IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10425
Conference Calendar

CHARLES JOHNSON,

Plaintiff-Appellant,

versus

GLENN OSBORN ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:94-CV-37-C

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(July 20, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Charles Johnson appeals the dismissal for frivolousness of his 42 U.S.C. § 1983 complaint. See 28 U.S.C. § 1915(d). Such a dismissal is reviewed for abuse of discretion. See Denton v. Hernandez, ___ U.S. ___, 112 S. Ct. 1728, 1734, 118 L. Ed. 2d 340 (1992).

The district court, in its order and judgment of dismissal, referred to Johnson's suit as against only one defendant. The district court erred by failing to treat Johnson's letter to the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court as an amendment of his complaint, thus bringing suit against the other named defendants. See Fed. R. Civ. P. 15(a); McGruder v. Phelps, 608 F.2d 1023, 1025 (5th Cir. 1979) (concluding that the district court should have treated the documents submitted by pro se plaintiff as an amendment of the complaint as of right).

Johnson alleges, in this Court and in the district court, that police officer Glenn Osborn, in collaboration with the district attorney and two assistant district attorneys, paid J.V. Harris to testify falsely at Johnson's trial for robbery of Harris. Johnson alleges that he was convicted and is presently incarcerated from that conviction. If true, these allegations would establish a constitutional violation affecting the validity of his conviction. See Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

Although the district court may have erred for dismissing the complaint as factually frivolous,** we affirm the dismissal because Johnson does not have a cognizable claim under § 1983. See Heck v. Humphrey, No. 93-6188, 1994 WL 276683, at *5 (U.S. June 24, 1994).

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, . . . a § 1983 plaintiff must prove that the conviction . . . 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

**See Denton, 112 S. Ct. at 1733 (noting that a claim is factually frivolous when the alleged facts are fantastic, fanciful, or delusional).

> 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.

Therefore, we AFFIRM the dismissal, without prejudice, on the alternate ground that Johnson has not demonstrated the invalidity of his conviction in order for his damages claim to be cognizable under § 1983.

AFFIRMED.