

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1957

Summary Calendar

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JIM RAY HOUSLEY,

Plaintiff-Appellant,

v.

J.E. BERRY, Justice of Peace,  
Lipscomb County, Texas, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Texas  
(2:92-CV-95)

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(January 31, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Proceeding pro se and in forma pauperis, Jim Ray Housley appeals the district court's dismissal of his complaint, brought pursuant to 42 U.S.C. § 1983, as frivolous. We affirm in part and vacate in part the judgment of the district court.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Jim Ray Housley, an inmate in the Custer County Jail in Arapaho, Oklahoma, filed a civil rights suit in the United States District Court for the Northern District of Texas against J. E. Berry, a justice of the peace in Lipscomb County, Texas; John Mann, an assistant district attorney in Lipscomb County; and John Ferguson, a bail bondsman. He asserted general claims of multiple violations of his constitutional rights.

In his supplemental pleadings filed in accordance with an order of the district court, Housley alleged that Berry, Mann, and Ferguson had engaged in a conspiracy against him to violate his civil rights, i.e., to have Housley falsely arrested and imprisoned. Housley specifically alleged that Berry had signed an illegal search warrant and that Mann had obtained an illegal indictment against him. He also specifically alleged that Ferguson had perjured himself by saying that Housley "was in a Texas jail and was in the courts [sic] Juris[dic]tion," thus causing Housley's bail to be revoked and a fugitive-from-justice warrant to be issued against Housley in Oklahoma. Additionally, Housley argued that Ferguson had defrauded Housley of \$1500 in bail money.

The magistrate judge noted that Housley's complaint charged Berry and Mann with acts taken solely in their official capacities, for which they were entitled to absolute immunity. The magistrate thus recommended that Housley's claims against Berry and Mann be dismissed as legally frivolous pursuant to 28

U.S.C. § 1915(d). Further, although the magistrate recognized that Ferguson was not entitled to an immunity defense, he recommended that Housley's claims against Ferguson should also be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d) because Housley's allegations were merely conclusory and thus his claims did not have a "realistic chance of success" on the merits.

Housley then filed objections to the magistrate's recommendations. The district court overruled the objections, adopted the report and recommendations of the magistrate, and dismissed all of Housley's claims as frivolous. Housley then filed a timely notice of appeal.

## II.

An in forma pauperis complaint is "frivolous" within the meaning of § 1915(d) if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). The Supreme Court has determined that pursuant to § 1915(d), a federal court has "not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Id. at 327.

The Court has also made it clear that a complaint should be dismissed as "factually frivolous" under § 1915(d) if the facts alleged are "fanciful," "fantastic," "delusional," or "clearly baseless." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992).

As those terms suggest, the Court explained, "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible," but not simply because the alleged facts are deemed unlikely. Id.

We review § 1915(d) dismissals for an abuse of discretion because a determination of frivolousness--whether legal or factual--is a discretionary one. Id. at 1734; Booker v. Koonce, 2 F.3d 114, 115 (5th Cir. 1993).

### III.

The district court did not abuse its discretion in dismissing as frivolous Housley's claims against Berry and Mann. A claim against a defendant who is immune from suit is frivolous because it is based upon an indisputably meritless legal theory. Booker, 2 F.3d at 116 (citing Neitzke, 490 U.S. at 327). As a justice of the peace, Berry is absolutely immune from liability "for judicial acts that are not performed in clear absence of all jurisdiction, however erroneous the act and however evil the motive." Johnson v. Kegans, 870 F.2d 992, 995 (5th Cir.), cert. denied, 492 U.S. 921 (1989); see Stump v. Sparkman, 435 U.S. 349, 356-57 (1978). Berry's signing of a search warrant, the act of which Housley complains, is a judicial act for which Berry is absolutely immune from liability.

As a prosecutor, Mann is absolutely immune from liability "for initiating prosecutions and other acts 'intimately associated with the judicial phase of the criminal process.'"

Johnson, 870 F.2d at 996 (quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976)). Mann's obtaining an indictment against Housley, the act of which Housley complains, was part of Mann's initiating prosecution against Housley and hence affords Mann absolute liability for Housley's claim against him.

Ferguson, however, as a private litigant is not entitled to any immunity in a § 1983 action. See Wyatt v. Cole, 112 S. Ct. 1827, 1833 (1992). Further, Ferguson could be liable under § 1983 if he conspired to act with Berry and Mann under color of state law to deprive Housley of a constitutional right. See Daniel v. Ferguson, 839 F.2d 1124, 1131 (5th Cir. 1988). Housley's allegation that Ferguson conspired with Berry and Mann to have him falsely arrested implicates Housley's constitutional right to be free from illegal arrest. See Booker, 2 F.3d at 116.

Although the district court dismissed Housley's claims against Ferguson as frivolous because Housley's allegations were conclusory and thus the district court assumed that Housley's claims did "not have a realistic chance of success," conclusory allegations may be sufficient to withstand dismissal under § 1915(d). Id. "The initial assessment of the plaintiff's factual allegations 'must be weighted in favor of the plaintiff,'" and "the factual frivolousness determination 'cannot serve as a factfinding process for the resolution of disputed facts.'" Id. at 117 (quoting Denton, 112 S. Ct. at 1733). As we thus determined in Booker, § 1915(d) permits the dismissal of only a claim which has no realistic chance of success on the

merits and has no arguable basis in law and fact. Id. at 115-16 & n.9 (explaining that dismissal of a claim under § 1915(d) which has even a slight chance of success on the merits is inappropriate).

Although Housley's claim against Ferguson is conclusory, it does implicate Housley's constitutional right to be free from illegal arrest, and it is not so irrational or wholly incredible as to be dismissed as factually frivolous under § 1915(d). Accordingly, the district court erred in dismissing Housley's claim against Ferguson pursuant to § 1915(d).

#### IV.

It is also unclear from Housley's complaint whether his allegations of wrongful arrest and imprisonment are relevant to the validity of his present incarceration.<sup>1</sup> If any of Housley's claims, which he brought pursuant to § 1983, could affect whether he is entitled to immediate or earlier release from confinement, those claims should first be pursued through state and federal habeas corpus proceedings. See Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1117-19 (5th Cir. 1987). However, if his claims which should properly be asserted in a petition for habeas relief are mixed with claims that arise only under § 1983 and the claims can be separated, the district court should separate the claims and entertain the § 1983 claims. Id. at

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<sup>1</sup> An illegal arrest or detention, standing alone, cannot serve as a basis for voiding a subsequent conviction. See Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

1119. On remand, the district court should therefore consider whether any of Housley's allegations are relevant to the fact or duration of his present confinement and, if so, whether those allegations are separable from his civil rights claims. Id.

V.

For the foregoing reasons, we AFFIRM in part and VACATE in part the judgment of the district court and REMAND for further proceedings consistent with this opinion.