IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-1057
Summary Calendar

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CHARLES RAY HARVEY,

Plaintiff-Appellant,

versus

BRIAN B. BLESSING,

Defendant-Appellee.

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Appeal from the United States District Court for the
Northern District of Texas
3:92 CV 0195 D

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July 21, 1993

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.[*]

PER CURIAM:

Plaintiff-appellant Charles Ray Harvey (Harvey) is a Texas state prisoner presently in the custody of the Texas Department of Criminal Justice. Proceeding *in forma pauperis*, he filed the present complaint pursuant to 42 U.S.C. § 1983 alleging that his court-appointed attorney, the sole named defendant, was ineffective

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and conspired with the prosecution to violate Harvey's civil rights. The magistrate judge to whom the cause was referred issued findings, conclusions, and recommended dismissal pursuant to 28 U.S.C. § 1915(d).

The district court ordered the magistrate judge to issue interrogatories related to Harvey's conspiracy allegations and to conduct further proceedings as appropriate. The magistrate judge complied, and Harvey answered. The magistrate judge recommended dismissal pursuant to 28 U.S.C. § 1915(d) for a second time because Harvey's "allegations [did] not support a claim for conspiracy." Harvey objected to the magistrate judge's second recommendation. The district court adopted the second recommendation and dismissed the action pursuant to 28 U.S.C. § 1915(d).

An *in forma pauperis* (IFP) complaint alleging a violation of 42 U.S.C. § 1983 may be dismissed as frivolous if it lacks an arguable basis in law or in fact. *Denton v. Hernandez*, 112 S.Ct. 1748, 1733 (1992). The "initial assessment of the *in forma pauperis* plaintiff's factual allegations must be weighed in favor of the plaintiff." *Id*. Section 1915(d) "cannot serve as a fact finding process for the resolution of disputed facts." *Id*. "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." *Id*. An IFP complaint may not be dismissed "simply because the court finds the plaintiff's allegations unlikely." *Id*. Appellate review of a section 1915(d)

dismissal is under the abuse of discretion standard. *Id*. at 1734. Despite an opportunity to respond to the magistrate judge's interrogatories, Harvey failed to assert facts that point to any complicity between the prosecution and his court-appointed attorney. His pleadings are factually frivolous and it is "wholly incredible" that ineffective assistance of counsel allegations are tantamount to an allegation of conspiracy. Harvey's allegations are factually frivolous.

Court-appointed counsel in a state criminal proceeding does not act under color of state law when performing the traditional functions of defense counsel, and is therefore not generally subject to liability under section 1983. *Polk County v. Dodson*, 102 S.Ct. 445 (1981). An exception to this rule obtains where defense counsel has conspired with state officials, even though the state officials may themselves be immune from suit. *Mills v. Criminal Dist. Court No. 3*, 837 F.2d 677, 679 (5th Cir. 1988). Conclusional allegations of a conspiracy, without reference to material facts, are insufficient to constitute grounds for section 1983 relief. *Dayse v. Schuldt*, 894 F.2d 170, 172 (5th Cir. 1990). *Cf. Nickens v. Cabana*, No. 92-7187, p. 12 (5th Cir. May 19, 1993) (unpublished).

There is no factual support for Harvey's conspiracy allegations in his complaint, his objections to the magistrate judge's two recommendations, or in his response to the magistrate judge's interrogatories. According to Harvey's complaint, the crux of his conspiracy allegation is that he pointed out to his attorney

that his Texas state indictment lacked the official seal, but that the attorney refused to raise the issue, and that his attonry "inform[ed] the prosecutor of everything that [Harvey had] confided in him."

In his answer to Interrogatory No. 1, which required him to state all known facts establishing that the prosecution and his court-appointed attorney entered into a conspiracy, Harvey asserted that his attorney failed to "protect and preserve [his] Constitutional rights," and "advised [him] of a fifty (50) year plea bargain . . . without even asking [him] if [he] was guilty." He also stated that the prosecution "constantly pressured [him] concerning plea bargains despite" an assertion of "innocence," and "willfully suppressed favorable evidence." He further asserted that the goal of the conspiracy was to obtain a conviction despite his innocence and to subject him to the "[g]reatest sentence possible." Harvey made no allegations of (or even suggesting) a factual basis to support the asserted conspiracy between his attorney and the prosecution.

In his objections to the magistrate judge's second recommendation, Harvey added no allegations of historical fact. Although the allegations may support an ineffective assistance of counsel claim, they do not support a conspiracy claim against the sole defendant. In the absence of a factual basis for the conspiracy claim, the district court properly dismissed Harvey's section 1983 complaint, which was solely a claim for damages against a private individual, his court-appointed attorney in his

state criminal case. To the extent that Harvey has a valid ineffective assistance of counsel claim, the dismissal does not bar him from pursuing habeas corpus relief for that claim. *See Serio v. Members of Louisiana State Bd. of Pardons*, 821 F.2d 1112, 1114 (5th Cir. 1987).

Harvey argues for the first time on appeal that the district court erred by denying him an opportunity to engage in discovery. His argument is unavailing. It was not raised below, and hence no reversible error is shown. Further, a district court may dismiss an action as frivolous under section 1915(d) prior to permitting a party to engage in discovery. *Cay v. Estelle*, 789 F.2d 318, 324 (5th Cir. 1986).

Accordingly, the judgment of the district court is

AFFIRMED.