FILED
United States Court of Appeals
Tenth Circuit

November 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GARY GOODWIN, JR.,

Plaintiff - Appellant,

v.

PHILLIP WEISER, Attorney General of the State of Colorado; MICHAEL ROURKE, Weld County District Attorney,

Defendants - Appellees.

No. 20-1448
(D.C. No. 1:20-CV-02894-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **MURPHY**, and **CARSON**, Circuit Judges.

Plaintiff Gary Goodwin Jr. pleaded guilty in state court to a violation of Colo. Rev. Stat. § 18-18-406 (Offenses relating to marijuana and marijuana concentrate) ("the marijuana statute"). He later sued under 42 U.S.C. § 1983, challenging his conviction and sentence claiming the marijuana statute is unconstitutional. Because he believes the marijuana statute is unconstitutional, he also claimed Defendant

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

District Attorney Michael Rourke violated his constitutional rights by unlawfully prosecuting him. The district court dismissed his claim as frivolous, and now he appeals.

Under 28 U.S.C. § 1915A(b), the district court must review pro se actions and dismiss the frivolous ones. Frivolous actions lack "an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). Here, the district court referred the case to a magistrate judge who recommended that the district court dismiss Plaintiff's § 1983 claim as barred by Heck v. Humphrey, 512 U.S. 477, 487 (1994). The magistrate judge also noted that prosecutorial immunity barred Plaintiff's claim against District Attorney Rourke. Plaintiff did not timely object to the recommendations, so the district court adopted them and dismissed Plaintiff's claim as frivolous.[1]

We normally review frivolity determinations for an abuse of discretion. Denton v. Hernandez, 504 U.S. 25, 33 (1992). But when the district court bases its decision on an issue of law, as it does here, we review de novo. See Conkle v. Potter, 352 F.3d 1333, 1335 n.4 (10th Cir. 2003); Carr v. El Paso Cnty., Colo., 757 F. App'x 651, 654 (10th Cir. 2018) (reviewing de novo the district court's dismissal for frivolity under § 1915A(b)). We construe Plaintiff's pro se pleadings liberally,

[1] Plaintiff failed to timely object to the magistrate judge's report and recommendation, and he failed to timely respond to this Court's show cause order on firm-waiver. But he says prison mail issues caused his delayed responses. For this case, we assume that Plaintiff could have overcome the firm waiver rule. So, rather than address that rule further, we affirm the district court on the merits.

Diversey v. Schmidly, 738 F.3d 1196, 1199 (10th Cir. 2013), but we do not construct arguments for Plaintiff or advocate on his behalf, Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

The Heck doctrine bars § 1983 claims in which a favorable judgment would necessarily invalidate confinement or its duration. Wilkinson v. Dotson, 544 U.S. 74, 81–82 (2005). But if the criminal "sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus," we can consider an otherwise barred claim. Heck, 512 U.S. at 486–87. Plaintiff's attack on the constitutionality of the marijuana statute necessarily attacks the constitutionality of his conviction and thus the validity of the state court conviction for which he is confined. See id. But Plaintiff offers no evidence of reversal, expungement, or invalidity, or that a federal court has issued a writ of habeas corpus. And we find none in the record. So we agree with the district court that Heck bars Plaintiff's claim.

Plaintiff also asserts Rourke unlawfully prosecuted him because Rourke "knew or should have known" the statute was unconstitutional. As a result, if Plaintiff's prosecutorial misconduct claim were to succeed, it would require a finding that the marijuana statute is unconstitutional. So Plaintiff's prosecutorial misconduct claim also necessarily attacks the constitutionality and validity of his conviction. Thus, Heck bars both Plaintiff's constitutional claim and his prosecutorial misconduct

claim.[2] For that reason, we conclude both lack any arguable basis in law and are thus frivolous under § 1915A(b).

AFFIRMED.

Entered for the Court

Joel M. Carson III
Circuit Judge

[2] Because we affirm the district court's Heck determination, we do not address Rourke's prosecutorial immunity argument.