IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10661
Summary Calendar

DARNELL JOHNSON,

Plaintiff-Appellant,

v.

JEFF BRYANT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:91-CV-1713-H)

(January 17, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Darnell Johnson, proceeding *pro se* and *in forma pauperis*, appeals the district court's dismissal of his civil rights complaint on grounds of frivolousness. 28 U.S.C. § 1915(d). We reverse the district court's dismissal with regard to Johnson's probable cause claim against defendant Bryant. In all other respects, the judgment of the district court is affirmed.

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 5, 1990, at approximately 10:30 a.m., Officer Jeff Bryant ("Bryant") of the Ellis County, Texas Sherriff's Department made a warrantless arrest of Darnell Johnson ("Johnson"), charging Johnson with the aggravated sexual assault of a 42 year-old Hispanic woman. Two days later, Bryant filed an "Affidavit of Nonprosecution," stating that Bryant should not be prosecuted for the assault because "subject [Johnson] was seen by complaintant [sic] within moments after the offense took place against her and description of clothing given, there would not have been time for actual suspect to have changed or discarded clothing in the time frame of this offense."

On August 6 or 7, 1990, Ellis County Sherriff Luther Buchanan ("Buchanan") charged Johnson with a second offense of burglary and the attempted sexual assault of a child, after the child's mother filed a complaint alleging that Johnson was the perpetrator. Within 48 hours of the second charge, Johnson was taken before a justice of the peace and arraigned on the second charge. Because he could not afford to post bail, Johnson remained in jail.

On September 22, 1990, the second complainant withdrew her complaint. On October 3, 1990, a grand jury determined that there was inadequate evidence with which to indict Johnson on the

first and second charges, and Johnson was released from jail later that same day.[1]

Following his release, Johnson filed suit pursuant to 42 U.S.C. § 1983 alleging that his confinement from August 5, 1990 until October 3, 1990 constituted false arrest and imprisonment in violation of the Fourth Amendment's protection against unreasonable seizure. The magistrate judge to whom Johnson's case was assigned conducted a Spears hearing and concluded that Johnson's claims should be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d). See Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). On January 6, 1993, after conducting an independent review, the district court adopted the magistrate judge's recommendations and dismissed Johnson's claims as frivolous.[2]

---

[1] On September 19, 1990, a warrant was issued for Johnson's arrest on the basis that Johnson had violated the terms of his parole. Thus, following the grand jury's issuance of a no-bill on the first and second charges, Johnson was returned to the custody of the Texas Department of Corrections to serve the remainder of his term on an unrelated offense. Johnson has filed a federal petition for a writ of habeas corpus alleging that the revocation of his parole resulted from the deprivation of his constitutional rights to the effective assistance of counsel and to be free from ex post facto laws. Johnson's habeas claims have not been consolidated with the present § 1983 claims and are therefore not before the court at this time.

[2] In an unpublished opinion dated March 17, 1993, this court affirmed the district court's dismissal as to Johnson's claims against defendant Mary Sheldon, a member of the parole board who revoked Johnson's parole, on grounds that she was entitled to absolute immunity. With regard to Johnson's claims against Bryant and Buchanan, we determined that they were so inextricably intertwined with Johnson's habeas petition as to require exhaustion of state remedies prior to consideration by a federal court. Accordingly, we remanded Johnson's § 1983 claims against Bryant and Buchanan to the district court for a determination as to whether Johnson had exhausted his state remedies. Upon remand, the magistrate judge and the district court concluded

Johnson filed a timely appeal, and the matter is now before this court.

II. STANDARD OF REVIEW

A § 1983 plaintiff who proceeds *in forma pauperis* is subject to dismissal if his complaint is "frivolous" within the meaning of 28 U.S.C. § 1915(d). Under § 1915(d), a complaint is frivolous if "it lacks an arguable basis in either law or fact." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992); Neitzke v. Williams, 490 U.S. 319, 325 (1989); Reeves v. Collins, 27 F.3d 174, 176 (5th Cir. 1994). A complaint is legally frivolous if it is premised on an "indisputably meritless legal theory," Neitzke, 490 U.S. at 327, or has no realistic chance of ultimate success. Luciano v. Galindo, 944 F.2d 261 (5th Cir. 1991). Accord Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993). A complaint is factually frivolous if "the facts alleged rise to the level of the irrational or the wholly incredible." Denton, 112 S. Ct. at 1733.

District courts have broad discretion in determining whether a complaint in an *in forma pauperis* proceeding is frivolous so as to warrant dismissal. Mendoza, 989 F.2d at 195. Thus, we will reverse a district court's decision to dismiss a complaint pursuant to § 1915(d) only for an abuse of discretion. Denton, 112 S. Ct. at 1734; Moore v. McDonald, 30 F.3d 616, 620 (5th Cir. 1994). In determining whether a district court has abused its

---

that Johnson has adequately exhausted available state remedies.

discretion under § 1915(d), we consider whether: (1) the plaintiff is proceeding *pro se*; (2) the court inappropriately resolved genuine issues of disputed fact; (3) the court applied erroneous legal conclusions; (4) the court has provided a statement of reasons for the dismissal which facilitates intelligent appellate review; and (5) the dismissal was with or without prejudice. Denton, 112 S. Ct. at 1733-34.

III. ANALYSIS

Johnson contends that the district court abused its discretion in dismissing his claims against Bryant and Buchanan pursuant to § 1915(d) because they are not entitled to qualified immunity under the facts of this case. The general rule is that municipal officers such as Bryant and Buchanan are qualifiedly immune from civil liability in their individual capacity[3] if

[3] We proceed to address Johnson's claims as claims against Bryant and Buchanan in their individual capacities, as did the court below. However, even should we liberally construe Johnson's *pro se* complaint to seek redress against Bryant and Buchanan in their official capacities, we would find such claims to be legally frivolous. Section 1983 suits versus an officer in his official capacity is just "another way of pleading an action against an entity of which the officer is an agent," Monnell v. Dep't of Social Svcs., 436 U.S. 658, 690 n.55 (1978), and therefore a suit against an officer in his official capacity is to be treated as a suit against the entity. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989); Karcher v. May, 484 U.S. 72, 78 (1987); Brandon v. Holt, 469 U.S. 464, 471-72 (1985). As Johnson has proffered no evidence that the alleged violations of his constitutional rights resulted from an official policy or custom of the governmental entity, he may not recover against the entity under § 1983, and such claims are therefore legally frivolous. Hafer v. Melo, 112 S. Ct. 358, 362 (1991); Kentucky v. Graham, 473 U.S. 159, 166 (1985); Monell, 436 U.S. at 690.

their actions were objectively reasonable under the circumstances. Johnson contends, however, that Bryant and Buchanan are not entitled to qualified immunity because their conduct violated Johnson's clearly established constitutional rights. See Siegert v. Gilley, 500 U.S. 226, 231 (1991); Anderson v. Creighton, 483 U.S. 635, 639-41 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 820 (1982). Specifically, Johnson contends (1) that Bryant and Buchanan violated his Fourth Amendment rights by arresting him without probable cause; and (2) that Bryant and Buchanan violated his right to have a prompt probable cause hearing as set forth in Gerstein v. Pugh, 420 U.S. 103, 125 (1975). Johnson also raises two additional, non-constitutional points of error: (1) that the district court abused its discretion in failing to grant his motion for leave to amend his complaint; and (2) that the district court abused its discretion by failing to grant his motion for appointment of counsel. We proceed to address these four arguments in turn.

A. Probable Cause.

Johnson next contends that his Fourth Amendment rights were violated because his incarceration was not supported by probable cause. "Probable cause exists where `the facts and circumstances within (the officers') knowledge and of which they had reasonable trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v. United States, 338 U.S.

160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). The magistrate and the district court concluded that Bryant arrested Johnson on the first charge of aggravated sexual assault "on the complaint of a citizen who accused plaintiff of sexually assaulting her." Johnson challenges this factual finding, asserting that "[t]he [H]ispanic woman never accused appellant of sexually assaulting her. She never filed any complaint against appellant. Bryant, just out of the blue, put appellant in jail on that charge, without a warrant or probable cause."[4]

The factual finding by the magistrate judge and the district court that the victim filed a complaint against Johnson is supported by the affidavit of non-prosecution filed by Bryant, which states that "subject was seen by *complaintant* [sic] within moments after the offense took place *against her* . . . . " This language clearly indicates that the individual who filed the complaint against Johnson was the victim herself. A victim's accusation identifying an individual as the perpetrator is generally sufficient to establish probable cause.[5] Cf. Chambers

[4] We note that to the extent that Johnson argues that his Fourth Amendment rights were violated because he was arrested without a warrant, this argument is clearly without merit. It is well-settled that when probable cause exists to believe that an individual has committed a felony, police may arrest the individual outside his home without an arrest warrant. United States v. Watson, 423 U.S. 411, 423-24 (1976); United States v. Logan, 949 F.2d 1370, 1378 (5th Cir. 1991), cert. denied, 112 S. Ct. 1597 (1992).

[5] This general rule is subject to the qualification of objective reasonableness such that police may not rely on the veracity of a victim to establish probable cause if the

v. Maroney, 399 U.S. 42, 46 (1970) (noting that probable cause to arrest existed when only description of robber came from victims and eyewitnesses and defendant matched the description).

However, what is unclear from the record is the specificity of the victim's identification of Johnson. We cannot discern, for example, whether the victim specifically named Johnson as the perpetrator or whether she provided a physical description. If the former, then clearly probable cause would exist to arrest Johnson. If the latter, then the determination as to probable cause will hinge upon the degree of specificity of the description provided by the victim and the degree to which Johnson conformed to that description. As this factual issue cannot be definitively resolved on the one-sided record before us, we cannot say that Johnson's claim against Bryant is based upon "fanciful", "fantastic", or "delusional" facts, see Denton, 112 S. Ct. at 1733, or that his claim is based upon an "indisputably meritless legal theory." Neitzke, 490 U.S. at 327. Thus, Johnson's claim against Bryant sufficiently presents an arguable basis in law or fact and the district court's dismissal under § 1915(d) was an abuse of discretion.

---

circumstances or actual knowledge reveals that the victim has provided false information. See Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 3.3(d), at 121 (1985) (noting that "[t]he Court has since proceeded as if veracity may be assumed when information comes from the victim . . . a position rather consistently taken by lower courts. But circumstances may make that presumption inoperative in a particular case; the cases holding veracity was properly presumed frequently emphasize that the police were unaware of any apparent motive to falsify.").

As to Johnson's § 1983 claims against Buchanan, we find that probable cause did exist to support the second charge of burglary and attempted sexual assault of a child. During the Spears hearing, Johnson indicated that the victim of the burglary, who was also the mother of the child allegedly assaulted, filed a complaint which named Johnson as the perpetrator. Thus, as there is no indication that the police knew or should have known that the complainant was untrustworthy, the complainant's specific identification of Johnson was sufficient to establish probable cause. Because Buchanan arrested Johnson based upon probable cause, his actions did not violate any clearly established constitutional right of Johnson, and Buchanan is entitled to qualified immunity. Accordingly, the district court did not abuse its discretion by dismissing, as frivolous, Johnson's § 1983 claims against Buchanan.

B. Gerstein Hearing.

Johnson next contends that his Fourth Amendment rights were violated because he was never provided a prompt probable cause hearing as mandated by Gerstein v. Pugh, 420 U.S. 103, 125 (1975). What constitutes a sufficiently "prompt" probable cause hearing within the meaning of Gerstein was clarified in County of Riverside v. McLaughlin, 500 U.S. 44 (1991), in which the Supreme Court held that, as a general rule, no Gerstein violation will occur if the arrestee is given a probable cause hearing within forty-eight hours of arrest. Id. at 56.

In the case at hand, the facts indicate that Johnson was given a Gerstein hearing with regard to the second charge (burglary and attempted sexual assault of a child) within forty-eight hours of being charged therewith. Thus, as to the second charge, there was no violation of Gerstein which would dissolve Buchanan's cloak of qualified immunity.

With regard to the first charge (aggravated sexual assault), however, Johnson was never given a Gerstein hearing. The magistrate judge implicitly determined that Johnson was not entitled to a Gerstein hearing on the first charge because the arresting officer, Bryant, filed an affidavit of non-prosecution within forty-eight hours of Johnson's arrest, thereby effectively "freeing" Johnson of the first charge. Thus, because Johnson was effectively "freed" of the first charge within 48 hours, the magistrate apparently concluded that Johnson was not subjected to the kind of significant restraint of liberty which requires a Gerstein hearing. See Gerstein, 420 U.S. at 114, 125, n.26 (holding that Fourth Amendment requires judicial determination of probable cause only when there is an "extended" or "significant" restraint of liberty). After the affidavit of nonprosecution was filed on the first charge, Johnson's continued incarceration was based upon the second charge, for which Johnson was indisputably given a prompt Gerstein hearing.

As an initial matter, we must determine whether the alleged violation of Gerstein (and hence, the Fourth Amendment) is causally attributable to Bryant. See Rizzo v. Goode, 423 U.S.

362, 370-71 (1976) (holding that the plain language of § 1983 requires proof that the defendant engaged in conduct which "subjects, or causes to be subjected" the plaintiff to a deprivation of federally protected rights). In Martinez v. California, 444 U.S. 277 (1980), the Supreme Court held that a § 1983 defendant cannot be held liable if the deprivation alleged is "too remote a consequence" of the defendant's acts. Id. at 285. While the Supreme Court has not yet provided a precise definition of the causation component of § 1983, it has stated that, the defendant must have actively participated in, or been a "moving force[]" behind, the alleged deprivation. City of Oklahoma City v. Tuttle, 471 U.S. 808, 819-20 (1985).

In this case, the constitutional deprivation alleged by Johnson is the failure to hold a prompt probable cause hearing with regard to the first charge of aggravated sexual assault. The defendant sought to be held responsible for this alleged constitutional deprivation is Bryant, the officer who arrested Johnson on the first charge. The question for this court, therefore, is whether Bryant's conduct is sufficiently causally connected to say that Bryant "subjected" Johnson to a Gerstein violation. We think not.

In the first instance, Bryant was merely an arresting officer who had no control over the timing or conduct of a subsequent probable cause hearing. Thus, even assuming arguendo that a Gerstein violation occurred, Bryant could not fairly be characterized as a "moving force" behind the decision to forgo a

probable cause hearing. In addition, we find Bryant's position analogous to the position of the defendants in Baucher v. Eastern Industrial Production Credit Association, 906 F.2d 332, 335 (7th Cir. 1990), who were sued under § 1983 for alleged violation of the Fourth Amendment suffered by a cattle owner whose cattle had been seized by the local sherriff after foreclosure was instituted by the defendants. The Seventh Circuit held that the defendants were not liable under § 1983 because their acts were not causally responsible for the plaintiff's harm. Specifically, the Seventh Circuit concluded that because the defendants had done "everything in their power to stop the seizure," id. at 335, and had "trie[ed] to stop the wheels of justice from wrongfully grinding over [the plaintiff]," they did not cause the harm as required by § 1983.

In the present case, Bryant likewise tried to stop the wheels of justice from wrongfully grinding over Johnson by filing an affidavit of non-prosecution asking that the first charge against Johnson be dismissed. Bryant, in short, did everything in his power as a police officer to stop the continued incarceration of Bryant on the first charge. As such, the later absence of a Gerstein hearing on the first charge is "too remote a consequence" of Bryant's act of arresting Johnson to hold Bryant liable for this alleged constitutional deprivation. Accordingly, it was not an abuse of discretion for the district court to dismiss this claim against Bryant as legally frivolous.

C. Motions for Leave to Amend and for Appointment of Counsel.

Johnson's final argument is that the district court erred by not granting his motion to amend his complaint and his motion for the appointment of counsel. Neither of these two motions had been ruled upon at the time the district court dismissed Johnson's claims as frivolous; thus, we proceed to address Johnson's argument as though the district court had denied both motions. See Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 666 (5th Cir.) (noting that the denial of a motion may be implied by the entry of an order inconsistent with the granting of the relief sought by the motion), cert. denied, 454 U.S. 1098 (1981).

A district court's denial of a motion for leave to amend will be reversed only for an abuse of discretion. Boyd v. United States, 861 F.2d 106, 108 (5th Cir. 1988); Addington, 650 F.2d at 666. Rule 15(a) of the Federal Rules of Civil Procedure indicates that after a responsive pleading has been filed, a party may amend his pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." In this case, therefore, the question is whether justice required the district court to grant Johnson's motion for leave to amend.

In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court noted that Rule 15(a) requires a district court to grant a motion for leave to amend only "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject

of relief . . . . " Id. at 182. The Court stated that certain justifications, whether "apparent or declared," may support a denial of a motion for leave to amend, including "futility of the amendment." Id. Thus, "if the complaint as amended would still be subject to dismissal, no abuse of discretion occurs when amendment is denied." Addington, 650 F.2d at 667; Pan-Islamic Corp. v. Exxon Corp., 632 F.2d 539, 546 (5th Cir. 1980).

The district court did not abuse its discretion in denying Johnson's motion for leave to amend. The motion filed by Johnson requested the addition of the Ellis County Sheriffs' Department as a defendant. Johnson's documentation supporting his motion proffers no evidence that the alleged constitutional deprivations he suffered resulted from an official municipal policy or custom as required by Monnell v. Department of Social Services, 436 U.S. 658, 690 (1978). Thus, Johnson's attempt to add the Sheriffs' Department as a defendant was futile and the complaint as amended would have still been subject to dismissal. Accordingly, it was not an abuse of discretion for the district court implicitly to deny Johnson's motion for leave to amend.

As to Johnson's motion to obtain the appointment of counsel, we review the district court's denial of this motion only for a clear abuse of discretion. Cupit v. Jones, 835 F.2d 83, 86 (5th Cir. 1987). There is no automatic right to appointment of counsel in § 1983 cases. Id.; Jackson v. Dallas Police Dep't, 811 F.2d 260, 261 (5th Cir. 1986). Rather, the appointment of counsel is warranted only in exceptional circumstances. Cooper

v. Sheriff, Lubbock County, Texas, 929 F.2d 1078, 1084 (5th Cir. 1991); Ulmer v. Chancellor, 691 F.2d 209, 212-13 (5th Cir. 1982). Among the factors the district court should consider are: (1) the type and complexity of the case; (2) whether the indigent is capable of adequately presenting his case; (3) whether the indigent was in a position to adequately investigate his case; (4) whether the evidence would consist in large part of conflicting testimony requiring skill in the presentation of evidence and cross-examination; and (5) the likelihood that appointment of counsel would benefit the parties and the court by shortening the trial or assisting in a just determination. Cooper, 929 F.2d at 1084; Ulmer, 691 F.2d at 213.

This case involves relatively few issues, none of which are particularly complex. The record discloses that Johnson has vigorously and effectively presented his case, including a separate petition for a federal writ of habeas corpus, which is presently pending. It is not likely that the appointment of counsel would have resulted in a more expeditious resolution of the issues. In short, we think this case falls short of presenting the kind of "exceptional circumstances" which would cause us to label the district court's decision as a clear abuse of discretion.

IV. CONCLUSION

For the foregoing reasons, we REVERSE the judgment of the district court dismissing as frivolous Johnson's claim against

Bryant alleging that Johnson was arrested by Bryant without probable cause. In all other respects, the judgment of the district court is AFFIRMED.