

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40761
Summary Calendar

JOSEPH ALFRED ROME, JR.,

Plaintiff-Appellant,

ELIZABETH B. ROME, ET AT.,

Plaintiffs,

VERSUS

ALAN LEVY, Assistant District Attorney,
Denton County,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(4:94-CV-137)

(October 5, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Joseph Rome appeals from the district court's order dismissing, without prejudice, his civil rights claim as frivolous.

We **MODIFY** and **AFFIRM**.

¹ Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

In June 1994, Joseph Rome, proceeding *in forma pauperis*, filed this action under 42 U.S.C. § 1983, alleging civil rights violations in connection with his conviction for aggravated sexual abuse of a child. Alan Levy, the prosecuting assistant district attorney, was named defendant. In findings and recommendations, the magistrate judge concluded that Rome's claims lacked merit because the assistant attorney general is subject to prosecutorial immunity and the statute of limitations for Rome's claim had expired. Following Rome's objection, the district court modified the magistrate judge's conclusions, noting that the statute of limitations had, in fact, not run because Rome was in prison. The district court, however, also noted that Rome's claim was barred by an additional factor in light of the Supreme Court's opinion in **Heck v. Humphrey**, ___ U.S. ___, 114 S. Ct. 2364 (1994). Therefore, it dismissed Rome's claim as frivolous, pursuant to 28 U.S.C. 1915(d), without prejudice. Rome now appeals.²

II.

We review the district court's dismissal of Rome's claim as frivolous, under § 1915(d), for abuse of discretion. **Denton v. Hernandez**, ___ U.S. ___, ___, 112 S. Ct. 1728, 1734 (1992). An *in forma pauperis* complaint is frivolous if "it lacks an arguable basis either in law or in fact". **Neitzke v. Williams**, 490 U.S.

² Rome has filed a motion with this court to proceed in forma pauperis. This motion is denied as unnecessary. See Fed. R. App. P. 24(a). Rome has also filed with this court a motion for leave to file an amended complaint. This motion is also denied.

319, 325, 109 S. Ct. 1827, 1831-32 (1989). A legally frivolous complaint is one premised on an "indisputably meritless legal theory". *Id.* at 327, S. Ct. at 1833.

We agree with the district court that the **Heck** doctrine bars Rome's claims. In **Heck**, the Supreme Court held that a claimed wrongful conviction cannot form the basis for a civil rights action unless that conviction has been reversed on direct appeal, in some other manner declared invalid by a state tribunal or called into question through a writ of habeas corpus issued by a federal court. 114 S. Ct. at 2372. Contrary to the mandate of **Heck**, Rome has not alleged that his conviction has been reversed, invalidated or called into question in any manner by a state or federal court. Thus, without more, the district court's dismissal without prejudice was correct.

However, like the **Heck** doctrine, immunity is also a proper basis for a § 1915(d) dismissal. **Boyd v. Biggers**, 1994 WL 462047, *5 (5th Cir. 1994). And as this court noted recently, "it is appropriate ... to resolve the question of ... immunity before reaching the **Heck** analysis". *Id.*

As a criminal prosecutor, Levy enjoys immunity from civil actions related to his initiation and prosecution of cases. **Graves v. Hampton**, 1 F.3d 315, 318 (5th Cir. 1993). This broad immunity applies even if a prosecutor acts maliciously or in bad faith in prosecuting an individual. **Brummett v. Camble**, 946 F.2d 1178, 1181 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2323 (1992). Rome alleges that Levy is guilty of malicious prosecution and abuse of

the legal process by prosecuting him *ex post facto*. These allegations are insufficient to overcome Levy's immunity. The complaint against Levy should, therefore, be dismissed with prejudice. See **Graves**, *supra* at 313 (holding that § 1915(d) dismissal based on immunity is properly dismissed with prejudice).³

III.

For the foregoing reasons, the district court's order is

AFFIRMED AS MODIFIED.

³ Rome also asserts, for the first time on appeal, that the district court mishandled his filing of a petition for writ of habeas corpus. We need not address issues not considered by the district court. **United States v. Garcia-Pillado**, 898 F.2d 36, 39 (5th Cir. 1990).