

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41174
Summary Calendar

CALVIN POWELL, JR.,

Plaintiff-Appellant,

VERSUS

STATE OF LOUISIANA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(94-CV-837)

(February 7, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Calvin Powell, Jr. appeals from the dismissal of his civil rights claims. We **DISMISS** his appeal.

I.

In 1985, Powell pleaded guilty to first degree robbery and received a 30-year sentence. He appealed his sentence and, although he was denied relief, the Louisiana appellate court noted that his sentence was "*illegally lenient*" (emphasis added), because it did not include a prohibition of parole, probation or suspension

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 Pursuant to that rule, the court has determined that this opinion should not be published.

of sentence as required under Louisiana law for first degree robbery. However, because the State had not sought review of this error, the appellate court did not address it. Nonetheless, through subsequent proceedings initiated by Powell, his sentence was invalidated several times; on each occasion, for being illegally lenient.

It appears that Powell sought imposition of the harsher sentence so that his plea would be rendered involuntary. Powell ultimately prevailed when, upon finally imposing the proper sentence in September 1993, the trial court was ordered on appeal to reconsider whether Powell's plea was voluntary. On remand in March 1994, Powell was permitted to plead guilty to the amended charge of *attempted* first degree robbery. He received a 20-year, instead of the earlier 30-year, sentence, with the benefit of probation, parole, or suspension of sentence, and received credit for time served.

Powell filed a *pro se, in forma pauperis* action for damages under 42 U.S.C. § 1983 against the trial judge and the district attorney, among others, alleging violations of the Thirteenth and

Fourteenth Amendments.² The action was dismissed as frivolous pursuant to 28 U.S.C. § 1915(d).

II.

A district court has the discretion to dismiss an *in forma pauperis* complaint as frivolous when it lacks an arguable basis in law or in fact. 28 U.S.C. § 1915(d); **Denton v. Hernandez**, 112 S. Ct. 1728, 1734 (1992). Powell apparently complains that he was illegally confined because his sentence was erroneous. The district court found no legal or factual basis for his claim. We agree.

Powell's original sentence was invalidated because it was too *lenient*. And, as noted, Powell ultimately benefitted from this error, receiving a sentence far more favorable than the original. Furthermore, Powell lost no time in the process because he received

² Powell relies on *Heck v. Humphrey*, 114 S. Ct. 2364, 2372 (1994), which held:

[I]n order to recover damages ... [for] 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 ... or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

Powell appears to assume that, because his first sentence was invalidated, he is entitled to damages. He is incorrect. *Heck* sets forth only a prerequisite for recovery under § 1983. Powell must also establish a constitutional violation. As discussed, *infra*, he has failed to do so.

credit for time served.³ He has not stated a basis for a constitutional violation.⁴ His claim and appeal are frivolous.⁵

III.

For the foregoing reasons the appeal is

DISMISSED.

³ It may be that, had Powell pleaded originally to *attempted* first degree robbery, or had the 20-year sentence been imposed initially, Powell may have been eligible for parole prior to now. Powell makes no such claim, however; we have no basis for review.

⁴ We need not consider the fact that the trial judge and the district attorney would appear to be immune from Powell's claim, if one existed.

⁵ An appeal presenting no issue of arguable merit will be dismissed as frivolous. Fifth Cir. Loc. R. 42.2.