

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10259
Summary Calendar

VALENTINO ADEPEGBA,

Plaintiff-Appellant,

versus

U.S. POSTAL SERVICE,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(3:93-CV-2515-D)

(July 28, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

Appellant Valentino B. Adepegba, an inmate confined in the Federal Correction Institute at Oakdale, Louisiana, sued the United States Postal Service and Postal Inspector Keith J. Tyner under 42 U.S.C. § 1983 (1981) to recover personal property seized by the Postal Service. The district court dismissed the in forma pauperis action with prejudice pursuant to 28 U.S.C. § 1915(d) (1994) for

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

failure to present a nonfrivolous claim. Because Adepegba presented a colorable Bivens claim with respect to Postal Inspector Tyner, we reverse and remand for further proceedings.

I

On the morning of June 26, 1992, Adepegba was stopped by several agents of the Secret Service and the Postal Service.¹ Ultimately, Adepegba was detained, and the truck he was driving was impounded. At the time Adepegba was initially detained, the government did not present a search warrant, although a warrant was produced approximately four hours later. That search warrant listed several sites and vehicles to be searched, including Adepegba's warehouse, convenience store, residence, two cars and the impounded truck. According to Adepegba, certain items of his property were seized but never returned to him. Because he has heretofore been unable to secure the return of his property, Adepegba filed this action. The district court, upon the recommendation of a magistrate judge, determined that Adepegba's suit presented no colorable claims, and dismissed the case with prejudice. Adepegba now appeals to this court.

II

Adepegba contends that the district court erred when it dismissed pursuant to 28 U.S.C. § 1915(d) (1994) his suit against

¹No governmental brief was filed in this case. Consequently, all facts presented in this opinion were taken from Adepegba's brief.

Postal Inspector Tyner. 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). Thus, we must determine whether Adepegba's allegations presented a nonfrivolous claim. Id.

On appeal, Adepegba argues that he raised a nonfrivolous claim against Postal Inspector Tyner under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) by contending that Tyner's conduct violated his constitutionally protected right against unreasonable searches and seizures.² The district court, however, dismissed the claim as frivolous, noting that "28 U.S.C. § 2679 renders a federal law enforcement officer immune from a suit for monetary damages for conduct related to the search and seizure of property while acting in the officer's scope of the discharge of his duties."³ This is

²Adepegba labeled his claim a claim under 42 U.S.C. § 1983 (1981), although he later referred to his claim as a Bivens-type claim. Because Adepegba is a pro se appellant, we construe his petition liberally. See, e.g., Estelle v. Gamble, 429 U.S. 97, 107, 97 S.Ct. 285, 292-93, 50 L.Ed.2d 251 (1976).

³The district court improperly relies upon Rivera v. United States, 928 F.2d 592 (2d Cir. 1991), cert. denied, ___ U.S. ___, 114 S.Ct. 160, 126 L.Ed.2d 120 (1993) to support its contention that Adepegba's claim is frivolous. In Rivera, the plaintiffs asserted common law tort claims against individual defendants who were acting within the course and scope of their employment. Consequently, such actions were barred under 28 U.S.C. § 2679(b)(1) (Supp. 1994). Id. at 608. However, the Rivera Court specifically noted that § 2679(b)(1) "does not apply to suits for violations of federal constitutional or statutory rights." Id.; see also 28 U.S.C. § 2679(b)(2)(a) (Supp. 1994). In this case, Adepegba contends that Tyner violated a constitutional right.

a correct, although incomplete, statement of the law. In addition to the passage quoted above, § 2679(b) expressly exempts from this broad grant of immunity actions brought for violations of the Constitution. United States v. Smith, 499 U.S. 160, 173, 111 S.Ct. 1180, 1188, 113 L.Ed.2d 134 (1991) (noting that Congress preserved employee liability for Bivens actions under § 2679(b)(2)(A)). Thus, Adepegba can assert a Bivens claim against Postal Inspector Tyner.⁴

III

Because the district court incorrectly concluded that Adepegba's claim against Postal Inspector Tyner was barred by 28 U.S.C. § 2679, the district court also incorrectly concluded that his claim was frivolous. Because Adepegba has a legally arguable claim against Tyner, we REVERSE the district court's order and REMAND for further proceedings consistent with this opinion.

R E V E R S E D and R E M A N D E D.

⁴The district court also noted that when read liberally, Adepegba's petition might be read as raising a claim under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1965 & Supp. 1994). However, as the district court correctly noted, Adepegba failed to exhaust his administrative remedies before filing such a suit. It should be noted that a Bivens action may be asserted outside of the framework of the Federal Tort Claims Act, and as such, no particular administrative remedies need be exhausted before filing the Bivens action. See, e.g., Griffin v. Leonard, 821 F.2d 1124, 1125 (5th Cir. 1987).