

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1035  
Summary Calendar

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DARNELL JOHNSON,

Plaintiff-Appellant,

VERSUS

JEFF BRYANT, et al.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Texas  
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March 17, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Darnell Johnson appeals the dismissal, under 28 U.S.C. § 1915(d), of his state prisoner's civil rights action brought pursuant to 42 U.S.C. § 1983. Concluding that there is a need to determine whether Johnson has exhausted his state remedies, we affirm in part and vacate and remand in part.

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\* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Johnson, a Texas state prisoner, alleges that his civil rights were violated when he was falsely arrested by two deputies of the Ellis County, Texas, sheriff's department on charges of burglary of a residence and aggravated sexual assault. Proceeding pro se and in forma pauperis, Johnson also names as a defendant Mary Sheldon, a member of the parole board that revoked his parole as a result of the two charges brought against him. Even though the charges were dropped, Johnson's parole was revoked, and he was returned to custody.

The complaint was referred to a magistrate judge who, after attempting to elicit further specific factual information from Johnson, recommended dismissing the complaint as frivolous. Johnson objected to the findings and recommendation of the magistrate judge, but the district court conducted an independent review and adopted the report and recommendation.

II.

A district court may sua sponte dismiss a pauper's complaint as frivolous where it lacks an arguable basis in either law or in fact. A reviewing court will disturb such a dismissal only on a finding of abuse of discretion. Denton v. Hernandez, 112 S. Ct. 1728, 1733-34 (1992).

The gravamen of Johnson's complaint is that the defendant officers had him falsely arrested without a warrant or probable cause. As a result of these charges and the imposition of what

Johnson terms an "ex post facto supervision fee law," his parole was revoked by defendant Sheldon, and he was returned to custody. In cases such as this one that combine claims that properly should be asserted in a petition for writ of habeas corpus with claims that may be pursued initially under section 1983, "and the claims can be separated, federal courts should do so, entertaining the 1983 claims." Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1119 (5th Cir. 1987). Because parole board members are absolutely immune from liability under section 1983 for exercising their decisionmaking powers in individual parole decisions, Walter v. Torres, 917 F.2d 1379, 1384 (5th Cir. 1990) (citations omitted), Johnson's complaint against defendant Sheldon was properly dismissed.

While a false arrest complaint is one that generally may be brought under section 1983, see Duckett v. City of Cedar Park, Tex., 950 F.2d 272, 278-79 (5th Cir. 1992), it is Johnson's argument that but for his false arrest he would not be presently confined. As such, the thrust of Johnson's complaint is plainly a challenge to the revocation of his parole, and despite the inclusion of a colorable section 1983 claim, the two are too inextricably linked to permit severance. Serio, 821 F.2d at 1119.

Because Johnson's section 1983 claim is not severable from his habeas claim, he must exhaust his state remedies before he can pursue this action in federal court. Id. In his objections to the magistrate judge's report and recommendation, Johnson claimed that he exhausted his state court remedies, but the district court did

not address this claim, and it is unclear from the record whether he has actually done so. Johnson also claimed that he filed a request for federal habeas relief and requested that it be consolidated with the present suit, but the district court did not discuss this assertion.

We therefore VACATE district court's judgment regarding the false arrest claim, and the cause is REMANDED for a determination of whether Johnson has exhausted his state court remedies. The district court may wish to consolidate the section 1983 and habeas actions, though the recommended disposition of the instant matter is not intended to comment on the merits of Johnson's remaining claims. The remainder of the judgment is AFFIRMED.