

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-7431  
Conference Calendar

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GARRY LEE MOORE,

Plaintiff-Appellant,

versus

FRANK RUSSELL,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Northern District of Mississippi  
USDC No. 1:92-CV-253  
- - - - -  
(October 29, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:\*

Garry Lee Moore appeals the dismissal of his 42 U.S.C. § 1983 complaint without prejudice against Frank Russell, Circuit Court Judge of the First Judicial District in Monroe County, Mississippi. The complaint alleged that Judge Russell violated Moore's constitutional rights by failing to provide him with an attorney during his arraignment proceeding.

Moore argues that the district court erred by concluding that Judge Russell is entitled to absolute immunity.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

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Absolute judicial immunity extends to all judicial acts that are not performed in the clear absence of all jurisdiction. Thus, a judge has no immunity (1) for actions taken outside of his judicial capacity, or (2) for actions that are judicial in nature, but occur in the complete absence of all jurisdiction.

Malina v. Gonzales, 994 F.2d 1121, 1124 (5th Cir. 1993)

(citations omitted). To determine whether the actions are "judicial in nature," four factors are used:

(1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity.

Id. Judge Russell's actions fall within the ambit of judicial immunity. See Mireles v. Waco, \_\_\_ U.S. \_\_\_, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991). Therefore, Moore's § 1983 claim was properly dismissed. See Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992).

"Neither habeas nor civil rights relief can be had, however, absent the allegation by a plaintiff that he has been deprived of some right secured to him by the United States Constitution or laws." Thomas v. Torres, 717 F.2d 248, 249 (5th Cir. 1983), cert. denied, 465 U.S. 1010 (1984).

Thus, the issue is whether Moore's Sixth Amendment right to counsel was violated by Judge Russell's failure to appoint counsel prior to and during the arraignment proceeding. The presence of counsel is required at any pretrial proceeding comprising a "critical stage" where a defendant's substantive

rights may be prejudiced. See United States v. Gouveia, 467 U.S. 180, 189, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984), cited as authority in Williamson v. State, 512 So.2d 868, 875 (Miss. 1987). The court in Williamson determined that arraignment as practiced in the state of Mississippi does not constitute a critical stage of a criminal proceeding. At an arraignment proceeding, the accused is informed of the charges pending against him by a reading of the indictment and he then enters a plea. The defendant does not sacrifice any substantive rights because he may later withdraw a guilty plea and proceed to trial and he is not required to plead all available defenses. Id. at 875-76. Accordingly, there is no constitutional right to counsel during an arraignment proceeding in Mississippi affording a remedy under either habeas or § 1983.

Moore also asserts that the district court erred by compelling him to seek habeas relief prior to pursuing his § 1983 complaint for damages. Moore has neither a habeas nor a § 1983 remedy.

For the foregoing reasons, the judgment of the district court is modified to a dismissal with prejudice, and as so modified is AFFIRMED.