UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10272
Summary Calendar

MALCOLM PLEASANT,

Plaintiff-Appellant,

versus

MILLIE CARAWAY,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(2:93-CV-82)

(June 6, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

PER CURIAM:

Plaintiff-appellant Malcolm Pleasant (Pleasant), an inmate at Lubbock County Jail, Texas, filed this section 1983 action against Millie Caraway (Caraway), an insurance agent for Caraway Insurance. Pleasant had purchased car insurance from Caraway. He alleged that Caraway made a false report to the Dumas, Texas, police that he had

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

made a bomb threat against her, and that this led to his arrest. He sued Caraway for $25,000 in damages for libel and slander. The district court dismissed Pleasant's complaint as frivolous under section 1915(d), holding that Pleasant's complaint did not allege that Caraway acted under color of state law, a required element of a section 1983 action. Pleasant brings this appeal.

Pleasant was proceeding *pro se* and *in forma pauperis*. A district court may dismiss an *in forma pauperis* complaint under section 1915(d) if it is frivolous, that is, if it lacks an arguable basis either in law or in fact. *Denton v. Hernandez*, ___ U.S. ___, 112 S.Ct. 1728, 1733-34, L.Ed.2d 340 (1992). A section 1915(d) dismissal is reviewed for abuse of discretion. *Id*.

A plaintiff must allege and prove two elements to recover under section 1983: (1) deprivation of a right secured by the Constitution or laws of the United States, and (2) that the defendant acted "'under color of law.'" *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 791 (5th Cir. 1989).

Private individuals generally are not considered to act under color of law, *i.e*., are not considered state actors. However, a private individual may act under color of law in certain circumstances, such as when a private person is involved in a conspiracy or participates in joint activity with state actors. *Adickes*, 398 U.S. at 152; *Auster Oil and Gas, Inc. v. Stream*, 764 F.2d 381, 387 (5th Cir. 1985).

Pleasant alleged only that Caraway made a false accusation in

her sworn affidavit to the Dumas Police. A private individual complainant in a criminal prosecution does not act under color of law. *Grow v. Fisher*, 523 F.2d 875, 879 (7th Cir. 1975), cited in *Auster*, 764 F.2d at 388 n.5. The fact that the police relied upon Caraway's sworn complaint in arresting and charging Pleasant does not make her a state actor. *Hernandez v. Schwegmann Bros. Giant Supermarkets*, 673 F.2d 771, 772 (5th Cir. 1982).

Pleasant did not allege any facts even suggesting that Caraway might have acted under color of law. Pleasant did not allege any facts which would suggest that Caraway acted jointly with the police in a preconceived plan to cause Pleasant's arrest. *See White v. Scrivener Corp*., 594 F.2d 140, 143-44 (5th Cir. 1979); *Hernandez*, 673 F.2d at 772. *Contrast Wheeler v. Cosden Oil and Chemical Co*., 734 F.2d 254, 256-61 (5th Cir. 1984) (plaintiff alleged facts which could show that defendant acted under color of law when he tendered false information to the prosecutor).

Pleasant's claim has no arguable basis in fact or in law. Although the factual frivolousness theoretically might have been subject to remedy by more specific factual pleading, *see Moore v. Mabus*, 976 F.2d 268, 270 (5th Cir. 1992), Pleasant's appellate brief does not even hint that additional facts exist which he could have pleaded to show that Caraway acted under color of law, nor does any filing by Pleasant below so suggest. We hold that the district court did not abuse its discretion in dismissing Pleasant's complaint as frivolous.

As for Pleasant's argument that the district court should have required Caraway to respond, a district court may dismiss an IFP

proceeding for frivolousness at any time, on the complaint alone, before service of process. *Green v. McCaskle*, 788 F.2d 1116, 1120 (5th Cir. 1986).

The district court's judgment is therefore

AFFIRMED.