

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10221  
Summary Calendar

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CURTIS ERIN DYSON,

Plaintiff-Appellant,

versus

KEASLER, Judge of the  
292nd District Court and  
EDWARD GRAY,

Defendants-Appellees.

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Appeal from the United States District Court for the  
Northern District of Texas  
(3:93-CV-2102-D)

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(June 29, 1994)

Before GOLDBERG, KING, and GARWOOD, Circuit Judges.

PER CURIAM:\*

I. Introduction

On October 19, 1993, Curtis Erin Dyson, proceeding pro se and in forma pauperis, filed this action in the United States District Court for the Northern District of Texas under 42 U.S.C. § 1983 against Judge Keasler, the judge of the 292nd Criminal

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

District Court of Texas, and Edward Gray, Dyson's court-appointed attorney. Before process was issued in this case, United States District Judge Sidney Fitzwater referred the complaint to Magistrate Judge William Sanderson for a recommendation as to whether Dyson's complaint should be dismissed. After requiring Dyson to answer written interrogatories, Magistrate Judge Sanderson recommended that Dyson's claims be dismissed; Judge Fitzwater adopted this recommendation. This appeal ensued.

A District Court may dismiss an in forma pauperis suit "if satisfied that the action is frivolous." 28 U.S.C. § 1915(d). A claim may be found to be frivolous under § 1915(d) only if it "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 329 (1989). We review a district court's dismissal of a suit under § 1915(d) for abuse of discretion. Id.

## II. Background

In his complaint, Dyson alleged that since February 17, 1993, he had wrongfully been held on various felony charges in the Dallas County Jail. He complained that he was unable to respond to or obtain information about the charges against him. More specifically, he claimed that Judge Keasler failed to act within a reasonable period of time and that both Judge Keasler and Edward Gray failed to supply relevant information about the case. Gray then allegedly withdrew from the case, further delaying Dyson's defense. Dyson asked the district court to quash the charges pending against him; he also sought damages for his inconvenience.

As noted above, Magistrate Judge Sanderson ordered Dyson to respond to a set of written interrogatories. On November 4, 1993, Dyson filed his answers to these interrogatories. Dyson explained that three felony charges had been filed against him: one count of theft, one count of escape, and one count of burglary of a vehicle. Dyson claimed that the charges against him were still pending. Further, Dyson stated that, on June 14, 1993, his parole was revoked due to the presence of the charges. Finally, Dyson conclusorily charged that his attorney, Gray, was conspiring with the prosecutor to obtain a conviction.

Importantly, Dyson revealed that he had not filed an application for a writ of habeas corpus in a state court in connection with the charges pending against him.

Dyson made several other allegations in a three page attachment to his interrogatory answers: He contended that several legal documents were executed without his consent, signature, or presence; that the signatures of the grand jury forewoman on two of the indictments were inconsistent; that he was not in custody at the time of the escape alleged in the second indictment because he had not been read his Miranda rights; and that the complainant on the burglary of a vehicle charge had not been sufficiently identified. Finally, Dyson charged that due to his absence during the announcement of charges, the examining trial, and the grand jury hearing, he was denied effective assistance of counsel, due process, and the equal protection of the law.

Magistrate Judge Sanderson observed that the portion of Dyson's complaint that challenged the legality of his confinement was a request relief properly available only through habeas corpus. Since Dyson had not filed a state habeas petition, Magistrate Judge Sanderson recommended that the complaint be dismissed without prejudice to allow Dyson to exhaust his state court habeas remedies. The magistrate judge also recommended that Dyson's claim that Gray was conspiring to secure a conviction be dismissed without prejudice for the same reason. Finally, the magistrate judge recommended that, because of the absolute immunity that judicial officers enjoy from claims that arise out of their official actions, Dyson's claims against Judge Keasler be dismissed with prejudice because they were legally frivolous. The district court adopted the magistrate judge's recommendations and dismissed the complaint accordingly.

### III. Discussion

Dyson raises two issues for the first time on appeal. First, he claims that the facts set out in an affidavit on the theft charge are different from the facts alleged in the indictment. He also claims that the indictment process on this charge was defective. Second, Dyson asserts that the complainant on the burglary of a vehicle charge did not have standing to file a complaint. Apparently, the vehicle was rented, and the rental agency failed to file a complaint. We do not consider issues raised for the first time on appeal unless the issue is purely legal and a consideration of the issue is necessary to prevent a

miscarriage of justice. First United Financial Corp. v. Specialty Oil Co., Inc., 5 F.3d 944 (5th Cir. 1993). The newly raised issues require factual determinations and hence are not purely legal in nature. Moreover, it would not be a miscarriage of justice to refuse to consider these contentions. Dyson's newly-raised claims challenge the legality of his confinement; he may raise these issues in a state court habeas corpus proceeding. See infra.

In the remainder of his brief to this Court, Dyson presses his argument that he was not in custody at the time of the escape alleged in the second indictment because he had not been read his Miranda rights. He requests that this Court release him from a "Defermental-Probationary Contract" that the 292nd District Court imposed on him. Although the terms and reasons for the imposition of the "Defermental-Probationary Contract" are unclear, Dyson's argument appears to challenge the legality of his present confinement. However, a plaintiff who files a § 1983 action that challenges the validity of his or her confinement must first exhaust the available state habeas remedies because the challenge amounts to a habeas proceeding. Johnson v. State of Texas, 878 F.2d 904 (5th Cir. 1989); Mills v. Criminal District Court No. 3, 837 F.2d 677 (5th Cir. 1988); Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112 (5th Cir. 1987). Given these precedents, the district court's dismissal of Dyson's complaint was proper.

Moreover, the manner in which the district court dismissed Dyson's complaint was also proper. The claims against Judge

Keasler were dismissed with prejudice. This was appropriate. As a judicial officer, Judge Keasler enjoys "absolute immunity from damage claims arising out of acts performed in the exercise of their judicial functions." Graves v. Hampton, 1 F.3d 315, 317 (5th Cir. 1993). The claims against Judge Keasler are well within the ambit of his judicial functions. Finally, the district court did not abuse its discretion when it dismissed Dyson's claims against Gray without prejudice.

#### IV. Conclusion

The judgment of the district court is AFFIRMED.