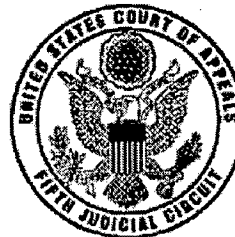


IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50172



RICARDO ENRIQUEZ SANCHEZ,

Plaintiff - Appellant

A True Copy

Certified order issued Jul 19, 2017

John W. Coyle

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

v.

HONORABLE GEORGE ALLEN, 54th and 19th District Judge McLennan County; MICHELLE VOIRIN, Assistant District Attorney McLennan County; PHIL MARTINEZ, Attorney at Law; HONORABLE MATT JOHNSON, 54th District Judge McLennan County; COMMUNITY EDUCATION CENTERS, Secure Facilities Division, Jack Harwell Detention Center,

Defendants - Appellees

Appeal from the United States District Court for the
Western District of Texas, Waco
USDC No. 6:11-CV-234

Before JOLLY, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

This court must examine the basis of its jurisdiction, on its own motion if necessary. *Hill v. City of Seven Points*, 230 F.3d 167, 169 (5th Cir. 2000). Pursuant to 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A), the notice of appeal in a civil case must be filed within thirty days of entry of judgment. In this prisoner civil rights case, the district court entered a final judgment dismissing the complaint on September 28, 2011.

17-50172

Plaintiff then filed a motion for reconsideration which was denied October 18, 2011. Therefore, the final day for filing a timely notice of appeal was November 17, 2011. The plaintiff's pro se notice of appeal is dated February 21, 2017, and stamped as filed on February 27, 2017. Because the notice of appeal is dated February 21, 2017, it could not have been deposited in the prison's mail system within the prescribed time. See FED. R. APP. P. 4(c)(1) (prisoner's pro se notice of appeal is timely filed if deposited in the institution's internal mail system on or before the last day for filing). The time limitation for filing a notice of appeal in a civil case is jurisdictional. *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The lack of a timely notice mandates dismissal of the appeal. *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985). All pending motions are denied as moot.

IT IS SO ORDERED.

Received on 7-25-2017

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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

July 19, 2017

Ms. Jeannette Clack
Western District of Texas, Waco
United States District Court
800 Franklin Avenue
Waco, TX 76701

No. 17-50172 Ricardo Sanchez v. George Allen, et al
USDC No. 6:11-CV-234

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Cindy M. Broadhead

By:

Cindy M. Broadhead, Deputy Clerk
504-310-7707

cc w/encl:

Mr. Ricardo Enriquez Sanchez

BH

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

RICARDO ENRIQUEZ SANCHEZ,
INMATE # 136872,
Plaintiff,

v.

HON. GEORGE ALLEN, et al.,
Defendants.

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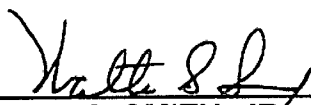
Civil No. W-11-CA-234

ORDER

Before the Court is Plaintiff's Motion to Suppress Evidence as well as a pleading that has been construed as a second motion for reconsideration (Docs. 13 and 14). By Order and Judgment entered on September 28, 2011, the Court dismissed Plaintiff's civil rights complaint as frivolous and for failure to state a claim for relief. (Docs. 9 and 10). Thereafter, on October 18, 2011, the Court denied Plaintiff's first motion for reconsideration. (Doc. 12). Plaintiff raises nothing in his present motions to persuade the Court that it should reconsider its dismissal or otherwise provide him with any relief from the final judgment. Accordingly, it is

ORDERED that Plaintiff's motions (Docs. 13 and 14) are **DENIED**. Plaintiff is advised that should he persist in file frivolous and repetitive motions in this case, the Court will consider imposing monetary sanctions against him.

SIGNED this 9 day of November, 2011.



WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS**

WACO DIVISION

**RICARDO ENRIQUEZ SANCHEZ,
INMATE # 136872,
Plaintiff,**

v.

**HON. GEORGE ALLEN, et al.,
Defendants.**

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Civil No. W-11-CA-234

ORDER

Before the Court is Plaintiff's *pro se* complaint under 42 U.S.C. § 1983. Plaintiff is confined at the Jack Harwell Detention Center and has been granted leave to proceed *in forma pauperis*. Plaintiff sues the following Defendants: (1) McLennan County Judges George Allen and Matt Johnson; (2) McLennan County Assistant District Attorney Michelle Voirin; (3) attorney Phil Martinez; and (4) the Communities Education Centers. (Doc. 1 at 1-3). Plaintiff generally alleges that the Defendants are denying his various motions submitted in connection with his criminal proceedings before the McLennan County district court. (*Id.* at 4). Plaintiff asserts that the Defendants have violated his constitutional rights by denying his right to appeal and/or to challenge his excessive bail. (*Id.*). Plaintiff appears to seek either release from jail or the right to an appeal. (*Id.*).

On September 2, 2011, the Court found that Plaintiff's allegations are conclusory and that many of the Defendants are entitled to obvious immunity defenses. (Doc. 5 at 2). The Court ordered Plaintiff to show cause in writing within

eleven (11) days why his civil rights complaint should not be dismissed as frivolous and for failure to state a claim for which relief can be granted. (Doc. 5 at 3). As part of Plaintiff's response to the September 2 order, the Court directed Plaintiff to: (1) clearly state whether he currently is a convicted inmate or a pre-trial detainee; and (2) address why his complaint is not subject to dismissal pursuant to either *Heck v. Humphrey*, 512 U.S. 477 (1994) or *Younger v. Harris*, 401 U.S. 37 (1971). (*Id.*).

Plaintiff has responded to the Court's show cause order by submitting numerous exhibits pertaining to his state criminal proceedings. (See Docs. 6 and 8). Plaintiff indicates that he was convicted in the McLennan County on July 16, 2009. (Doc. 8 at 1-2). A review of Plaintiff's attached documents reveals that on July 13, 2011, a McLennan County district court convicted Plaintiff of indecency with a child by contact and sentenced him to three years in prison. (See Doc. 8, Attachments). While Plaintiff's response to the Court's show cause order is rambling and disjointed, it is clear that he seeks to raise claims challenging his convictions and current confinement. (Doc. 8 at 1-5). Indeed, Plaintiff claims that the State has no evidence to prove its case and that he is innocent. (*Id.* at 4-5). Plaintiff, however, has presented no coherent arguments addressing why *Heck* is inapplicable.

Section 1915A(b)(1) of Title 28 requires the district court to dismiss the complaint or any portion of the complaint, if it is frivolous, malicious, or fails to state a claim upon which relief may be granted. *Berry v. Brady*, 192 F.3d 504, 507 (5th Cir. 1999). Likewise, 28 U.S.C. §§ 1915(e)(2)(B)(i) and (ii) require a court to dismiss the case at any time that the court determines the action is frivolous or malicious or fails

to state a claim on which relief may be granted. *Id.* To state a claim under section 1983, plaintiffs must allege two elements: first, that they were deprived of a right or interest secured by the Constitution and laws of the United States, and second, that the deprivation occurred under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

A claim is frivolous and may be dismissed if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir.1999); *Harper v. Showers*, 174 F.3d 716, 718 (5th Cir.1999). A claim lacks an arguable basis in law if it is grounded upon an untenable, discredited or indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist. *Neitzke*, 490 U.S.. at 325; *Harper*, 174 F.3d at 718 (quoting *Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir.1998)).

When considering a dismissal for failure to state a claim upon which relief may be granted, the dismissal is proper “only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations.” *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998) (quoting *McGrew v. Texas Bd. Of Pardons & Paroles*, 47 F.3d 158, 160 (5th Cir. 1995); see also *Estelle v. Gamble*, 429 U.S. 97, 105 (1976)(holding that a complaint can only be dismissed for failure to state a claim if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief). The district court must assume all of the plaintiff’s factual allegations are true. *Id.*

A plaintiff must allege specific facts, not conclusory allegations. *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir.1989). To avoid dismissal for failure to state a claim, a plaintiff must plead in his complaint enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff's factual allegations, therefore, must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Conclusory allegations, legal conclusions masquerading as factual conclusions, and unwarranted deductions of fact are insufficient to prevent dismissal of a complaint for failure to state a claim for relief. *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992).

The United States Supreme Court has held that in order to recover damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence, has been reversed, expunged or otherwise declared invalid. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). *Heck* also applies to claims for injunctive relief that imply the invalidity of the conviction. *Kutzner v. Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002). Such claims are not cognizable under § 1983. *Heck*, 512 U.S. at 483.

Plaintiff acknowledges in his complaint that he has been convicted by the McLennan County district court in 2009 and 2011 and that his convictions have not been reversed, expunged, set aside, or otherwise called into question. Because

Plaintiff does not have a cognizable § 1983 cause of action until the *Heck* requirements are met, his claims are frivolous. To the extent that Plaintiff seeks his immediate release or a shortened period of incarceration, he must seek such relief in a proper application for habeas corpus relief filed after he exhausts his available state remedies. See *Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998).

Moreover, Defendants Allen, Johnson and Voirin are entitled to immunity with respect to Plaintiff's claims. Pursuant to § 1983, these two judges and assistant district attorney are entitled to absolute immunity for their judicial decisions and acts performed as an advocate of the state. *Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 276 (5th Cir. 2001) (citing *Imbler v. Pachtman*, 424 U.S. 409, 430-31 & n. 33 (1976)). See also *Murray v. Earle*, 405 F.3d 278, 290 n.40 (5th Cir. 2005) ("of course, judges and prosecutors enjoy absolute immunity for their judicial decisions and prosecutorial functions, respectively."). Finally Plaintiff's claims against Defendant Martinez are not cognizable under § 1983 because a private attorney is not a state actor. See *Polk County v. Dodson*, 454 U.S. 312, 324-25 (1981); *Mills v. Criminal Dist. Court No. 3*, 837 F.2d 677, 679 (5th Cir. 1988) ("private attorneys, even court-appointed attorneys, are not official state actors, and generally are not subject to suit under section 1983").

Having carefully considered Plaintiff's complaint, the Court finds his claims to be without any arguable basis in law or fact, and the Court is convinced beyond a

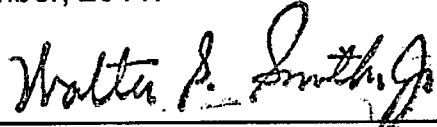
doubt that Plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Accordingly, it is

ORDERED that Plaintiff's § 1983 claims are hereby **DISMISSED** with **prejudice** as frivolous and for failure to state a claim for relief, pursuant to 28 U.S.C. § 1915A(b)(1). The dismissal of this case as frivolous and for failure to state a claim for relief will count as a "strike" for the purposes of 28 U.S.C. § 1915(g). See *Adepegba v. Hammons*, 103 F.3d 383, 385-87 (5th Cir. 1996). Plaintiff is admonished that if he accumulates three "strikes" pursuant to § 1915(g), he may not proceed *in forma pauperis* ("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). It is further

ORDERED that any and all motions not previously ruled upon by the Court are hereby **DENIED**. It is further

ORDERED that the Clerk of the Court is directed to e-mail copies of this Order and the Judgment to the TDCJ - Office of the General Counsel and the Pro Se Clerk for the United States District Court for the Eastern District of Texas.

SIGNED this 28th day of September, 2011.



WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50172

RICARDO ENRIQUEZ SANCHEZ,

Plaintiff - Appellant

v.

HONORABLE GEORGE ALLEN, 54th and 19th District Judge McLennan County; MICHELLE VOIRIN, Assistant District Attorney McLennan County; PHIL MARTINEZ, Attorney at Law; HONORABLE MATT JOHNSON, 54th District Judge McLennan County; COMMUNITY EDUCATION CENTERS, Secure Facilities Division, Jack Harwell Detention Center,

Defendants - Appellees

Appeal from the United States District Court for the
Western District of Texas, Waco

Before JOLLY, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

This panel previously entered an order dismissing the appeal for lack of jurisdiction. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.