

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5255  
Summary Calendar

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JAY TODD NEESE,

Plaintiff-Appellant,

v.

JEFFERSON COUNTY, TEXAS, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(1:93-CV-201)

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(January 12, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.\*

PER CURIAM:

Appellant, Jay Todd Neese, filed a 42 U.S.C. § 1983 action against employees of a bail bond company and a state court judge, sheriff, and clerk. Neither the magistrate judge nor the district court adequately analyzed this unusual case, but, dismissal was proper in any event. Based on the following discussion, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Neese alleged the following facts. AAA Bail Bonds (AAA) provided a bond in connection with a criminal charge filed against Neese in August 1991. Helen Rouse, a AAA agent, contacted Neese on October 12, 1991, and advised Neese that he would have to return to the jail for a short period to be re-booked. Rouse and another AAA employee, Tommy Prevost, returned Neese to the jail.

After Neese arrived at the jail, a deputy told him that AAA had applied for and obtained a release of their surety obligation. According to Neese, the application was "filed to" Judge Larry Gist, but he did not sign an arrest warrant. The Clerk of Court issued a capias ordering Neese's arrest, presumably because the conditions of release requiring a surety bond were no longer fulfilled. The Sheriff then incarcerated Neese based on the issuance of the capias.

An exhibit attached to Neese's complaint reflects that Helen Rouse executed an affidavit of surrender on behalf of the bonding company seeking the issuance of an arrest warrant for Neese. The affidavit stated that the reason for the surrender was that Neese had been identified as the individual who had robbed the bonding company office. Neese also attached a document reflecting a capias was issued that same day in Neese's original criminal proceeding by the Clerk of Court. The Clerk ordered the Sheriff to arrest Neese because the Affidavit for Release of Surety (AFRS) "charged" Neese with the offense of burglary.

Neese argues that his arrest was not made in conformity with Tex. Crim. Proc. Code Ann. § 17.19 (West 1993), which requires

an arrest warrant to be issued--not a *capias*--in order for a surety to release an unwilling principal. Hernandez v. State, 600 S.W.2d 793 (Tex. Ct. Crim. App. 1980). Neese also argues that he was arrested prior to a charge being filed against him and prior to the issuance of a parole warrant. The district court determined that Neese was not arrested pursuant to a *capias* under § 17.19 but that he surrendered voluntarily to the Sheriff pursuant to Tex. Crim. Proc. Code Ann. § 17.16 (West 1993). The district court further determined that the bonding company defendants would not be liable for false arrest even if Neese had been arrested under the *capias*. The district court did not address the claims against the state defendants.

#### **DISCUSSION**

On appeal, Neese argues that between October 12 and November 5, 1991, he was illegally arrested and detained on the basis of an invalidly issued *capias*. Neese argues that he did not willingly surrender under § 17.16 and that he agreed to go to the jail for a short period based on false information provided to him by the bond company employees.

An initial question that must be considered is whether the allegations in Neese's complaint challenge the constitutionality of his present confinement. If so, Neese must exhaust his habeas remedies prior to the disposition of the § 1983 claim. See Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1114-17 (5th Cir. 1987). Because Neese states that his claim is limited to whether he was illegally arrested and detained, the

district court erred in dismissing the claims to enable Neese to exhaust his habeas remedies.

The district court dismissed Neese's substantive claims as frivolous. A complaint may be dismissed as frivolous if it lacks an arguable basis in law or in fact. Denton v. Hernandez, \_\_\_U.S\_\_\_, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992). The dismissal of the complaint is reviewed for an abuse of discretion. Id. at 1734.

#### **1. The Bonding Company Employees**

A nongovernmental private defendant can be held liable for an illegal arrest under 42 U.S.C. § 1983 if the defendant's conduct was "state action." Daniel v. Ferguson, 839 F.2d 1124, 1129 (5th Cir. 1988). Two factors have been considered in determining whether conduct resulting in the deprivation of a federal right constitutes "state action." Id. The deprivation 1) "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible" and 2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" Id. at 1130 (citation omitted). "State action" may be found when a private actor acts together with or obtains significant aid from state officials or when "his conduct is otherwise chargeable to the State." Id.

Under Texas law, a surety may relieve itself of its obligation to provide a bond under two statutory provisions. Section 17.16 provides that "[a] surety may before forfeiture

relieve himself of his undertaking by . . . surrendering the accused into custody of the sheriff of the county where the prosecution is pending." This provision provides for the "surrender of a principal without a warrant `if the principal will surrender willingly and without the use of force.'" Linder v. State, 734 S.W.2d 168, 170 (Tex. Ct. App. 1987) (citation omitted). If the principal will not surrender willingly, the surety must comply with § 17.19 and secure a warrant of arrest for the principal from a judge or magistrate. Id. The bonding company's conduct arose under either § 17.16 or § 17.19 in surrendering Neese to the Sheriff, thus, the defendants were arguably exercising a right created by State law.

However, Neese's complaint does not allege that the State defendants conspired with the private defendants or assisted them in luring Neese to the station. Neese admits that he voluntarily accompanied the surety's representatives to the police station based on the false information provided by these individuals.

A private individual's misuse of a valid state statute cannot be attributed to the state and is not cognizable under § 1983. Daniel, 839 F.2d at 1130. "`[A] private party does not act under color of state law when she merely elicits but does not join in an exercise of official state authority.'" Id. (citation omitted). The alleged conduct of the bonding company defendants did not constitute "state action." Therefore, the district court properly dismissed the § 1983 claims against Rouse and Prevost as frivolous.

## 2. State Officer Defendants

Neese argued in his Rule 59(e) motion that the state court judge, the Clerk of Court, and the Sheriff should have been aware that the capias was invalidly issued and that a warrant should have been obtained pursuant to § 17.19.

Contrary to Neese's ingenious argument, the U.S. Constitution is not violated simply because he was surrendered to the sheriff because of a lie or was surrendered in violation of Texas procedure pursuant to a capias rather than arrest warrant. The Fourth Amendment provides a right to be free from arrest without probable cause. Daniel, supra at 1129. Neese does not contest that the bonding company employees believed he had "robbed" them; this belief would have provided probable cause for the issuance of a warrant or perhaps even for a warrantless arrest.<sup>1</sup> Neese's claims predicated on a violation of state criminal procedures do not rise to a constitutional level because they do not challenge probable cause. No more need be said of these claims. Further, as to the sheriff, the initial arrest was valid if the Sheriff reasonably believed either that Neese voluntarily surrendered or that there was probable cause for the arrest. The record does not permit us to make the factual determination that the sheriff thought Neese had voluntarily surrendered, but the allegations that Neese "robbed" the bonding company, together with the surety's release of the bond, furnished a valid basis for

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<sup>1</sup> Neese's pleadings acknowledge that he was later formally charged with and apparently tried for robbery of the bonding company, but he was acquitted.

Neese's detention. In sum, even if Neese was taken into custody by means of procedures that did not comply with certain state law technicalities, his arrest and detention did not violate any constitutional right.

Accordingly, Neese's claims against the bonding company employees and the state officials were properly dismissed as frivolous.

The judgment of the district court is **AFFIRMED**.