

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1383
Summary Calendar

Richard James Barnard,

Plaintiff-Appellant,

VERSUS

Russell Lawrence, Et. Al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-2584-H)

(November 8, 1993)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:*

Prisoner brought civil rights action, in essence alleging that a law enforcement officer conspired to unlawfully convict him of possession of a controlled substance. The district court construed the complaint as a writ of habeas corpus and dismissed it for failure to exhaust state remedies. The district court's dismissal

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

is affirmed in part as modified by the following opinion, but we vacate and remand as to the § 2241 issue.

Facts and Prior Proceedings

Richard James Barnard, who is currently incarcerated in the Dallas County jail, filed the instant 42 U.S.C. § 1983 action against Russell Lawrence, a private citizen, and Sergeant Dan Easterwood of the Texas Department of Public Safety. Proceeding pro se and in forma pauperis, Barnard alleges that Lawrence and Easterwood, through an illegal oil and gas investment scheme, obtained \$13,400.00 from Barnard. When Lawrence was unable to repay the investment, Barnard alleges that Lawrence conspired with Easterwood to frame Barnard for possession of cocaine. Barnard alleges that their efforts resulted in his state court conviction for conspiracy to possess a controlled substance.

Barnard's complaint was referred to a magistrate judge who, after directing Barnard to answer interrogatories, concluded that the complaint sounded in habeas corpus relief. As such, the magistrate judge recommended that the complaint be dismissed since Barnard had not exhausted his state remedies. The district court subsequently dismissed the complaint, and Barnard timely appeals that dismissal.

Discussion

A. The Essence of the Complaint

Barnard contends that the district court erred by construing his complaint as a habeas corpus petition and dismissing it for failure to exhaust state remedies. He contends that he is not

challenging the fact or length of his confinement, but seeks monetary damages and an official Justice Department investigation into the actions of the defendants.

Prisoners who bring § 1983 claims which actually challenge the constitutionality of their convictions or sentences must first pursue state remedies such as habeas corpus relief. **Serio v. Members of Louisiana State Board of Pardons**, 821 F.2d 1112, 1117-1119 (5th Cir. 1987). Although Barnard argues that he is not requesting relief from confinement, his allegations could conceivably form the basis of a false arrest claim under § 1983, and the resolution of the factual issues necessary to adjudicate that claim could, in effect, entitle Barnard to immediate release. **See Duckett v. City of Cedar Park, Tex.**, 950 F.2d 272, 278-79 (5th Cir. 1992). The alleged wrongful conduct of Easterwood and Lawrence perpetrated against Barnard is inextricably linked to the state conviction against him. Therefore, Barnard's claim regarding the conspiracy to "frame" him for possession of cocaine must be pursued initially through habeas corpus since resolution of this issue could result in his release from confinement. **Serio**, 821 F.2d at 1119.

When a Texas prisoner brings such a civil rights action before a habeas petition, however, the district court should dismiss the petition without prejudice and direct the plaintiff to promptly pursue habeas remedies. **Rodriguez v. Holmes**, 963 F.2d 799, 804-05 (5th Cir. 1992). The district court's dismissal of Barnard's action did not specify whether it was with or without prejudice.

See Fed. R. Civ. P. 41(b). Therefore, the district court's judgment should be modified to note that the dismissal was without prejudice as to this claim.

B. Scheme to Defraud

Liberally construed, Barnard's complaint could also state a claim that Easterwood, acting under color of state law, assisted Lawrence in a scheme to defraud Barnard of his property without due process of law. An intentional or negligent deprivation of property by a state employee, however, does not constitute a violation of one's procedural due process rights if, as in the instant case, a meaningful post-deprivation remedy exists. **Hudson v. Palmer**, 104 S.Ct. 3194, 3205 (1984). Clearly, Barnard could have made a state law claim against the defendants under a number of tort theories. Where courts can separate out claims that pertain to the validity of the conviction from those that do not, the court should proceed to entertain the separable § 1983 claims. **Serio**, 821 F.2d at 1119. Since availing himself of state tort remedies would not call into question the validity of Barnard's state conviction, Barnard's claim that he was defrauded of \$13,400 should be severed from the rest of the complaint, and its dismissal by the district court should be affirmed with prejudice.

C. Federal Parole Status

Barnard also alleges that Easterwood contacted Barnard's federal parole officer throughout the same time period that Easterwood and Lawrence solicited money from Barnard. Barnard alleges that Easterwood hindered his rehabilitative efforts. The

district court noted that since Barnard's allegations also implicated his federal parole status, his § 1983 complaint should also be construed as a federal habeas challenge under 28 U.S.C. § 2241. The district court then concluded that it lacked jurisdiction over that claim because Barnard was in the custody of the U.S. Marshal in Tennessee. This conclusion is not supported by the record, and Barnard denies that he has been in Tennessee in connection with the instant matter. However, Barnard must exhaust § 2241 remedies before pursuing relief under § 1983. **See Spina v. Aaron**, 821 F.2d 1126, 1128-30 (5th Cir. 1987). The district court, therefore, needs to consider whether to construe Barnard's § 1983 allegations as a petition for relief under § 2241. This case is remanded as to this issue.

Conclusion

Based on the foregoing, the dismissal of Barnard's § 1983 complaint is affirmed in part as modified, but vacated and remanded on the issue of relief under § 2241.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.