

App. 1

Case 5:22-cv-00753-OLG Document 7 Filed 10/31/22

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FILED

OCTOBER 31, 2022

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY: JU

DEPUTY

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

KELVIN LIONELL

WRIGHT II

Plaintiff,

v.

USDC WESTERN

DISTRICT OF TEXAS,

SAN ANTONIO

DIVISION,

Defendant.

SA-22-CV-00753-OLG

FINAL JUDGMENT

Before the Court is the above-entitled cause. Upon review of the entire case file and this Court's Order dismissing *pro se* Plaintiff Kelvin Lionell Wright II's 42 U.S.C. § 1983 Complaint, the Court renders the following Final Judgment pursuant to FED. R. CIV. P. 58.

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IT IS HEREBY ORDERED that Plaintiff Kelvin Lionell Wright II's 42 U.S.C. § 1983 Complaint is **DISMISSED WITH PREJUDICE** as frivolous. See 28 U.S.C. § 1915A(b)(1).

IT IS FURTHER ORDERED that Plaintiff Kelvin Lionell Wright II's 42 U.S.C § 1983 Complaint is **DISMISSED WITHOUT PREJUDICE** for failure to prosecute and failure to comply with the Court's Show Cause Order. See FED. R. CIV. P. 41(b).

IT IS FINALLY ORDERED that this case is **CLOSED**.

The Clerk of Court shall send a copy of this Final Judgment and the Order of Dismissal in this case to the keeper of the three-strikes list.

It is **SO ORDERED**.

SIGNED this 31st day of October, 2022.

Orlando L. Garcia
ORLANDO L. GARCIA
Chief United States District Judge

United States Court of Appeals for the Fifth
Circuit

Certified as a true
copy and issued as
the mandate on
Jun 26, 2023

Attest: Tyle W.
Cayce

Clerk, U.S. Court
of Appeals, Fifth
Circuit

No. 22-51035

Summary
Calendar

United States
Court of Appeals
Fifth Circuit

FILED

May 4, 2023

Lyle W. Cayce
Clerk

KELVIN LIONELL WRIGHT, II,

Plaintiff-Appellant,

versus

UNITED STATES DISTRICT COURT WESTERN
DISTRICT OF TEXAS, *San Antonio Division,*

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:22-CV-753

Before BARKSDALE, HIGGINSON, and HO, *Circuit
Judges.*

JUDGMENT

This cause was considered on the record on
appeal and the brief on file.

IT IS ORDERED and ADJUDGED that the
appeal is DISMISSED as frivolous.

Wright is WARNED: if he accumulates a total of three strikes,
he may not proceed in forma pauperis (IFP) in any civil action or
appeal while he

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Case: 22-51035 Document: 39-2 Page:2 Date Filed: 06/26/2023

No. 22-51035

is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g). As Wright is not proceeding IFP in the instant appeal, he is also **WARNED: sanctions—including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court’s jurisdiction—may be imposed in response to future frivolous filings.**

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Date Filed: 06/26/2023

United States Court of Appeals FIFTH CIRCUIT
OFFICE OF THE CLERK
LYLE W. CAYCE
CLERK
TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA
70130

June 26, 2023

Mr. Philip Devlin
Western District of Texas, San Antonio
United States District Court
655 E. Cesar E. Chavez Boulevard
Suite G65
San Antonio, TX 78206

No. 22-51035 Wright v. USDC Western Dist
USDC No. 5:22-CV-753

Dear Mr. Devlin,
Enclosed is a copy of the judgment issued as the
mandate and a copy of the court's opinion.

Sincerely,
LYLE W. CAYCE, Clerk
By: Casey A. Sullivan
Casey A. Sullivan, Deputy Clerk
504-310-7642

cc: Mr. Kelvin Lionell Wright II

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**United States Court of Appeals
for the Fifth Circuit**

No. 22-51035
Summary
Calendar

United States
Court of Appeals
Fifth Circuit

FILED

May 4, 2023

Lyle W. Cayce
Clerk

KELVIN LIONELL WRIGHT, II,

Plaintiff-Appellant,

versus

UNITED STATES DISTRICT COURT WESTERN
DISTRICT OF TEXAS, SAN ANTONIO DIVISION,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:22-CV-753

Before BARKSDALE, HIGGINSON, and HO, *Circuit
Judges.*

PER CURIAM:*

Kelvin Lionell Wright, II, federal prisoner # 39615-380 and proceeding *pro se*, appeals the district court's: 28 U.S.C. § 1915A(b)(1) dismissal with prejudice of his complaint (under 42 U.S.C. § 1983) as frivolous; and dismissal without prejudice pursuant to Federal Rule of Civil

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

No. 22-51035

Procedure 41(b) for failure to prosecute and to comply with a show-cause order.

Wright fails to challenge the reasons for the district court's dismissal; therefore, he abandons any challenge he may have had to the court's judgment. *E.g.*, *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993) ("Although we liberally construe the briefs of pro se appellants, we also require that arguments must be briefed to be preserved." (citation omitted)); *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987) (stating our court "will not raise and discuss legal issues" that appellant "failed to assert"). Accordingly, we dismiss the appeal as frivolous. *See* 5th Cir. R. 42.2.

The district court's dismissal of Wright's complaint and our dismissal of his appeal each count as strikes under 28 U.S.C. § 1915(g). *E.g.*, *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson*, 575 U.S. 532, 534 (2015) (explaining Congress intended "both the dismissal in district court *and* the separate dismissal of the appeal as frivolous" count as individual strikes against appellant (emphasis in original)). Wright is WARNED: if he accumulates a total of three strikes, he may not proceed in *forma pauperis* (IFP) in any civil action or appeal while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g). As Wright is not proceeding IFP in the instant appeal, he is also WARNED: sanctions—including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction—may be imposed in response to future frivolous filings.

DISMISSED; STRIKE IMPOSED; SANCTION
WARNING ISSUED.

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United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 04, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 22-51035 Wright v. USDC Western Dist
USDC No. 5:22-CV-753

Enclosed is a copy of the court's decision. The court has entered judgment under **Fed. R. App. P. 36**. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through **41**, and **5th Cir. R. 35, 39, and 41** govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40** require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order. Please read carefully the Internal Operating Procedures (IOP's) following **Fed. R. App. P. 40** and **5th Cir. R. 35** for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. **5th Cir. R. 41** provides that a motion for a stay of mandate under **Fed. R. App. P. 41** will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

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Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under **Fed. R. App. P. 41**. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you **MUST** confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

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Sincerely,
LYLE W. CAYCE, Clerk
By: Casey A. Sullivan
Casey A. Sullivan, Deputy Clerk

Enclosure(s)
Mr. Kelvin Lionell Wright II

FILED

October 31, 2022

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY: JU

DEPUTY

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

KELVIN LIONELL)

WRIGHT II)

Plaintiff,)

v.)

SA-22-CV-00753-OLG

USDC WESTERN)

DISTRICT OF TEXAS,)

SAN ANTONIO)

DIVISION,)

Defendant.)

ORDER OF DISMISSAL

Before the Court is pro se Plaintiff Kelvin Lionell Wright II's ("Wright") 42 U.S.C. § 1983 Complaint. (Dkt. No. 1). Wright paid the filing fee. (Dkt. No. 4). On August 31, 2022, the Court ordered Wright to show cause, on or by September 30, 2022, why his § 1983 claims should not be dismissed as frivolous. (Dkt. No. 5); *see* 28 U.S.C. § 1915A(b)(1). Wright was specifically advised that if he failed to comply, his Complaint could be dismissed for failure to prosecute and failure to comply with the Show Cause Order. (Dkt. No. 5); *see* FED. R. CIV. P. 41(b). To date, Wright has not responded to the Court's Show Cause Order.

After review, Wright's Complaint is **DISMISSED WITH PREJUDICE** as frivolous. (Dkt. No. 1); *see* 28 U.S.C. § 1915A(b)(1). Additionally, the Court orders Wright's Complaint **DISMISSED WITHOUT PREJUDICE** for failure to prosecute and failure to comply with the Court's Show Cause Order. (Dkt. Nos. 1, 5); *see* FED. R. CIV. P. 41(b).

BACKGROUND

This Court's records show Wright pled guilty to possession with intent to distribute five (5) grams or more of methamphetamine, and by Amended Judgment was sentenced to one hundred (100) months confinement to run currently with term of confinement imposed in *United States v.*

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Wright, No. 5:14-CR-477-FB(8). *See United States v. Wright*, No. 5:19-CR-00321-FB(1) (W.D. Tex. Jan. 27, 2022). Wright has now filed this civil rights action against what appears to be this Court. (Dkt. No. 1). However, the Court is unable to determine the actual defendants, what acts or omissions were allegedly committed, or the constitutional provisions allegedly violated. (*Id.*). As relief, Wright appears to seek monetary damages. (*Id.*).

APPLICABLE LAW

When an inmate seeks redress from an officer or employee of a governmental entity, his complaint is subject to preliminary screening pursuant to 28 U.S.C. § 1915A. *See Martin v. Scott*, 156 F.3d 578, 579–80 (5th Cir. 1998) (*per curiam*). The statute provides for *sua sponte* dismissal of a complaint—or any portion thereof—if the Court finds it frivolous or malicious, if it fails to state a claim upon which relief can be granted, or if it seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915A(b).

A complaint is frivolous if it lacks an arguable basis in law or fact, i.e., when “the facts alleged are fantastic or delusional scenarios or the legal theory upon which a complaint relies is indisputably meritless.” *Samford v. Dretke*, 562 F.3d 674, 678 (5th Cir. 2009) (quoting *Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir. 1999)).

All well-pleaded facts are taken as true, but the district court need not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions. *See Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005). And although a court must construe a *pro se*’s allegations liberally, see *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), a plaintiff’s *pro se* status does not offer him “an impenetrable shield, for one acting *pro se* has no license to harass others,

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clog the judicial machinery with meritless litigation and abuse already overloaded court dockets.”

Ferguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986).

ANALYSIS

A. Frivolous Claims

To state a viable claim, a plaintiff’s allegations must present “enough facts to state a claim to relief that is plausible on its face,” which means that “[f]actual allegations must be enough to raise a right to relief above the speculative level;” “labels and conclusions ... will not do.” *Twombly*, 550 U.S. at 555–56, 570; *see* FED. R. CIV. P. 8(a) (stating pleadings must contain “a short and plain statement of the claim showing that the pleader is entitled to relief”). Under the notice pleading requirement for a federal lawsuit,

Wright is required, among other things, to: (1) state with particularity the acts or omissions committed by those he claims caused him damage; and (2) identify the constitutional provisions allegedly violated by those acts or omissions. See FED. R. CIV. P. 8(a).

In his Complaint, Wright appears to reference subject-matter jurisdiction as it relates to his criminal case, an absence of immunity as it relates to governmental entities, the “Accardi Doctrine,” denial of the existence of a contract, a biased judiciary, breach of fiduciary duty, provisions from Titles 28 and 15 of the United States Code, “bonds and insurance,” “public hazard bonding of corporate agents,” “appointment of trustee-notice of fiduciary trusteeship duty,” and “notice of tort.” (Dkt. No. 1). The applicability of these concepts, most of which are unclear in and of themselves, to a constitutional violation lacks coherence. The Court is unable to determine whom Wright is suing, what acts or omissions were allegedly committed, and what constitutional amendments were violated for purposes of an action pursuant to § 1983. In fact, as pled, the Court finds Wright’s Complaint “fantastic or delusional” and, therefore, factually frivolous and subject to dismissal. See *Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir. 1999).

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B. Failure to Respond to Show Cause Order

As set out above, this Court previously ordered Wright to show cause by September 30, 2022, why his Complaint should not be dismissed for the reasons set out in the Show Cause Order. (Dkt. No. 5). Wright has not filed an amended complaint or

otherwise responded to this Court's Show Cause Order.

The Court has the inherent power under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss a case *sua sponte* where necessary to achieve orderly, expeditious disposition of cases. FED. R. CIV. P. 41(b). Wright's failure to respond to this Court's Show Cause Order suggests he no longer desire to pursue this matter and subjects him to dismissal under Rule 41(b) for failure to prosecute and failure to comply with an Order of this Court. *See id.*

CONCLUSION

Wright was given an opportunity to amend his Complaint to correct the deficiencies set out in the Court's Show Cause Order, but he failed to respond. The Court finds Wright's claims are substantively subject to dismissal based on the analysis set out above. Moreover, by failing to respond to the Court's Show Cause Order, Wright's Complaint is subject to dismissal for want of prosecution and for failure to comply with the Show Cause Order.

IT IS THEREFORE ORDERED that Wright's 42 U.S.C § 1983 Complaint (Dkt. No. 1) is **DISMISSED WITH PREJUDICE** as frivolous. *See* 28 U.S.C. § 1915A(b)(1).

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IT IS FURTHER ORDERED that Wright's 42 U.S.C § 1983 Complaint (Dkt. No. 1) is **DISMISSED WITHOUT PREJUDICE** for failure to prosecute and failure to comply with the Court's Show Cause Order. *See* FED. R. CIV. P. 41(b).

It is **SO ORDERED**.

SIGNED this 31st day of October, 2022.

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Orlando L. Garcia

ORLANDO L. GARCIA

Chief United States District Judge