

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 94-10087  
(Summary Calendar)

---

WESLEY EUBANKS,

Plaintiff-Appellant,

versus

PARKER COUNTY COMMISSIONERS  
COURT, ET AL.,

Defendants-Appellees.

---

Appeal from the United States District Court  
for the Northern District of Texas  
(4:93-CV-572-A)

---

(January 3, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

Inmate Wesley Eubanks filed this action under 42 U.S.C. § 1983. He sought class certification on behalf of all past, present, and future indigent defendants accused of crimes in Parker County, Texas. Eubanks alleged that the county has a policy of failing to provide reasonable notice to accused indigents that they are required to request the appointment of counsel. Eubanks

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

alleged that indigent defendants are ultimately denied a meaningful defense at trial because they have no representation during preliminary proceedings and that, once appointed, counsel routinely provide inadequate representation of indigent defendants.

After reviewing Eubanks's initial complaint, the district court denied class certification and determined that Eubanks could not serve as an adequate class representative because he was not represented by counsel. The district court stated that it would address the claims personal to Eubanks and ordered Eubanks to amend his complaint to include specific facts giving him standing to assert his claims.

Eubanks filed a "Second Amended Complaint," and the district court struck the amendment based on a number of deficiencies in the pleading. Eubanks filed another amended complaint on October 25, 1993, and alleged the following facts.

Eubanks was arrested for the burglary of a building, "bail jumping," and failure to appear. He was arraigned without representation of counsel and bail was not set. Counsel was subsequently appointed to represent Eubanks, but counsel advised Eubanks that he had not been appointed to represent him on the "bail jumping" charge and that he would not submit Eubanks's motion for a bail bond. Counsel also gave Eubanks erroneous advice concerning his defenses. Eubanks alleged that he did not receive a bond forfeiture hearing and that he was illegally denied his right to bail.

The district court scheduled a Spears<sup>1</sup> hearing. During the hearing, the district judge stated that it construed Eubanks's complaint as addressing the conduct of the judge who presided over Eubanks's criminal proceedings and Eubanks agreed that was the case with respect to the court's denial of a bail bond. Eubanks also challenged the application of certain state laws which affected his defense and resulted in his being found guilty. Eubanks indicated that he had named the county commissioners as defendants because they regulated the payment of court-appointed counsel and did not provide counsel with adequate fees. Eubanks asserted that, as a result of the inadequate payments, appointed counsel do not provide meaningful representation to indigent defendants.

The district court determined that Eubanks' original complaint was superseded by the amended complaint and denied his request to incorporate the allegations challenging the constitutionality of the application of several state statutes made in his previous complaints. The district court denied Eubanks's motion to amend his complaint to join Dan Morales, the Texas Attorney General, as a defendant.

The district court determined that Eubanks's claim for damages was barred by judicial immunity and that his requests for declaratory and injunctive relief should be construed as a petition for habeas relief. The district court determined that Eubanks had

---

<sup>1</sup> Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). The purpose of a Spears hearing is to determine if there exists an arguable factual and legal basis, of constitutional dimension, for the asserted wrong.

not demonstrated that he had exhausted his state remedies and that his claims should be dismissed pursuant to 28 U.S.C. § 1915(d).<sup>2</sup>

#### DISCUSSION

Eubanks argues that the district court erred in holding that Eubanks's previous pleadings had not been incorporated into his amended pleading. We disagree.

Generally, an amended complaint supersedes and replaces an original complaint, "unless the amendment specifically refers to or adopts the earlier pleading." Wilson v. First Houston Inv. Corp., 566 F.2d 1235, 1237 (5th Cir. 1978), vacated on other grounds, 444 U.S. 959 (1979). Eubanks specifically stated in his last amended complaint that he was adopting and incorporating by reference his original and prior amended complaints. However, these prior complaints already had been dismissed as defective and/or stricken from the record. Thus, Eubanks's reference to them and his attempt to incorporate them into his last amended complaint are without effect. A pleading that is defective when originally filed and which is dismissed or stricken is not resuscitable merely by an attempt to incorporate it and thereby reassert the same incognizable claims in later pleadings. The district court did not err in making this determination.

Eubanks also argues that the district court erred in determining that he is seeking habeas corpus relief in his complaint. Eubanks contends that he is challenging the Parker

---

<sup>2</sup>28 U.S.C. § 1915(d) provides, *inter alia*, that the court, in an *in forma pauperis* proceeding, may dismiss the case if satisfied that the action is frivolous.

County policy of failing to provide indigent defendants with reasonable notice regarding their right to seek appointment of counsel because the policy deprives indigents of a meaningful defense. Eubanks argues that he has standing because these policies were applied during his criminal proceedings and he was found guilty and sentenced to prison.

A district court may dismiss an *in forma pauperis* complaint as frivolous if it lacks an arguable basis in law or in fact. Denton v. Hernandez, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992). The dismissal is reviewed for an abuse of discretion. Id. at 1734. The district court's dismissal of Eubanks's damage claims for failure to exhaust his state habeas remedies was incorrect in light of Heck v. Humphrey, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Heck held that

in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Id. at 2372 (footnote omitted)(emphasis added). Heck requires courts to "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated."

Eubanks has not alleged that his state convictions have been reversed or otherwise invalidated by a state or federal tribunal. Thus, Eubanks's complaint for damages does not assert an arguable § 1983 claim insofar as it challenges the validity of his convictions based on the ineffective assistance of counsel and the unconstitutional application of certain state statutes. It was not the failure to exhaust state habeas remedies that prevented Eubanks' § 1983 from being cognizable, but rather his failure to allege that his state convictions have been reversed or otherwise invalidated. The district court's dismissal of those portions of the complaint as frivolous, although for reasons other than those stated herein, was not an abuse of discretion. See Bickford v. Int'l Speedway Corp., 654 F.2d 1028, 1031 (5th Cir. 1981) (reversal is inappropriate if ruling of district court can be affirmed on any grounds, regardless of whether those grounds were used by district court).

Eubanks has no standing insofar as he is seeking declaratory relief or to enjoin prospectively the application of the policies governing the appointment of counsel or bond forfeiture proceedings. In order to demonstrate standing to pursue the prospective relief, Eubanks must show that he suffers "either continuing harm or a real and immediate threat of repeated injury in the future." See Society of Separationists, Inc. v. Herman, 959 F.2d 1283, 1285 (5th Cir.) (en banc), cert. denied, 113 S.Ct. 191 (1992). Eubanks acknowledges in his amended complaint that he was convicted of burglary and failure to appear and was sentenced to

eighty-eight years imprisonment. Eubanks has not alleged that he will again be personally harmed by the prospective application of the policies. Further, Eubanks has not briefed the district court's order determining that he could not proceed on behalf of a class of indigent defendants. Therefore, the issue of whether Eubanks can seek prospective injunctive relief on behalf of other defendants is not before the Court. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

Eubanks's remaining damages claims appear to be based on his lack of representation by counsel at his arraignment to assist him in obtaining a bond and on the trial judge's refusal to hold a bond forfeiture hearing or to grant him bail. The resolution of these claims has no bearing on the validity of Eubanks's convictions. See Gerstein v. Pugh, 420 U.S. 103, 119, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (an illegal arrest or detention, standing alone, cannot serve as a basis for voiding a subsequent conviction). Heck is inapplicable to these claims because it only applies to claims relating to the plaintiff's allegedly unconstitutional state convictions or sentences. See Heck, supra, 114 S.Ct. at 2371-72.

Eubanks' claims in large part arise out of the conduct of the state judge. The applicable Texas law provides that the state judge is responsible for the appointment of counsel for indigent defendants during criminal proceedings. TEX. CODE CRIM. PROC. ANN. art. 26.04. Eubanks acknowledged at the hearing that the judge was also responsible for the failure to hold a bond forfeiture hearing and the denial of his request for bond. Eubanks has not briefed

the dismissal of his damage claim against the state judge based on immunity. Therefore, he has abandoned on appeal any claim against the judge. See Yohey, supra, 5 F.2d at 224-25.

It is not clear from Eubanks's brief whether he is pursuing his sole complaint against the county commissioners that they did not provide adequate payments to appointed counsel. Eubanks merely alleged in the statement of the facts in his brief that the pay schedule for counsel promulgated by the commissioners is unconstitutional. However, he did not brief the "pay" issue nor did he argue that the district court was in error in dismissing this claim. Thus, Eubanks appears to have abandoned the claim. Ibid.

However, even assuming that Eubanks is pursuing the claim against the Commissioners, his allegations do not present an arguable causal connection between the inadequate fee schedule and the alleged ineffective assistance provided by counsel in his defense. To subject a defendant to § 1983 liability, there must be a causal connection between the personal acts or policies implemented by the defendant and the constitutional deprivation suffered by the plaintiff. See Lozano v. Smith, 718 F.2d 756, 768 (5th Cir. 1983). Thus, the district court did not abuse its discretion in dismissing the claim against the county commissioners as frivolous.

Eubanks also argues that the district court erred in not permitting him to amend his complaint to add the Attorney General as a defendant because the Attorney General is partly responsible



for representing the state if the constitutionality of a state statute is challenged.

After responsive pleadings have been filed, leave to amend a party's pleadings "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). A district court's decision to grant or deny leave to amend is not broad enough to permit denial "if [it] lacks a substantial reason to deny leave . . . ." Jamieson v. Shaw, 772 F.2d 1205, 1208 (5th Cir. 1985) (internal quotations and citations omitted). An acceptable reason for denying leave to amend is the futility of the amendment. Id.

A supervisory official can be held liable under § 1983 if he had personal involvement in the constitutional deprivation or if he implemented a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation. Thompkins v. Belt, 828 F.2d 298, 304 (5th Cir. 1987).

Eubanks acknowledged during the Spears hearing that he did not seek to add Morales as a defendant because of any personal action on his part and agreed that the Attorney General did not participate in the criminal proceedings against him. Eubanks does not allege that the Attorney General implemented the allegedly unconstitutional policies. Eubanks stated that he named the Attorney General because he was statutorily obligated to represent the state if a state statute is challenged. Thus, Eubanks did not allege an arguable § 1983 damage claim against the Attorney General.

As previously discussed, Eubanks does not have standing to seek injunctive or declaratory relief to bar the prospective application of the statutes which he contends are being unconstitutionally applied. Because the amendment would have raised a futile claim against the Attorney General, the denial of the motion to amend was not an abuse of discretion.

Eubanks also contends that the district court erred in failing to appoint him counsel, and he requests the appointment of counsel on appeal in his brief. Civil rights litigants are entitled to the appointment of counsel in cases involving "exceptional circumstances." See Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). Factors to be considered, among others, are the complexity of the issues and the plaintiff's ability to represent himself adequately. Id. at 213.

This case does not present exceptional circumstances, and Eubanks's pleadings demonstrate his ability to provide himself with adequate representation. The district court did not abuse its discretion in denying the motion for appointment of counsel. Further, Eubanks has not demonstrated that he is entitled to appointment of counsel on appeal. The motion for appointment of counsel on appeal is denied.

#### CONCLUSION

For the foregoing reasons, the district court's § 1915(d) dismissal of Eubanks' § 1983 action is AFFIRMED. The district court's denial of the motion for appointment of counsel is

AFFIRMED. The motion for appointment of counsel on appeal is DENIED.