

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHN R. DRAYER, JR.,)
)
 Plaintiff,)
)
 v.) CA No. 03-306-KAJ
)
 STATE OF DELAWARE, DEPT. OF)
 CORRECTION, CUSTODY AND)
 SUPERVISION, PROBATION,)
 VOLUMOUS DEFS, U.S. DISTRICT)
 CTS. DEL. 98-264-RRM, and)
 TANYITA NESBIT,)
)
 Defendants.)

MEMORANDUM ORDER

The plaintiff, John R. Drayer, Jr. ("Drayer"), a pro se litigant, has filed this action pursuant to 42 U.S.C. § 1983 and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. PROCEDURAL HISTORY

Drayer indicates on page 2 of the Complaint that he is incarcerated at the Sussex Correctional Institution. However, he filed the Complaint on March 19, 2003, two days after his release. (D.I. 49 at 2) On April 11, 2003, I ordered Drayer to pay \$19.82 as an initial partial filing fee because it appeared that Drayer was a prisoner at the time he filed the complaint. (D.I. 5) On June 4, 2003, I denied Drayer's Motion to Vacate the Order. (D.I. 8) On August 26, 2003, I dismissed Drayer's Complaint without prejudice because he did not pay the initial partial filing fee. (D.I. 36) However, on June 30, 2004, the United States Court of Appeals for the

Third Circuit vacated the April 11, 2003, and August 26, 2003, Orders and remanded the case because Drayer was not a prisoner at the time he filed this complaint. (D.I. 48; D.I. 49)

II. STANDARD OF REVIEW

When reviewing pauper applications, the Court must make two separate determinations. First, the Court must determine whether Drayer is eligible for pauper status pursuant to 28 U.S.C. § 1915. Based on the information provided in Drayer's in forma pauperis affidavit, the Court concludes that the Drayer has insufficient funds to pay the requisite filing fee. Accordingly, the Court will grant Drayer's request to proceed in forma pauperis.

Second, the Court must "screen" the complaint to determine whether it is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant immune from such relief pursuant to 28 U.S.C. § 1915(e)(2)(B). The United States Supreme Court has held that 28 U.S.C. § 1915(e)(2)(B)'s term "frivolous" when applied to a complaint, "embraces not only the inarguable legal conclusion, but also the fanciful factual allegation," such that a claim is frivolous within the meaning of § 1915(e)(2)(B) if it "lacks an arguable basis either in law or in fact," Neitzke v. Williams, 490 U.S. 319, 325 (1989).¹

When reviewing complaints pursuant to 28 U.S.C. § 1915(e)(2)(B), the Court must apply the standard of review set forth in Fed. R. Civ. P. 12(b)(6). Neal v. Pennsylvania Bd. of Prob. & Parole, CA No. 96-7923, 1997 WL 338838 (E.D. Pa. June 19, 1997)(applying Rule 12(b)(6)

¹ Neitzke applied § 1915(d) prior to the enactment of the Prisoner Litigation Reform Act ("PLRA"). Section 1915 (e)(2)(B) is the re-designation of the former § 1915(d) under the PLRA. Therefore, cases addressing the meaning of frivolous under the prior section remain applicable. See § 804 of the PLRA, Pub.L.No. 14-134, 110 Stat. 1321 (April 26, 1996).

standard as appropriate standard for dismissing claim under § 1915A).² Under this standard, the Court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976)(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

As discussed below, Drayer's claims against the Defendants have no arguable basis in law or in fact and shall be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B).

III. DISCUSSION

1. Motion for Recusal

Drayer has filed a document entitled "Motion for Order for Change of Venue," which I construe as a Motion for Recusal. (D.I. 38) Drayer requests that his Complaint be transferred to a "three judge district court." (Id.) Drayer has filed two documents in what appears to be an effort to support this motion. The first document is an Affidavit filed on October 8, 2003. (D.I. 44). The second document is a letter filed on January 28, 2004. (D.I. 46) Although it is not clear, Drayer appears to be arguing that I am unduly prejudiced against him. (Id.)

² The bases for dismissal under § 1915A are virtually identical to § 1915(e)(2)(B). Section 1915A(a) requires the Court to screen prisoner complaints seeking redress from governmental entities, officers or employees before docketing, if feasible and to dismiss those complaints which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant immune from such relief. Therefore, the Court applies the § 1915A standard of review when screening non-prisoner complaints pursuant to § 1915(e)(2)(B).

Drayer cites 28 U.S.C. § 455 as the statutory basis for his motion. Nonetheless, I will analyze the motion under both § 144 and § 455. In order to be disqualifying, both § 144 and § 455 require that the alleged bias or prejudice stem from an extrajudicial source. See Liteky v. United States, 510 U.S. 540 (1994). "Extrajudicial source" means a source outside the present or *prior* judicial proceedings. See id. at 555 (emphasis added). I will address Drayer's allegation separately under each section.

Section 144 requires that a party seeking recusal file a "timely and *sufficient* affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party." See 28 U.S.C. § 144 (emphasis added). "Conclusory allegations need not be accepted as true." Jones v. Pittsburgh Nat. Corp., 899 F.2d 1350, 1356 (3d Cir. 1990)(citing United States v. Vespe, 868 F.2d 1328, 1340 (3d Cir. 1989)). In this case, Drayer's affidavit is not sufficient to support his claim. Drayer has not presented any facts to support his motion. He has merely presented his conclusory allegation that I am prejudiced against him. He appears to be basing this allegation, as well as the motion for recusal, solely on judicial rulings in this case, as well as his prior cases. (D.I. 44)

However, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky v. United States, 510 U.S. at 555 (citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)). The Supreme Court explained that judicial rulings "in and of themselves can only in the rarest circumstances evidence the degree of favoritism or antagonism required" to prove bias. Id. Drayer's bare allegation that I am biased has no merit and is insufficient to support his claim.

Under § 455, "any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455. Section 455 requires a judge to raise the issue of bias sua sponte. "Under this section a judge must consider whether a reasonable person knowing all the circumstances would harbor doubts concerning the judge's impartiality." Jones, 899 F.2d at 1356 (citing United States v. Dalfonso, 707 F.2d 757, 760 (3d Cir. 1983)). Again, other than his bare allegations, Drayer has offered no evidence to support his claim that I harbor a bias against him. Consequently, I find that no reasonable person, knowing all the circumstances, would harbor doubts concerning my impartiality.

Because Drayer has failed to allege facts demonstrating that I have a personal bias or prejudice against him, I shall deny the motion for recusal.

2. The Complaint

Drayer's complaint is difficult to read. An example of Drayer's prose is set out in the margin.³ However, it appears that Drayer is alleging that his original conviction and sentences, as well as his subsequent probation violation, are unconstitutional. (D.I. 2) He requests that he be awarded twenty-six million dollars in compensatory and punitive damages. (Id. at 3-4)

Drayer has also filed the following motions: a Motion to Supplement Appeal and Motions (D.I. 37) filed on September 3, 2003; a Motion for Leave to Proceed In Forma Pauperis on Appeal (D.I. 40) filed on October 1, 2003; and, a Motion for a Judgment as a Matter of Law

³ "Statement of claims: wrongfully convicted on false charges, 5/96 - present, plea - to uncommitted crime 9/97, V.O.P. Reported Ms. Nesbit Judge Graves, Superior Ct. Sussex Cty, Del. John R. Drayer Jr. Motions Quash Capais warrant V.O.P. Demanded Waivers immunity signed before proceeding refusal cause dismissal...." (D.I. 2 at 3)

(D.I. 50) filed July 26, 2004. Because I find that the Complaint is frivolous, the motions shall be denied as moot.

3. Analysis

Drayer's sole federal remedy for challenging the fact or duration of his confinement is by way of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475 (1973). Furthermore, a plaintiff cannot recover under § 1983 for alleged wrongful incarceration unless he proves that the conviction or 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. See Heck v. Humphrey, 512 U.S. 477, 487 (1994). It is clear from the pleadings and public record that Drayer never appealed his conviction and sentence. Furthermore, I have denied Drayer's Petition for Writ of Habeas Corpus.⁴ See Drayer v. Kearney, CA No. 02-1602-KAJ Mem Order (D. Del. September 30, 2003); See generally Drayer v. State, 829 A.3d 935 (Del. 2003). Because Drayer cannot prove that his conviction and sentence were reversed or invalidated by any means required under Heck, his claims lack an arguable basis in law or in fact. Consequently, I will dismiss his claims as frivolous pursuant to § 1915(e)(2)(B).

NOW THEREFORE, at Wilmington this 13th day of October, 2004, IT IS HEREBY ORDERED that:

1. Drayer's Motion to Proceed In Forma Pauperis (D.I. 42) is **GRANTED**.
2. Drayer's Motion for Recusal (D.I. 38) is **DENIED**.

⁴ Although Drayer filed a Request for a Certificate of Appealability, the Third Circuit denied his request, finding that his Petition for Writ of Habeas Corpus was time barred under the applicable statute of limitations. See Drayer v. Kearney, No. 03-4160 (3d. Cir. Sep. 30, 2004).

3. Drayer's Motion to Proceed In Forma Pauperis on Appeal (D.I. 40) is **DENIED** as MOOT.
4. Drayer's Motion to Supplement Appeal and Motion (D.I. 37) is **DENIED** as MOOT.
5. Drayer's Motion for Judgment as a Matter of Law (D.I. 50) is **DENIED** as MOOT.
6. Drayer's complaint is **DISMISSED** as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B).

Kent A. Jordan
UNITED STATES DISTRICT JUDGE