

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60472
Conference Calendar

RONALD BARRY EVANS,

Plaintiff-Appellant,

versus

ANNETTE PARKER ET AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 94-CV-57

- - - - -
(November 17, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

Ronald Barry Evans appeals the district court's dismissal as frivolous of his in forma pauperis (IFP) civil rights complaint. An IFP suit may be dismissed as frivolous if it lacks an arguable basis in law or fact. Denton v. Hernandez, ____ U.S. ____, 112 S. Ct. 1728, 1733, 118 L. Ed. 2d 340 (1992); 28 U.S.C. § 1915(d). We review a § 1915(d) dismissal for an abuse of discretion. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992).

A § 1915(d) frivolousness determination may be "made sua sponte before the defendant has even been asked to file an

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

answer." Denton, 112 S. Ct. at 1733. As discussed below, Evans's complaint is based on an indisputably meritless legal theory; therefore, the magistrate judge and the district court did not abuse their discretion by failing to serve the complaint on the defendants.

Witnesses are entitled to absolute immunity from § 1983 damage claims, even if it is alleged that the witnesses committed perjury. See Graves v. Hampton, 1 F.3d at 315, 317 (5th Cir. 1993); see also Briscoe v. LaHue, 460 U.S. 325, 343-46, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983)(§ 1983 does not authorize a claim for damages against a police officer for allegedly giving perjured testimony). "The decision to file or not file criminal charges falls within th[e] category of acts that will not give rise to section 1983 liability." Oliver v. Collins, 904 F.2d 278, 281 (5th Cir. 1990)(discussing absolute prosecutorial immunity). Further, 18 U.S.C. § 241 cannot serve as a basis of liability for Evans's civil suit against the defendants because it is a criminal statute.

Regarding Evans's assertion that the magistrate judge should have recused himself from this action because he "knew" Evans from prior court appearances, a judge must disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). To show the necessary prejudice under § 455(a), Evans must demonstrate that the alleged bias or partiality stems from an extrajudicial source. See Liteky v. United States, ___ U.S. ___, 114 S. Ct. 1147, 1157, 127

L. Ed. 2d 474 (1994). Evans has failed to make such a showing.
The judgment of the district court is AFFIRMED.