

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-7786  
Conference Calendar

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ROBERT E. TUBWELL,

Plaintiff-Appellant,

versus

BARBARA DUNN, Circuit Clerk of Hinds  
County Mississippi, Et Al.,

Defendants,

LINDA ANDERSON, Assistant District  
Attorney of Hinds County, Mississippi  
EDWARD PETERS, District Attorney of  
Hinds County, Mississippi,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Mississippi  
USDC No. CA-J91-0191(B)  
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(December 14 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

In this 42 U.S.C. § 1983 suit, Robert E. Tubwell argues that the district court erred in granting the motion of the defendant prosecutors to dismiss based on prosecutorial immunity.

This Court reviews de novo a trial court's dismissal of a complaint for failure to state a claim upon which relief can be

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

granted. Giddings v. Chandler, 979 F.2d 1104, 1106 (5th Cir. 1992). The dismissal may be upheld "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." Id. (citation omitted). "In making this determination, [the Court] accept[s] the well-pleaded allegations in a complaint as true." Id. (citations omitted).

Tubwell's complaint brings into question the validity of his guilty plea, and, thus, the legality of his incarceration. Therefore, his sole initial federal remedy is habeas corpus with its requirement of exhaustion of state remedies. Serio v. Members of La. State Board of Pardons, 821 F.2d 1112, 1115 (5th Cir. 1987). However, a motion to dismiss a § 1983 claim based on prosecutorial immunity may be addressed prior to the exhaustion of Tubwell's habeas remedies because its disposition will not implicate the merits of a challenge to his state conviction. Id. at 1114-15.

Prosecutors are immune from § 1983 suits for acts that are within the scope of their prosecutorial duties. Imbler v. Pachtman, 424 U.S. 409, 427-30, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Prosecutorial immunity has been extended to a prosecutor's actions in initiating, investigating, and pursuing a criminal prosecution. Cook v. Houston Post, 616 F.2d 791, 793 (5th Cir. 1980). This immunity encompasses acts within the judicial phase of criminal proceedings, even if the prosecutor has acted maliciously, wantonly, or negligently. Rykers v. Alford, 832 F.2d 895, 897 (5th Cir. 1987). A prosecutor's

involvement in obtaining a guilty plea has been found to be associated with the judicial phase of the criminal process. See Humble v. Foreman, 563 F.2d 780, 781 (5th Cir. 1977), overruled on other grounds by, Sparks v. Duval County Ranch Co., 604 F.2d 976, 978 (5th Cir. 1979) (a state actor's immunity does not extend to a private citizen who is allegedly involved in an unconstitutional conspiracy with the state actor), cert. denied, 445 U.S. 943 (1980); see also Taylor v. Kavanagh, 640 F.2d 450, 453 (2d Cir. 1981) (a prosecutor's activities in plea bargaining are an essential component of the criminal justice system and merit the protection of absolute immunity).

Accepting as true Tubwell's allegations that the prosecutors maliciously misled him at the time of his guilty plea with respect to the execution of his sentence, the prosecutors are absolutely immune from suit because their actions were within the scope of the judicial phase of the criminal proceeding. Tubwell's claim that the prosecutors violated his right to access to the courts because they caused him to forego his trial also relates to the prosecutors' actions in negotiating the guilty plea and is also barred by immunity.

The district court properly granted the motion to dismiss.

AFFIRMED.