

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3667  
Summary Calendar

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ROGER MAYWEATHER,

Plaintiff-Appellant,

versus

EDWIN A. LOMBARD,  
MYRA ROBERT, JOSEPH MEYER,  
and EVE S. KAZIK,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CA-93-0207-N)

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(November 18, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:\*

Roger Mayweather (Mayweather), previously convicted of first-degree robbery in state court, filed this civil rights lawsuit against two court officials, his indigent defender attorney, and an indigent defender clerk. Mayweather alleged, among other things, that the defendants conspired to deny him access to the court on his direct appeal. Finding that the district court properly

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

disposed of his claims, we affirm.

#### I. FACTS AND PROCEDURAL HISTORY

Mayweather was convicted pursuant to a plea bargain of first-degree robbery in a Louisiana state court. Mayweather was represented by Attorney Joseph Meyer of the Orleans Indigent Defender Program (OIDP). Mayweather was sentenced to three ten-year concurrent sentences. The state trial court vacated Mayweather's original sentence and resentenced him to three concurrent 40-year terms.

On direct appeal, the convictions were affirmed but the 40-year sentences were set aside and Mayweather's original ten-year sentences were reinstated. It was further determined that the trial court should hold a hearing on the multiple bill which the state had filed to impose a longer prison term. Mayweather apparently was not resentenced, and thus, the ten-year sentences remain in effect.

Mayweather filed this 42 U.S.C. § 1983 action against Edwin A. Lombard, Clerk of the Orleans Parish Criminal District Court; Court Reporter Eve S. Kazik of the court; Attorney Meyer; and Myra Robert, an OIDP appeals clerk. He alleged that Kazik furnished him an altered copy of his Boykin<sup>1</sup> transcript and that he had not been provided with a copy of his sentencing transcript. Mayweather alleged that this showed that the defendants "have conspired with the Orleans Parish District Attorney, Harry Connick, to deny your plaintiff meaningful access to the courts"; and that he needed the "transcript in order to perfect his appeal and Habeas Corpus

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<sup>1</sup> Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969).

Relief." His direct appeal previously had been decided. Mayweather subsequently filed a motion for a TRO and/or preliminary injunction, seeking to require the defendants to provide him a true and correct copy of his trial and sentencing transcripts. He alleged that he needed the transcripts to timely file for postconviction relief.

The magistrate judge recommended denial of a TRO and an injunction because there was no showing of irreparable injury. The magistrate judge recommended granting summary judgment to Meyer and Robert, on grounds that they had not acted under color of state law for purposes of § 1983. The magistrate judge recommended (1) dismissal of the claims against Lombard and Kazik as frivolous pursuant to 28 U.S.C. § 1915(d); and (2) dismissal of the conspiracy claim because it was conclusional. Over Mayweather's objections, the district court adopted the magistrate judge's report and dismissed the action.

## II. DENIAL OF MEANINGFUL ACCESS TO COURT

The crux of Mayweather's claim is that the appellees denied him meaningful access to the state court on his direct criminal appeal by failing to provide him with a true and correct copy of transcripts or provide him with an "altered" transcript. Because Mayweather has not alleged in what respects the transcript may have been "altered" or was incorrect, the claim is conclusional.

### A. WHETHER MAYWEATHER WAS ENTITLED TO INJUNCTIVE RELIEF.

Mayweather contends that the district court erred by denying his requests for a temporary restraining order (TRO) and a preliminary injunction. He argues that the court should have ordered the appellees to furnish him with true copies of

transcripts and tape recordings of all proceedings against him relative to his robbery prosecution. Mayweather asserts that those records would establish that the appellees conspired to deny him his constitutional right of access to the state appellate court and have delayed his efforts to seek postconviction relief.<sup>2</sup>

There is no right to appeal the denial of a TRO. Lowe v. Warden and Comm'r of Holman Prison Unit, 450 F.2d 9, 11 (5th Cir. 1971). "[A]n order granting or denying a preliminary injunction will be reversed only upon a showing that the district court abused its discretion. The district court's findings of fact are subject to the clearly erroneous standard of review." Lakedreams v. Taylor, 932 F.2d 1103, 1107 (5th Cir. 1991) (citation omitted). However, the district court's "legal determinations are subject to plenary review on appeal." Id.

To be entitled to the "extraordinary remedy" of "a preliminary injunction, the moving party must establish four factors: (1) a substantial likelihood of success on the merits, (2) a substantial threat that failure to grant the injunction will result in irreparable injury, (3) the threatened injury outweighs any damage that the injunction may cause the opposing party, and (4) the injunction will not disserve the public interest." Id. As the district court held, Mayweather was not entitled to a preliminary injunction because he did not show that its denial would result in irreparable injury to him.

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<sup>2</sup> He also accuses Attorney Meyer of having induced his plea by telling him that he would receive no more than a three-year term and that he would be allowed to spend six months in a drug-rehab program rather than going to prison. If this occurred, however, the transcripts and recordings would not show it.

Relative to a direct criminal appeal, the State is required to supply a verbatim transcript only of such parts of the proceedings in the trial court as are relevant to the issues presented on appeal. Moore v. Wainwright, 633 F.2d 406, 408 (5th Cir. 1980). Mayweather concedes that Kazik provided him a copy of the transcript of the proceeding at which he pleaded guilty. Although he alleged that the copy he received was "altered," id., he never has alleged in what respects it may have been incorrect.

Mayweather asserted that he needed the transcript of his sentencing to the ten-year terms to challenge that sentence, in a supplemental pro se brief on direct appeal. Once again, he has not suggested how that transcript may have shown that the state court should have reversed his ten-year sentence in addition to setting aside his forty-year sentence. The district court did not abuse its discretion in denying injunctive relief.

B. DISMISSAL OF CLAIMS AGAINST LOMBARD AND KAZIK AS FRIVOLOUS.

Mayweather contends that the district court erred by dismissing his claims against Lombard and Kazik pursuant to 28 U.S.C. § 1915(d). "An in forma pauperis complaint may be dismissed as frivolous if it lacks an arguable basis in law or fact." Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994). We review such dismissals "for abuse of discretion." Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992).

Mayweather alleged conclusionally that Lombard and Kazik conspired with Meyer, Roberts, and the prosecutor to deny him access to the state appellate court by not providing him a copy of his sentencing transcript, and that Kazik furnished him with an

"altered" copy of his Boykin transcript. As such, Mayweather has not shown that he was denied any constitutional right. A conspiracy to deprive a person of a constitutional right may be actionable under § 1983. However, the plaintiff must "prove an actual deprivation of a constitutional right; a conspiracy to deprive [standing alone] is insufficient" as grounds for § 1983 liability. Villanueva v. McInnis, 723 F.2d 414, 418 (5th Cir. 1984). Further, the conspiracy claims against all the appellees were properly dismissed on grounds that they were merely conclusional, and he would not be able to remedy the deficiency by amendment. Dayse v. Schuldt, 894 F.2d 170, 172-73 (5th Cir. 1990).

C. SUMMARY JUDGMENT GRANTED AS TO MEYER AND ROBERT

Mayweather contends that the court erred by granting summary judgment to Meyer and Robert. Robert allegedly assured Mayweather that a copy of his sentencing transcript would be sent to him after Lombard prepared it. In his complaint he did not allege any specific acts or omissions by Meyer; and another attorney represented him on direct appeal.

Rule 56(c), Fed.R.Civ.P., provides that the district court shall render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To avoid summary judgment, the opposing party "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986). This

Court's standard of review of a summary judgment ruling is the same as the district court's, and it must be based on the evidence which was presented in the district court. Sanders v. English, 950 F.2d 1152, 1159 (5th Cir. 1992).

Meyer and Robert were not state actors. It is true that "private attorneys who have conspired with state officials may be held liable under section 1983 even though the state officials with whom they conspire are themselves immune from suit." Mills v. Criminal District Court #3, 837 F.2d 677, 679 (5th Cir. 1988). However, Mayweather failed to allege or show any such conspiracy or that he was deprived of any constitutional right. The district court properly granted summary judgment in favor of Meyer and Robert.<sup>3</sup>

### III. CONCLUSION

For the reasons set forth above, the judgment is AFFIRMED.

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<sup>3</sup> In his objections to the report and on appeal, Mayweather has accused Attorney Meyer of wrongfully inducing his guilty pleas. Mayweather did not request leave to amend his complaint to allege this as a new claim against Meyer, and the district court did not advert to it. Rule 15, Fed.R.Civ.P., "permits a party to amend his pleadings out of time by leave of court, and commands that "[such] leave shall be freely given when justice so requires.'" Sherman v. Hallbauer, 455 F.2d 1236, 1242 (5th Cir. 1972). The interests of justice did not require the district court to construe Mayweather's belated allegation "as a motion to amend the pleadings filed out of time," id., because it challenges the validity of his conviction. He will not have such a § 1983 claim unless and until his convictions have been invalidated. See Heck v. Humphrey, \_\_\_ U.S. \_\_\_, 114 S. Ct. 2364, 2374 (1994).