confinement and must first be brought as a habeas action. See Serio, 821 F.2d at 1119. A district court may not dismiss with prejudice a civil rights claim irrespective of merit until the habeas remedies have been exhausted. Williams v. Dallas County Com'rs, 689 F.2d 1212, 1215 n.2 (5th Cir. 1982), cert. denied, 461 U.S. 935 (1983). The claims could have properly been dismissed without prejudice, if such a dismissal would not in fact prejudice Wilson's claim by action of any applicable statute of limitations. See Jackson v. Johnson, 950 F.2d 263, 266 (5th Cir. 1992) (discusses effect of holding Texas habeas petitions in abeyance).

Notwithstanding the foregoing, the dismissal of the claim for damages against United States Magistrate Judge Clinton E. Averitte in the original complaint on the basis of absolute judicial immunity is affirmed. See Dayse v. Schuldt, 894 F.2d 170, 172 (5th Cir. 1990). Recognizing this immunity will have no impact on a determination of the merits of the habeas claim. See Serio, 821 F.2d at 1115. The qualified immunity covering defendants Drake, Doherty, and Hetrick requires an inquiry into the extent of their roles in the alleged conspiracy and may not serve as a basis for

dismissal. See Dayse, 894 F.2d at 172; Martin v. Dallas County, Tex., 822 F.2d 553, 555-56 (5th Cir. 1987).

With respect to the claims brought in the amended complaint, the district court correctly found that Wilson's allegations had no merit and that the complaint was frivolous under § 1915(d). The claims that Wilson raised, to the extent that they were intelligible, had nothing to do with any wrongful prosecution. They were no more than conclusional allegations of a conspiracy between the named defendants related to the dismissal of four § 1983 actions. Such allegations, not referencing specific facts, will not support a § 1983 action. Hale v. Harney, 786 F.2d 688, 690 (5th Cir. 1986). Additionally, the dismissals of three² of these actions has been affirmed by this Court. Wilson v. Neal, No. 92-1411 (5th Cir. Apr. 20, 1993).

The dismissal of the claims in the amended complaint is affirmed. The judgment dismissing the claims in the original complaint is vacated and the case is remanded to the trial court for entry of judgment consistent with this opinion.

² According to the clerk's office, the appeal of the fourth dismissal was abandoned by Wilson.