

United States Court of Appeals for the Fifth Circuit

No. 22-10767

DONNIE EARL PHILLIPS, JR.,

United States Court of Appeals
Fifth Circuit

FILED

March 15, 2023

Lyle W. Cayce
Clerk

Plaintiff—Appellant,

versus

ROBERT RAY COWIE; SCOTT WISCH; TOM BENSON; ROB HAYDEN; MOLLEE WESTFALL; PATRICK CURRAN; ALEJANDRA ESTRADA; MAMIE BUSH JOHNSON; J. ERIC NIKOLS; SCOTTY JONES,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CV-1362

Before WIENER, ELROD, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Donnie Earl Phillips, Jr., Texas prisoner #0518336, asserted various claims under 42 U.S.C. § 1983 relating to his conviction and sentence for driving while intoxicated. The district court granted Phillips's motion to

* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

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proceed *in forma pauperis* and allowed the filing of two amended complaints. After Phillips filed a second amended complaint, the district court dismissed several of his claims with prejudice and entered a partial final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. *Phillips v. Cowie*, No. 4:21-CV-1362, ECF 23 (July 15, 2022) (opinion and order); *id.* ECF 24 (partial final judgment). The partial dismissal addressed the claims Phillips asserted against his private defense attorneys, several Tarrant County judges, and various bail bondsmen. The district court explained that, on the facts alleged, the defense attorneys and bail bondsmen are not state actors for purposes of § 1983, and that the state judges were entitled to absolute immunity. Phillips appealed the partial final judgment, and the district court granted his motion to proceed *in forma pauperis* on appeal.

We have jurisdiction to consider appeals from partial final judgments where the district court determines that there is no just reason to delay dismissal. 28 U.S.C. § 1291; *see Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 292 n.3 (5th Cir. 2017). But where, as here, the appellant proceeds *in forma pauperis*, we must dismiss the appeal if the issues presented are frivolous. 28 U.S.C. § 1915(e)(2)(B)(i). Issues are frivolous if they are not “arguable on their merits.” *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983).

Phillips’s issues are not arguable on their merits. First, private attorneys are not state actors except in the exceptional case that they conspire with an actual state official. *Hudson v. Hughes*, 98 F.3d 868, 873 (5th Cir. 1996); *Mills v. Crim. Dist. Court No. 3*, 837 F.2d 677, 679 (5th Cir. 1988); *see, e.g., Uresti v. Reyes*, 506 F. Appx. 328, 329 (5th Cir. 2011). The same is generally true of bail bondsmen. *Tebo v. Tebo*, 550 F.3d 492, 496 (5th Cir. 2008); *Landy v. A-Able Bonding, Inc.*, 75 F.3d 200, 203–05 (5th Cir. 1996); *see, e.g., Cabalero v. Aamco Bail Bonding Co.*, No. 97-20617, 1998 WL 414307, at *2 (5th Cir. July 16, 1998) (asking whether bondsman “enlisted the assistance of law enforcement officers” or “displayed an arrest warrant”) (citation and internal

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quotation marks omitted). Accepting the facts alleged in Phillips's second amended complaint as true, they do not show that the defense attorneys or the bail bondsmen were acting under color of state law. Second, a judge is entitled to absolute immunity from acts taken in his or her judicial capacity. *See, e.g., Davis v. Tarrant County*, 565 F.3d 214, 222 (5th Cir. 2009) (citing *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)). Phillips's complaint alleges that one judge wrongfully entered his conviction and that another committed a clerical on the judgment. The judges are entitled to absolute immunity because those actions were plainly taken in the judges' judicial capacity.

The issues raised in Phillips's appeal are not arguable on the merits. We therefore must DISMISS the appeal. 28 U.S.C. § 1291(e)(2)(B)(i). The petition for a writ of mandamus and motion to file a supplemental brief are DENIED AS MOOT.

Sincerely,

LYLE W. CAYCE, Clerk

Roeshawn Johnson

By: Roeshawn Johnson, Deputy Clerk

Enclosure(s)

Mr. Donnie Earl Phillips Jr.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DONNIE EARL PHILLIPS, JR.,

Plaintiff,

v.

No. 4:21-cv-1362-P

ROBERT ROY COWIE, ET AL.,

Defendants.

ORDER of DISMISSAL

By Opinion and Order of Partial Dismissal signed July 15, 2022, the Court dismissed the claims of Plaintiff, Donnie Earl Phillips, Jr., against certain defendants in this action. ECF No. 23. The dismissal was made final by Partial Final Judgment.¹ ECF No. 24. By Order Regarding Filing a More Definite Statement signed that same date, the Court required Plaintiff to provide further information so that it could assess his claims against the remaining defendants. ECF No. 25. Plaintiff filed a response, ECF No. 26, and the Court now finds that Plaintiff's remaining claims in this action must be **DISMISSED WITH PREJUDICE**.

By its earlier Opinion and Order of Partial Dismissal, the Court explained why Plaintiff could not proceed with claims against individual attorneys, bail bondsmen, and judges under § 1983. ECF No. 23. For the same reasons, his claims against the law firm, Dunham and Jones, the bail bond firm, Act Fast Bail Bond, and the alleged employer of the judges, "Tarrant County Judicial," must be dismissed. Moreover, "Tarrant County Judicial" is not a legal entity capable of being sued. *See Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313 (5th Cir. 1991).

¹ Plaintiff has filed a notice of appeal from that judgment. ECF No. 27. He has also filed a document titled "Motion of Certiorari Writ," ECF No. 28, which is wholly nonsensical. The Court interprets the document to be addressed to the United States Supreme Court. It is not a motion to be handled by this Court.

Claims against district judges in their official capacities are claims against the State of Texas, which is entitled to Eleventh Amendment immunity. *Warnock v. Pecos Cnty.*, 88 F.3d 341, 343 (5th Cir. 1996). Thus, identifying the employer of the judge defendants would not have mattered.

As for Sebastian Aguirre, the only remaining individual defendant, Plaintiff has barely mentioned him in response to the Court's specific question asking for all facts to support his claim that Aguirre violated his civil rights. ECF No. 26 at 11–19. Plaintiff makes nothing but conclusory allegations of conspiracy, which are wholly insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiff's remaining claims in this action are **DISMISSED WITH PREJUDICE** as frivolous.

This dismissal shall count as a qualifying dismissal under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b), and *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1996). Plaintiff is cautioned that if he accumulates three strikes, he may not proceed *in forma pauperis* in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is in imminent danger of serious physical injury. See 28 U.S.C. § 1915(g).

Dismissal of this action does not release Plaintiff or the institution where he is incarcerated from the obligation to pay any filing fee previously imposed. See *Williams v. Roberts*, 116 F.3d 1126, 1128 (5th Cir. 1997).

Plaintiff is advised that if he appeals this Order of Dismissal, he will be required to pay the appeal fee of \$505.00 pursuant to the PLRA, and he must submit an application to proceed *in forma pauperis* and a 6-month Certificate of Inmate Trust Account at the same time he files his notice of appeal.

SO ORDERED on this 6th day of October 2022.



Mark T. Pittman
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DONNIE EARL PHILLIPS, JR.,

Plaintiff,

v.

No. 4:21-cv-1362-P

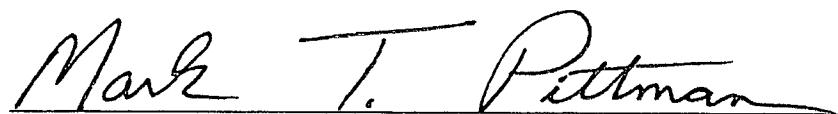
ROBERT ROY COWIE, ET AL.,

Defendants.

FINAL JUDGMENT

Consistent with the Order of Dismissal signed this date, all remaining claims of Plaintiff, Donnie Earl Phillips, Jr., asserted in this action are **DISMISSED WITH PREJUDICE**.

SO ORDERED on this 6th day of October 2022.



Mark T. Pittman
UNITED STATES DISTRICT JUDGE