

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-9006
Summary Calendar

Kenneth Greg Russell,

Plaintiff-Appellant,

VERSUS

Terry McEachern, Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

5:92 CV 244 C

April 26, 1993

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge*:

Pro se prisoner filed a civil rights action alleging that his constitutional rights were violated during the investigation and prosecution leading to his conviction. The district court dismissed the action for failure to state a claim; however, the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court failed to give reasons for that conclusion. For the following reasons, we remand this case to the district court to proceed in a fashion consistent with this opinion.

Facts and Prior Proceedings

Texas prisoner Kenneth Greg Russell, proceeding pro se, sued the Hale County, Texas, district attorney and others for civil rights violations pursuant to 42 U.S.C. § 1983.¹ He alleged irregularities in the criminal proceedings that resulted in his conviction on drug charges. The district court dismissed the case as frivolous under 28 U.S.C. § 1915(d). The court stated that Russell, "failed to state a cause of action with an arguable basis in law or in fact." The court gave no reasons for that conclusion.

Discussion

A claim is frivolous if it lacks an arguable basis in law or fact. **Denton v. Hernandez**, __ U.S. __, 112 S.Ct. 1728, 1733, 118 L.Ed. 2d 340 (1992). Such a claim may be dismissed pursuant to 28 U.S.C. § 1915(d). The standard of review is abuse of discretion. 112 S.Ct. at 1734.

Russell argues that he was entrapped, that the search and seizure were unlawful, his Fifth and Sixth Amendment rights were violated, he had ineffective assistance of counsel, he is a victim of malicious prosecution, misprision of felony and malicious abuse of legal process. This Circuit bars consideration of claims under § 1983 that directly or indirectly challenge the constitutionality of the prisoner's state conviction without first exhausting state

¹Russell was granted in forma pauperis status.

remedies, such as habeas corpus. **Serio v. Member of Louisiana State Board of Pardons**, 821 F.2d 1112, 1117 (1987). In the instant case, Russell has alleged constitutional claims that challenge the legality of his confinement. As such, these claims must first be pursued through habeas corpus. **Serio**, 821 F.2d 1112. When a prisoner brings a civil rights action before a habeas petition, the district court should dismiss the civil rights action without prejudice and direct the plaintiff to promptly pursue habeas remedies. **Rodriguez v. Holmes**, 963 F.2d 799, 804-05 (5th Cir. 1992). In addition, when a complaint combines claims that should be asserted in habeas corpus petitions with claims that properly may be pursued as an initial matter under § 1983, and the claims can be separated, federal courts should do so if the § 1983 claims do not necessitate release from confinement. **Serio**, 821 F.2d at 1119. Russell's complaint contains claims which are cognizable under § 1983, such as the malicious prosecution and the malicious abuse of process claims. However, when the resolution of the factual and legal issues in a case necessary to decide § 1983 liability automatically entitle a prisoner to immediate release, the claims must be pursued initially through habeas corpus. **Serio**, 821 F.2d at 1119. In his brief, Russell requests, among other things, relief from incarceration and the removal of all charges from his record. Russell's factual allegations supporting his request for relief, if true, all necessitate his release from confinement. Clearly, if it is true that Russell was prosecuted maliciously as a result of a conspiracy between his in-laws and law enforcement, and there is no evidence to support his conviction, then he must be

released from confinement. Therefore, Russell must first pursue all of his claims through habeas corpus. We note that the record does not indicate whether Russell has or has not pursued relief through habeas corpus. Therefore, we remand to the district court to make such a determination. If Russell has not pursued relief through habeas corpus, then the district court should instruct him to do so. If Russell has already pursued relief through habeas corpus, then the district court should make more specific findings concerning why Russell's § 1983 claim was dismissed as frivolous.²

Conclusion

For the foregoing reasons, we remand this case to the district court.

²See generally *Parker v. Carpenter*, 978 F.2d 190 (5th Cir. 1992)(pro se complaints are read in a liberal fashion and should not be dismissed unless it appears beyond all doubt, after the prisoner has been given the opportunity to develop his case, that the prisoner's complaint lacks an arguable basis in law and fact).