

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10891
Summary Calendar

EDDIE VEE AKERS,

Plaintiff-Appellant,

versus

DON FITZGERALD, ET AL.,

Defendants,

DON FITZGERALD, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-1862-D)

(October 12, 1995)

Before JOLLY, JONES and STEWART, Circuit Judges.

PER CURIAM:*

Eddie Vee Akers, a prisoner of the State of Texas, appeals the district court's denial of his motion to file an out-of-time appeal pursuant to Federal Rule of Appellate Procedure 4(a)(6) ("Rule 4(a)(6)"). This court affirms the district court's judgment.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

Akers filed a pro se, in forma pauperis, civil damages action against the Dallas Police Department, three police officers, the Dallas District Attorney, an Assistant District Attorney, and the City of Dallas, pursuant to 42 U.S.C. § 1983 ("§ 1983"). Akers alleged that: a) Police Officer Don Fitzgerald violated Akers's constitutional rights by giving perjured testimony at trial; b) Assistant District Attorney Clark Birdsall elicited perjurious testimony from Fitzgerald; c) Police Officer Kirby Swafford stopped Akers without probable cause, conducted an illegal search, and arrested him; d) the evidence obtained during the allegedly illegal search was presented during the criminal trial; e) District Attorney John Vance failed to supervise and train Birdsall; f) Police Officer John McGuire gave false testimony in order to convict Akers; and g) Fitzgerald, Swafford, McGuire, and Birdsall conspired to arrest and convict Akers, depriving him of his constitutional rights.

Akers concedes that neither his conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus.

On April 18, 1994, the district court dismissed the § 1983 damages suit with prejudice. To the extent that Akers's suit could be construed as a habeas corpus petition, the district court dismissed it without prejudice for failure to exhaust state court remedies.

On September 22, 1994, Akers filed an untimely notice of appeal from the district court's dismissal of his § 1983 case. He argued that he had not received notice of the dismissal, and filed a motion to re-open the time for appeal pursuant to Rule 4(a)(6). The district court denied Akers's motion because his appeal was not in good faith and because Akers had not demonstrated "due diligence in inquiring as to the status of his case." Akers appeals the district court's denial of his Rule 4(a)(6) motion and requests to supplement the record with a document from the prison mail log.

II. DISCUSSION

This court grants Akers's motion to supplement the record; the document he offers pertains to the Rule 4(a)(6) motion.

Nevertheless, we conclude that the district court did not abuse its discretion in denying Akers's Rule 4(a)(6) motion because his appeal was not in good faith. See In re Jones, 970 F.2d 36, 39 (5th Cir. 1992). Akers has no cause of action for civil damages under § 1983, as his conviction and sentence have not been invalidated. The Supreme Court has held that:

"[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence 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 writ of habeas corpus, 22 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."

Heck v. Humphrey, ___ U.S. ___, 114 S.Ct. 2364, 2372 (1994) (internal footnotes omitted). Further, to the extent that Akers's appeal

constitutes a habeas corpus petition, that appeal has no merit; Akers has not exhausted his state court remedies. See id. at 2369.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.