

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8614

LEONARD ODELL CAZEY,

Plaintiff-Appellant,

v.

ROBERT M. STEM, Judge,
THOMAS B. SHEON, District Attorney
and LARRY HOELSCHER, District Clerk,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W-92-CV-252)

(September 23, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Leonard Odell Cazez brought a civil rights action against a state district judge, a district attorney, and a state court clerk. The district court assigned the case to a magistrate, who recommended that Cazez's suit be dismissed for failure to state a

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

claim. The district court adopted the magistrate's recommendation. Cazey appeals. We affirm.

I.

Leonard Odell Cazey, a state prisoner, filed a pro se complaint under 42 U.S.C. § 1983 seeking compensatory and punitive damages from a state district judge, a district attorney, and a state court clerk in their individual and official capacities. According to Cazey, the appellees violated his civil rights by using a conviction to enhance the sentence he is currently serving even though the appellees had lost the court records of the conviction that was used to enhance his sentence. A magistrate judge recommended dismissing the case on the ground that Cazey had failed to state a claim upon which relief could be granted. The magistrate recommended the dismissal of Cazey's claims against Judge Stem and District Attorney Sheon because of absolute immunity. The magistrate recommended that Cazey's suit against District Clerk Hoelscher be dismissed because he was at a minimum protected by qualified immunity. The magistrate also recommended that all of Cazey's allegations of negligence should be dismissed because a negligence claim will not support a § 1983 suit. Furthermore, the magistrate recommended that all claims against the appellees in their official capacities be dismissed because Cazey had failed to allege that any policy or custom played a part in the deprivation of his civil rights. The district court adopted the magistrate's report and recommendation

and dismissed Cazez's suit. Cazez appeals the dismissal of his suit.

II.

Allegations in a prisoner's complaint, "`however inartfully pleaded,' are held `to less stringent standards than formal pleadings drafted by lawyers.'" Hughes v. Rowe, 449 U.S. 5, 9 (1980). Construing Cazez's complaint with the requisite liberality, we determine that his complaint is essentially an attack on the constitutionality of the sentence that he is presently serving. Specifically, Cazez alleges that

it is clearly stated, that the district attorney, the honorable Judge Stem, knew, or should have known, that without the proper paperwork, without the proper legal documents, the sentence in cause number, 13,986, could not be enhanced, by the cause number 12,542, for these said officials, could not prove that cause number, M-993, even existed, because the legal documents, had been lost, misplaced, and/or destroyed.

It is clearly established that "prisoners who challenge the constitutionality of their convictions or sentences must first exhaust their state remedies." Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1117 (5th Cir. 1987). However, the record does not indicate what appeals, if any, that Cazez has undertaken with regard to his conviction. Even if Cazez has not exhausted his state remedies, we need not defer our determination of immunity for the appellees. Id. at 1114-15. In this case, even if the allegations of Cazez are true and he is entitled to habeas relief, as will be seen below, the appellees are entitled to absolute immunity. Therefore, in the absence of a threat to

the principles of comity there is no sound basis to defer our decision.

Personal Capacity

We agree with the district court that Judge Stem and prosecutor Sheon enjoyed absolute immunity from damages under § 1983. Judges are absolutely immune from liability for judicial acts that are not performed in the clear absence of all jurisdiction, however erroneous the act or evil the motive. Johnson v. Kegans, 870 F.2d 992, 995 (5th Cir.), cert. denied, 492 U.S. 921 (1989). Because Cazey's allegations are intimately connected with Judge Stems judicial acts, Judge Stem is absolutely immune from suit under § 1983. Likewise, prosecutors are absolutely immune from liability for initiating prosecutions and other acts "intimately associated with the judicial phase of the criminal process." Id. at 996. Sheon is also absolutely immune under § 1983 because Cazey's allegations against Sheon are "intimately associated with the judicial phase of the criminal process."

Court clerks have a narrower degree of immunity than do prosecutors or judges. "They have absolute immunity from actions for damages arising from acts they are specifically required to do under court order or at a judge's direction, and only qualified immunity from all other actions for damages." Tarter v. Hurley, 646 F.2d 1010, 1013 (5th Cir. 1981). Cazey's allegation is that the appellees wrongfully enhanced his sentence

because the appellees had lost the court records that were necessary to prove the conviction that was used to enhance his sentence. Any connection that clerk Hoelscher could have had with this alleged enhancement had to have come at the judge's direction. Therefore, Hoelscher is absolutely immune.

Official Capacity

Furthermore, Cazey has asserted violations of his civil rights against the appellees in their official capacities. Official capacity suits are merely another way of bringing an action against the entity for which the official works. Kentucky v. Graham, 473 U.S. 159, 165 (1985). A local governmental entity is liable under § 1983 only when the entity's policy or custom has played a part in the violation of the plaintiff's constitutional rights. Id. at 166. Cazey has not alleged that any policy or custom played a role in the deprivation of his constitutional rights.¹ Therefore, Cazey has failed to state a cause of action against the appellees in their official capacities. Likewise, dismissal of Cazey's claims against the appellees in their official capacities resolves none of the underlying merits of his claim, and we decide not to defer our decision.

III.

¹ Furthermore, Cazey's suit against Judge Stem in his official capacity is barred by the Eleventh Amendment. Johnson v. Kegans, 870 F.2d 992, 998 n.5 (5th Cir.), cert. denied, 492 U.S. 921 (1989).

For the foregoing reasons, we AFFIRM the district court's dismissal of Cazey's § 1983 suit.