

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-60289
Summary Calendar

HOSEY B. JOHNSON,
Plaintiff-Appellant,

VERSUS

CITY OF GULFPORT,
Defendant-Appellee.

No. 94-60308
Summary Calendar

HOSEY B. JOHNSON,
Plaintiff-Appellant,

VERSUS

KIRK FORDICE, in his official capacity,
and THE STATE OF MISSISSIPPI,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Mississippi
(CA-93-614 & 3:94-CV-21WS)

(August 10, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:¹

In these two appeals, which we order consolidated, Johnson challenges the dismissal of two § 1983 actions which are virtually identical. We affirm.

I.

Hosey B. Johnson is currently an inmate at the South Mississippi Correctional Institute serving a life sentence for armed robbery. He filed two civil rights actions pro se and **in forma pauperis** (IFP), alleging that he should not have been convicted of armed robbery and sentenced to life imprisonment because the state failed to produce a handgun at trial to corroborate the victim's testimony. Johnson contends that his conviction should have been for simple robbery only, which carries a maximum sentence of fifteen years. He also contends that Mississippi's armed robbery statute is unconstitutional because it allows for a conviction without requiring the state to produce the gun at trial.

The district court dismissed Johnson's complaint in 94-60289 as frivolous under § 1915(d), holding that Johnson's claim constituted a challenge to the fact or length of his confinement and, therefore, that he was required to exhaust his state and federal habeas corpus remedies before bringing a § 1983 action.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The court also concluded that because Johnson did not establish the deprivation of any federal constitutional right, he did not present a cognizable claim under either § 1983 or § 2254. The court then dismissed the action with prejudice. Johnson timely appealed.

The district court in 94-60308 (which is essentially identical to 94-60289) first noted that Johnson's claim more appropriately sounded in habeas. The district court then held that because Johnson's complaint did not assert a viable constitutional challenge, it could be dismissed without first requiring Johnson to exhaust his habeas remedies. Accordingly, the court also dismissed this action with prejudice. Johnson appeals.

II.

These two actions were filed separately by Johnson and, although both were filed in the Southern District of Mississippi, each went to a different judge of that court.² The appeals were docketed separately in this court as well; because the claims raised in the complaints and on appeal are virtually identical, they have been consolidated.

A district court may dismiss an IFP complaint as frivolous under § 1915(d) if it lacks an arguable basis in law or fact. **Eason v. Thaler**, 14 F.3d 8, 9 (5th Cir. 1994). Such dismissals are reviewed on appeal for abuse of discretion.

Johnson contends that his complaint constitutes a challenge to the constitutionality of Mississippi's armed robbery statute and

² Johnson filed 94-60289 on December 27, 1993. The second action, 94-60308, was filed on January 13, 1994.

that he should not have been convicted of armed robbery because the state failed to produce the gun used in the crime at trial.

He also contends that Mississippi's armed robbery statute violates the Ex Post Facto clause of the Constitution, because it was enacted after the Supreme Court's decision in **In Re Winship**, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), which requires the state to prove each element of the crime alleged. Johnson argues that Mississippi's armed robbery statute does not satisfy the requirements of **Winship** because the statute does not require the state to produce a gun at trial.

In **Pittman v. Moore**, 980 F.2d 994 (5th Cir. 1993), this court held that a pro se prisoner's IFP civil rights action, duplicative of a pending action already filed by that same prisoner, may be dismissed as frivolous or malicious under § 1915(d). As this court noted, "[w]hen declaring that a successive in forma pauperis suit is 'malicious' the court should insure that the plaintiff obtains one bite at the litigation apple -- but not more." As Johnson's second action--94-60308--falls squarely within this rule, we affirm the dismissal of this suit on the alternative ground that it is duplicative.

We also affirm the district court's dismissal of Johnson's first action, 94-60289. The district court held that Johnson's complaint did not state a viable constitutional claim for either § 1983 or § 2254 purposes. We agree with the district court that Johnson's challenge clearly implicates the fact or length of his confinement and should therefore have been brought pursuant to

§ 2254. **See Serio v. Members of La. State Bd. of Pardons**, 821 F.2d 1112, 1117, 1119 (5th Cir. 1987). Nonetheless, if no constitutional right is implicated, a habeas challenge improperly brought under § 1983 may be dismissed rather than requiring the plaintiff to exhaust his habeas remedies. **See Thomas v. Torres**, 717 F.2d 248 (5th Cir.), **cert. denied**, 465 U.S. 1010 (1984) (facts asserted did not implicate a federal constitutional right).

In this case, Johnson's complaints do not implicate a federal constitutional right. First, we know of no authority to support Johnson's argument that the state cannot punish a person for using a weapon without producing the weapon. In fact, this court has already rejected Johnson's habeas petition challenging his conviction despite the fact that the state did not produce any weapon at trial. The court reasoned that "the eyewitness testimony of Johnson's use of the gun is more than sufficient to enable a reasonable jury to return a guilty verdict of armed robbery." **Johnson II**, 978 F.2d at 860. Therefore, the state's failure to produce the gun does not invalidate Johnson's conviction. The district courts in both cases did not abuse their discretion by dismissing Johnson's actions as frivolous. **See Eason**, 14 F.3d at 9.

AFFIRMED.