

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50542
Summary Calendar

JEFF COOK,

Plaintiff-Appellant,

versus

STEVEN BAUM, LT., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-94-CA-529)

(November 14, 1994)

Before, SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

Per curiam:¹

Jeff Cook ("Cook"), a Texas prisoner, filed this action *pro se* against Lieutenant Steven Baum, and officers Jeffery Ward and Charles O'Dell of the San Antonio Police Department pursuant to 42 U.S.C. § 1983, alleging false imprisonment and malicious prosecution. Cook alleged that the officers arrested him based on a faulty identification provided by Minnie Davis, who was proven to

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

be legally blind at his criminal trial. Cook further alleged that the officers subjected him to an impermissibly suggestive identification procedure, and the evidence at this trial was insufficient to support his conviction of theft. Cook sought a court order setting aside his conviction.

The district court referred the case to a magistrate judge, who recommended dismissing the complaint as frivolous pursuant to 28 U.S.C. § 1915(d). The magistrate judge observed that Cook previously filed a § 1983 action against the Bexar County prosecutors, which was dismissed as frivolous, and that Cook had a 28 U.S.C. § 2254 petition for habeas corpus pending in the same district court where the present case was filed. The magistrate judge determined that the malicious prosecution claim failed as a matter of law because Cook's complaint revealed that the prosecution ended in conviction. Because Cook's other claims amounted to nothing more than a collateral attack on his conviction, the magistrate judge determined that they were precluded by *Heck v. Humphrey*, ___ U.S. ___, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The magistrate judge also recommended sanctioning Cook, pursuant to FED. R. CIV. P. 11 for filing this groundless action, by issuing a formal warning against filing further frivolous suits.

The district court adopted the magistrate judge's report and recommendation and dismissed the case without prejudice. We affirm.

A complaint may be dismissed as frivolous under § 1915(d) if

it has no arguable basis in law or in fact. *Denton v. Hernandez*, ___U.S.___, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992). This Court reviews such a dismissal for abuse of discretion. *Ancar v. Sara Plasma, Inc.*, 964 F.2d 465, 468 (5th Cir. 1992).

In *Heck*, the Supreme Court held:

[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, 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.

114 S.Ct. at 2372 (footnote omitted). Thus, when a state prisoner seeks damages in a § 1983 action, *Heck* requires the court to "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.*

Cook's allegations attack the validity of his state conviction. Cook's conviction has not been called into question by any court, and a judgment in his favor would necessarily imply the invalidity of the conviction. Unlike the plaintiff in *Heck*, however, Cook does not seek damages. Instead, he seeks to have his conviction set aside. Cook's claims, therefore, are not cognizable under § 1983 because he is challenging the fact of his imprisonment and the relief he seeks is release. His only federal remedy under

these circumstances is a writ of habeas corpus. See *Boyd v. Biggers*, 31 F.3d 279, 283 n. 4 (5th Cir. 1994) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973)). Cook's habeas case attacking the theft conviction was pending in the district court at the time judgment was entered in this case, and he may raise these claims in that action. Accordingly, the district court correctly dismissed Cook's complaint.

In his brief, Cook raises two issues that are unrelated to this action -- that the state prosecutors conspired to convict him by suppressing evidence of the victim's legally blind status and that trial counsel was ineffective for failing to move for dismissal based on the victim's inability to identify her assailant. Cook's arguments concerning the prosecutors apparently relate to his previously dismissed conspiracy claim against them from which he took no appeal. The ineffective assistance issue must be part of Cook's pending habeas action. These arguments need not be addressed because they were not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal questions and the failure to consider them would result in manifest injustice." *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991).

The judgement of the district court is AFFIRMED.

Pursuant to FED. R. CIV. P. 34(a) and 37(a), Cook moves this Court for an order compelling the defendants to produce documents concerning probable cause for his arrest. This is a discovery

motion which Cook should have made in the district court.

It is ORDERED that the motion is DENIED.