

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1905
Conference Calendar

KURBY GERALD DECKER,

Plaintiff-Appellant,

versus

ROBERT BROTHERTON, District
Judge, Wichita County, and
MARY COPELAND

Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:92-CV-000083-K
- - - - -

March 19, 1993

Before KING, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

Because the district court did not conduct a Spears hearing or afford Decker any other opportunity to amend his pleadings, the 28 U.S.C. § 1915(d) dismissal is premature if the complaint, viewed in its most favorable light with all its allegations accepted as true, states a colorable claim. Foulds v. Corley, 833 F.2d 52, 53-55 (5th Cir. 1987).

Prisoners who challenge the constitutionality of their conviction or sentence must first exhaust their state and federal

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

habeas remedies before seeking relief under 42 U.S.C. § 1983. Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112, 1117 (5th Cir. 1987). Federal courts should ordinarily decline to address the merits of a potential § 1983 claim that must be exhausted through habeas review. See William v. Dallas County Comm'rs, 689 F.2d 1212, 1214-15 (5th Cir. 1982), cert. denied, 461 U.S. 935 (1983). In cases such as this one, however, where the allegations of the complaint involve a challenge to the validity of conviction and sentence and the defendants are entitled to absolute immunity from monetary damages, "there remains no sound basis to defer decision on the immunity issue." Serio, 821 F.2d at 1115.

Decker's pleadings do not allege facts indicating that the state court judge lacked jurisdiction over the subject matter or acted in a nonjudicial capacity. Thus, Decker's claims concerning the judge are not actionable under § 1983 because the judge is absolutely immune. See Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). The prosecutor is also absolutely immune from suit for money damages since the conduct alleged to have been improper involved an official act performed in an official capacity. See Mills v. Criminal Dist. Court No. 3, 837 F.2d 677, 679 (5th Cir. 1988).

The district court's dismissal was without prejudice, but since it is clear that Decker can allege no facts to avoid the defendants' defense of immunity, the judgment is modified to be with prejudice.

AFFIRMED AS MODIFIED.