

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States District Court
Southern District of Texas
FILED

DEC 26 2017

David J. Bradley, Clerk of Court

No. 17-20121
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

November 15, 2017

Lyle W. Cayce
Clerk

COLLIN O. NYABWA,

Plaintiff-Appellant

v.

WARDEN PAM LYCHNER, State Jail, Individually and Official Capacity,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-2638

Before DENNIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Collins O. Nyabwa has moved for leave to proceed in forma pauperis (IFP). He seeks to appeal the district court's dismissal of his 42 U.S.C. § 1983 complaint as frivolous and malicious under 28 U.S.C. § 1915(e)(2)(B)(i). In that complaint, Nyabwa alleged that the Pam Lychner State Jail and its warden violated his constitutional rights by falsely imprisoning him based on his three Texas state convictions for improper photography. After completion of

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

APPENDIX A

Nyabwa's term of imprisonment, the Texas Court of Criminal Appeals held in an unrelated case that the improper photography statute was unconstitutional. *See Ex parte Thompson*, 442 S.W.3d 325, 351 (Tex. Crim. App. 2014). In this case, the district court determined that Nyabwa's claims were legally frivolous and that his complaint was also malicious because he repeated allegations that had been rejected in a previous civil action. The district court denied Nyabwa leave to proceed IFP because it certified that his appeal was not taken in good faith for the same reasons expressed in its dismissal order.

By moving for leave to proceed IFP on appeal, Nyabwa challenges the district court's certification that his appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry into his good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted). Nyabwa's motion for leave to file a supplemental brief on appeal is GRANTED.

Nyabwa has not shown that the district court abused its discretion by dismissing his complaint as frivolous or malicious. *See Ruiz v. United States*, 160 F.3d 273, 274-75 (5th Cir. 1998). He has not shown how his citation to the actual-innocence prong of the test set forth in *Reyes-Requena v. United States*, 243 F.3d 893, 900-04 (5th Cir. 2001), is relevant in this context. Nyabwa is not entitled to relief under 28 U.S.C. §§ 1495 and 2513 because those statutes "come into play only after a defendant has succeeded in overturning his federal conviction and is seeking damages for wrongful conviction." *Freeman v. Johnson*, 79 F. App'x 3, 3 (5th Cir. 2003). Similarly, his reliance on Texas Civil Practice and Remedies Code Ann. § 103.001 or other state law fails to state a valid claim under § 1983. *See Southwestern Bell Tel., LP v. City of Houston*,

529 F.3d 257, 260 (5th Cir. 2008). To the extent he seeks to invoke *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), we need not consider that argument because it is raised for the first time on appeal. See *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999). In any event, *Nelson* does not directly support his argument because that case did not involve a claim of false imprisonment. Furthermore, examination of his complaint in this appeal and his prior complaint dismissed in *Nyabwa v. Warden, Individual and Official Capacity, Pam Lychner State Jail*, No. 4:16-cv-1643 (S.D. Tex. June 30, 2016), supports the district court's dismissal of his instant complaint as malicious. See *Pittman v. Moore*, 980 F.2d 994, 995 (5th Cir. 1993).

Accordingly, Nyabwa has failed to show an error in the district court's certification decision and has not established that he will raise a nonfrivolous issue on appeal. See *Baugh*, 117 F.3d at 202; *Howard*, 707 F.2d at 220. Nyabwa's motion for leave to proceed IFP is DENIED, and his appeal is DISMISSED as frivolous. See *Baugh*, 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2.

Nyabwa is CAUTIONED that future frivolous, repetitive, or otherwise abusive filings will result in the imposition of sanctions, including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court or any court subject to this court's jurisdiction. He should review any pending appeals and actions and move to dismiss any that are frivolous, repetitive, or otherwise abusive.

ENTERED

February 22, 2017

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COLLINS O. NYABWA,

Plaintiff,

v.

WARDEN, PAM LYCHNER STATE JAIL,

Defendant.

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CIVIL ACTION NO. H-16-2638

MEMORANDUM OPINION AND ORDER

Former state inmate Collins O. Nyabwa, has filed a 42 U.S.C. § 1983 Complaint and Brief in Support Thereof ("Complaint") (Docket Entry No. 1), alleging that he was wrongly imprisoned by the Warden of the Pam Lychner State Jail facility. Nyabwa has also filed a Motion for Default Judgment (Docket Entry No. 5) and a Motion for Summary Judgment on his own behalf (Docket Entry No. 8). Because Nyabwa proceeds in forma pauperis, the court is required to scrutinize the claims and dismiss the Complaint, in whole or in part, if it determines that the Complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted" or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). After considering all of the pleadings, the court will vacate the Order entered on November 1,

APPENDIX B

2016, referring this case to a Magistrate Judge (Docket Entry No. 6), and will dismiss this case for the reasons explained below.

I. Background

Nyabwa was charged in state court with three counts of "improper photography" in violation of § 21.15(b)(1) of the Texas Penal Code.¹ At the time of those charges the Texas improper photography statute made it a criminal offense to photograph, record, or broadcast by video "a visual image of another at a location that is not a bathroom or private dressing room: (A) without the other person's consent; and (B) with intent to arouse or gratify the sexual desire of any person." Tex. Penal Code § 21.15(b)(1) (West 2011).

Nyabwa challenged the constitutionality of the Texas improper photography statute by filing a pretrial writ of habeas corpus, which the trial court denied. That decision was affirmed by the state court of appeals, which concluded that the statute was not unconstitutional. See Ex parte Nyabwa, 366 S.W.3d 719 (Tex. App. – Houston [14th Dist.] 2011). The Texas Court of Criminal Appeals refused Nyabwa's petition for discretionary review from that decision. See Ex parte Nyabwa, 366 S.W.3d 710 (Tex. Crim. App. 2012).

¹See Petition for a Writ of Habeas Corpus by a Person in State Custody ("Habeas Petition"), Docket Entry No. 1, p. 2, in Civil No. H-12-1152 (S.D. Tex.).

On July 29, 2011, Nyabwa entered a guilty plea to the improper photography charges against him and received a one-year prison sentence.² He did not pursue an appeal from the conviction.³

From August of 2011 through July of 2012 Nyabwa was imprisoned at the Pam Lychner State Jail facility in Humble, Texas, as the result of his improper photography conviction.⁴ On September 17, 2014, the Texas Court of Criminal Appeals found the Texas improper photography statute unconstitutional. See Ex parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014). On August 23, 2016, Nyabwa's improper photography conviction was vacated on federal habeas corpus review. See Nyabwa v. Davis, Civil No. H-12-1152 (S.D. Tex.) (Docket Entry Nos. 95, 96).

Noting that the Texas improper photography statute was declared unconstitutional and that his conviction was set aside, Nyabwa now argues that he was falsely imprisoned by the Warden of the Pam Lychner State Jail facility from August of 2011 to July of 2012.⁵ Invoking 42 U.S.C. § 1983, Nyabwa seeks \$5 million in damages for his wrongful confinement.⁶

²Id. at 2-3.

³Id. at 3.

⁴Complaint, Docket Entry No. 1, p. 3.

⁵Id.

⁶Id. at 7.

II. Discussion

Nyabwa concedes in his Complaint that he has filed a previous unsuccessful civil action against the Warden of the Pam Lychner State Jail, alleging the same claim of false imprisonment.⁷ In that case the district court dismissed Nyabwa's claim for damages as barred by the rule in Heck v. Humphrey, 114 S. Ct. 2364, 2372 (1994), because his underlying conviction for improper photography had not yet been set aside. See Nyabwa v. Warden, Pam Lychner State Jail, Civil No. H-16-1643 (S.D. Tex. June 30, 2016) (Docket Entry No. 5, pp. 3-4). In the alternative, the district court dismissed Nyabwa's Complaint because he failed to state a valid claim for false imprisonment. See id. at 3-4 (concluding that Nyabwa failed to articulate a claim of false imprisonment under state law or the Fourteenth Amendment). Nyabwa's appeal from that decision was dismissed on his own motion. See Nyabwa v. Warden, Pam Lychner State Jail, No. 16-20436 (5th Cir. Sept. 16, 2016).

Since that time other courts have also dismissed Nyabwa's claims of false imprisonment stemming from his conviction for improper photography, which also resulted in his detention by immigration officials. See Nyabwa v. CCA, Civil No. H-16-1644 (S.D. Tex. Feb. 1, 2017) (Docket Entry No. 23, pp. 6-9); Nyabwa v. Unknown Jailers at CCA, Civil No. H-16-0782 (S.D. Tex. Jan. 27, 2017) (Docket Entry No. 31, pp. 5-7); see also Nyabwa v.

⁷Id.

United States, No. 1:16-1056, 2017 WL 80076, at *7 (Ct. Fed. Cl. Jan. 6, 2017) (noting that Nyabwa's detention by immigration officials was not improper because it was based on his criminal conviction, which was not vacated until 2016, well after he was released from custody).

The court need not repeat at length the legal analysis on which these prior rulings are based. It is sufficient to note that "[t]he essential elements of false imprisonment are: (1) willful detention; (2) without consent; and (3) without authority of law." Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995) (quoting Sears, Roebuck & Co. v. Castillo, 693 S.W.2d 374, 375 (Tex. 1985)). "If an arrest or detention is executed under process which is legally sufficient in form and duly issued by a court of competent jurisdiction, an action for false imprisonment will not lie." James v. Brown, 637 S.W.2d 914, 918 (Tex. 1982); accord Pete v. Metcalfe, 8 F.3d 214, 218-19 (5th Cir. 1993) (rejecting a false imprisonment claim against prison officials where the plaintiff's imprisonment "was the result of a judgment of conviction by a court with jurisdiction over him"). Because Nyabwa's conviction for improper photography was not vacated until 2016, he cannot show that the one-year sentence of imprisonment that he received in 2011 or his subsequent detention by CCA from July of 2012 through November of 2013 was without authority of law; and he cannot otherwise establish a claim for false imprisonment

against the officials who held him in custody pursuant to the conviction. See James, 637 S.W.2d at 918; see also United States ex rel. Bailey v. Askew, 486 F.2d 134, 135 (5th Cir. 1973) (per curiam) (noting that "a jailer cannot be held liable for an error in an order of commitment which is patently proper") (citation omitted); Contreras v. Schiltgen, 122 F.3d 30, 33 (9th Cir. 1997) (observing that immigration officials are "entitled to rely on the conviction as a basis for custody and eventual deportation" until the conviction is "successfully overturned") (citation omitted).

Based on this record, the Complaint in this case will be dismissed as legally frivolous because the allegations are meritless and have no arguable basis in law. See Henthorn v. Swinson, 955 F.2d 351, 352 (5th Cir. 1992) (A complaint filed in forma pauperis may be dismissed sua sponte as frivolous "if it lacks an arguable basis in law or fact or if there is no realistic chance of ultimate success.") (citation omitted). To the extent that Nyabwa repeats allegations in this case that were raised by him previously in another civil action that he filed against the Warden of the Pam Lychner State Jail, the Complaint is also malicious. See Pittman v. Moore, 980 F.2d 994, 994 (5th Cir. 1993) (per curiam).

Court records reflect that Nyabwa has filed at least six unsuccessful civil actions in the federal courts stemming from his

conviction for improper photography and his allegations of false imprisonment: Nyabwa v. Keller, Civil No. 1:15-0735 (W.D. Tex. Dec. 30, 2015); Nyabwa v. Unknown Jailers at CCA, Civil No. H-16-0782 (S.D. Tex. Jan. 27, 2017); Nyabwa v. Warden, Pam Lychner State Jail, Civil No. H-16-0786 (S.D. Tex. May 23, 2016); Nyabwa v. United States, No. 1:16-1056 (Ct. Fed. Cl. Jan. 12, 2017); Nyabwa v. Warden, Pam Lychner State Jail, Civil No. H-16-1643 (S.D. Tex. June 30, 2016); and Nyabwa v. CCA, Civil No. H-16-1644 (S.D. Tex. Feb. 1, 2017). Several similar actions remain pending: Nyabwa v. United States, Civil No. H-16-0783 (S.D. Tex.); Nyabwa v. CCA, Civil No. H-16-3792 (S.D. Tex.); and Nyabwa v. Harris County Sheriff, Civil No. H-17-0028 (S.D. Tex.). Nyabwa is warned that he will face sanctions, including monetary penalties, if he continues to abuse judicial resources by filing repetitive, meritless cases in the federal courts.

III. Conclusion and Order

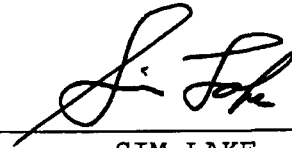
Based on the foregoing, the court **ORDERS** as follows:

1. The Order referring this case to a United States Magistrate Judge (Docket Entry No. 6) is **VACATED**.
2. The 42 U.S.C. § 1983 Complaint filed by Collins O. Nyabwa (Docket Entry No. 1) is **DISMISSED with prejudice** pursuant to 28 U.S.C. § 1915(e)(2)(B) as frivolous and malicious.
3. The Motion for Default Judgment (Docket Entry No. 5) and Motion for Summary Judgment (Docket Entry No. 8) filed by Nyabwa are **DENIED**.

4. Nyabwa is **WARNED** that he will face sanctions, including monetary penalties, if he continues to abuse judicial resources by filing repetitive, meritless cases in the federal courts.

The Clerk is directed to provide a copy of this Memorandum Opinion and Order to the plaintiff.

SIGNED at Houston, Texas, on this 22nd day of February, 2017.



SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20121

COLLINS O. NYABWA,

Plaintiff - Appellant

v.

WARDEN PAM LYCHNER, State Jail, Individually and Official Capacity,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 11/15/17, 5 Cir., _____, _____ F.3d _____)

Before DENNIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

A handwritten signature in cursive script, appearing to read "L. R. Smith", is written over a horizontal line.

UNITED STATES CIRCUIT JUDGE