

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-11352
Conference Calendar

JOE L. LUTZ,

Plaintiff-Appellant,

versus

CHRIS CARLSON, Parole Board Member; CRAIG HINES, Parole Board
Members; UNKNOWN, Two Parole Board Members,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:97-CV-616-E

December 16, 1999

Before JOLLY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Joe L. Lutz, Texas prisoner # 389813, appeals the district court's dismissal of his 42 U.S.C. § 1983 action for failure to state a claim upon which relief may be granted. Lutz argues that Heck v. Humphrey, 512 U.S. 477 (1994) should not bar this litigation because the underlying criminal offense upon which his parole was revoked was dismissed. Heck v. Humphrey applies to claims for damages related to violations of constitutional rights

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

in parole proceedings. McGrew v. Texas Bd. of Pardons & Paroles, 47 F.3d 158, 160-61 (5th Cir. 1995). Because an action attacking the validity of a parole proceeding calls into question the fact and duration of confinement, a § 1983 plaintiff must prove that a sentence imposed as a result of revocation proceedings has been invalidated by a state or federal court. Id. at 161. The fact that the underlying criminal charges were dismissed does not affect the validity of the parole proceedings which Lutz seeks to challenge and does not bar application of Heck. See Else v. Johnson, 104 F.3d 82, 83 (5th Cir. 1997).

Lutz also argues that he was denied equal protection, arguing that other inmates, similarly situated, were released and reinstated to parole after having been found guilty on the same class of misdemeanor charges. In order to state a claim for the denial of equal protection, Lutz would have had to allege that he was treated more severely in his parole revocation due to his race or other improper motive, and not just due to an inconsistent application or result. See Thompson v. Patteson, 985 F.2d 202, 207 (5th Cir. 1993). Lutz has not made such allegations of improper motive.

The district court did not err in dismissing Lutz's action for failure to state a claim. Further, Lutz's appeal is without arguable merit and is frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is dismissed. See 5th Cir. R. 42.2.

The dismissal of this appeal as frivolous counts as a strike for purposes of 28 U.S.C. § 1915(g). We caution Lutz that once he accumulates three strikes, he may not proceed IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. See 28 U.S.C. § 1915(g).

APPEAL DISMISSED AS FRIVOLOUS.