UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2592

GEORGE HOLT,

Plaintiff-Appellant,

versus

RICHARD JONES, acting in his official capacity and individual capacity as Assistant Warden of Wynn Unit of Texas Department of Criminal Justice, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-90-0624)

(December 9, 1993)

Before POLITZ, Chief Judge, REAVLEY and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

George Holt appeals the dismissal of his civil rights suit as frivolous under 28 U.S.C. § 1915(d). For the reasons assigned we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Holt, an inmate in the Wynne Unit of the Texas Department of Criminal Justice - Institutional Division, contends that he was the victim of an imaginative frame-up. According to Holt, fellow inmate Jeffrey Fry, angered by Holt's rejection of his sexual advances, induced his attorney, Shannon Warren, to inform Warden Richard Jones that Holt was planning an elaborate escape. Holt maintains that there was no such plan which, he says, was a total fabrication by Fry and Warren. The warden allegedly knew that the attorney's report was untrue but nonetheless pressed administrative charges against Holt in order to polish his image, which recently had been tarred by a successful escape. Holt was found guilty of attempted escape in a disciplinary proceeding and suffered various adverse consequences, including placement in administrative segregation and loss of good time credits and visitation privileges. He states that he fears that the disciplinary notation on his record will prevent him from achieving top level trusty status and will adversely affect parole decisions.

Proceeding *pro se* and *in forma pauperis*, Holt invoked 42 U.S.C. § 1983 and sued Jones, Fry, and Warren, complaining that they had conspired to violate his rights to due process and equal protection. After a **Spears**[1] hearing, the district court dismissed the case as frivolous under 28 U.S.C. § 1915(d). Holt timely appealed.

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[1] **Spears v. McCotter**, 766 F.2d 179 (5th Cir. 1985).

Analysis

This appeal involves two unfolding legal developments: the Supreme Court's elucidation of the contours of section 1915(d), as recently discussed in our decision in **Booker v. Koonce**,[2] and the invalidation of our heightened pleading requirement for section 1983 claims alleging municipal liability in **Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit**.[3] Ruling without the benefit of these intervening decisions, the district court reached the right disposition but used an incorrect rationale.

The court *a` quo* dismissed Holt's conspiracy claim with the following explanation:

> It is necessary to cite specific facts to establish the existence of a conspiracy; conclusions and suppositions do not suffice. Holt based his conspiracy claim, as he testified, on what he was told by Inmate Fry, on what was written in the disciplinary charge, and on his supposition that Ms. Warren was involved. These foundations are too weak to support a § 1983 claim involving these facts. In the absence of a conspiracy, Defendants Fry and Warren are not "state actors" within the terms of § 1983. Holt's conspiracy claim has no realistic chance of success.[4]

In **Booker**, we recognized that "slight chance of success" was no longer a valid ground for a section 1915(d) dismissal after the Supreme Court decisions in **Denton v. Hernandez**,[5] and **Neitzke v.**

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[2]2 F.3d 114 (5th Cir. 1993).

[3]_____ U.S. _____, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

[4]Internal citations omitted.

[5]_____ U.S. _____, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992).

Williams.[6] **Neitzke** and **Denton** teach that claims are not frivolous within the meaning of section 1915(d) merely because they are unlikely to be proven. Such claims have some chance of success and hence survive the section 1915(d) threshold test. Under these holdings it was inappropriate to dismiss Holt's conspiracy claim on the grounds that it lacked a "realistic chance of success."

We nonetheless affirm the dismissal of Holt's claim against Warren because it is clearly baseless and therefore factually frivolous within the meaning of section 1915(d) as recently clarified.[7] Holt's claim against Warren hinges on his allegation that she visited Fry in prison immediately before reporting Holt's supposed escape plans to Warden Jones. According to Holt, Warren and Jones concocted the scheme to frame him during that visit and Fry gave Warren ostensibly incriminating evidence, which she in turn immediately passed on to Jones. Holt now concedes that Warren did not make the alleged visit. Therefore, under Holt's own scenario, Warren could not have been involved in the conspiracy. Holt's claim against Warren, therefore, manifestly has no basis in fact. The same applies to the claim against Fry.

AFFIRMED.

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[6]490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

[7]**Denton**.