

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 7, 2023

Christopher M. Wolpert
Clerk of Court

JACOB ANDREW HERRINGTON,

Plaintiff - Appellant,

v.

GORDON P. GALLAGHER; UNITED
STATES DISTRICT COURT,

Defendants - Appellees.

No. 22-1254
(D.C. No. 1:22-CV-00483-LTB-KLM)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MORITZ, BRISCOE**, and **CARSON**, Circuit Judges.

Petitioner Jacob Andrew Herrington, a Colorado state prisoner proceeding pro se,¹ appeals the district court’s dismissal of his Bivens complaint. Petitioner also seeks leave to proceed *in forma pauperis*. Because Petitioner failed to satisfy the pleading standards under Federal Rule of Civil Procedure 8 and illustrate any waiver of

* 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). This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

¹ “Although we liberally construe *pro se* filings, we do not ‘assume the role of advocate.’” Yang v. Archuleta, 525 F.3d 925, 927 n.1 (10th Cir. 2008) (quoting Ledbetter v. City of Topeka, Kan., 318 F.3d 1183, 1187–88 (10th Cir.2003)).

immunity, we affirm the district court's dismissal and deny his request to proceed *in forma pauperis*.

I.

Petitioner is a pretrial detainee at the El Paso County Criminal Justice Center in Colorado Springs, Colorado. On February 24, 2022, Petitioner initiated these proceedings in the United States District Court for the District of Colorado by filing a pro se application for a writ of habeas corpus pursuant to 28 U.S.C § 2241, and a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Petitioner alleged that his arrest and detention were violent and various sheriff's deputies, police officers, and jail officials violated his federal constitutional rights because he was the victim of a beating and robbery and he committed no crime. Petitioner also alleged he was deprived of necessary medication and medical attention, denied access to appropriate religious materials, and denied access to legal materials and medical files. Finally, Petitioner alleged he was refused a speedy trial, forced to be represented in state court by an appointed attorney he never requested or agreed to be represented by, and the state court set his bond unreasonably high.

On February 28, 2022, the assigned magistrate judge entered an order directing Petitioner to cure certain deficiencies in his § 1915 motion and to specify whether his complaint sought relief under § 2241 or under 42 U.S.C. § 1983. The order further warned that if Petitioner failed to cure the deficiencies within thirty days, the magistrate judge would dismiss the action without further notice. After correspondence from Petitioner, the assigned magistrate judge entered a second order directing him to again

cure deficiencies in his § 1915 motion and to use the court-approved prisoner complaint form. In response, the assigned magistrate judge received motions, letters, and an amended complaint from Petitioner. The assigned magistrate judge ultimately granted Petitioner's renewed § 1915 motion and denied Petitioner's additional motions and petitions (motions "For Copy of My Case File" and Counsel, and petitions to Appeal Competency Evaluation and for "Subpena Duce Secum"). On April 14, 2022, in response to Petitioner's second amended complaint, the assigned magistrate judge entered a third order directing Petitioner to file an amended complaint containing clear statements of his claims pursuant to Federal Rule of Civil Procedure 8. Petitioner subsequently filed his third amended complaint naming the assigned magistrate judge, Gordon Gallagher, and the "United States District Court" as defendants. And he identified Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) as the basis for his claim.

Magistrate Judge Gallagher immediately recused himself and the Clerk of Court assigned a new magistrate. The newly assigned magistrate judge recommended dismissal of the amended prisoner complaint for failure to comply with Federal Rule of Procedure 8, and because judicial and sovereign immunity protections preclude actions against judges and federal entities in their official capacities. Over Petitioner's objections, the district court accepted and adopted the magistrate judge's recommendation and dismissed the complaint and action without prejudice for Petitioner's failure to comply with Federal Rule of Civil Procedure 8. And relying on

28 U.S.C. § 1915(a)(3), the district court certified that we should not take this appeal in forma pauperis because it lacks good faith.

Petitioner appeals the district court’s dismissal of his complaint, asserting “Tenth Circuit District Courts are unreasonable, [manipulative] and ignore and refuse” him access to the courts. He lists (1) the “district courts [sic] repative ignoreing [sic] [his] pleadings and requests for court injunction” and (2) the court’s “mind games” as the issues on appeal. Petitioner asserts the district court incorrectly decided the facts because he could not access legal materials, lacked notice of the court’s filings and determinations, and had limited ability to file and correct documents. Petitioner asks us to remand his case and separate his prisoner complaint and his § 2241 petition. This appeal only relates to Petitioner’s prisoner complaint as we resolved his § 2241 petition in Herrington v. Geary, No. 22-1257, 2023 WL 2662910 (10th Cir. Mar. 28, 2023).

The district court dismissed Petitioner’s complaint and action without prejudice on two grounds: (1) for failure to comply with Federal Rule of Civil Procedure 8, and (2) under the doctrine of sovereign immunity. We address each ground in turn.

II.

Petitioner first appears to challenge the dismissal of his prisoner complaint for failure to meet the requirements of Federal Rule of Civil Procedure 8. Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an action if the plaintiff fails “to comply with [the Federal Rules of Civil Procedure] or any order of

court.”² We review dismissals under Rule 41(b) for abuse of discretion. Olsen v. Mapes, 333 F.3d 1199, 1204 (10th Cir. 2003) (citing Mobley v. McCormick, 40 F.3d 337, 340 (10th Cir. 1994)). Dismissal without prejudice under Rule 41(b) gives a plaintiff another chance to edit the pleading’s language and does not require district courts to abide by any particular procedures. Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe Cnty. Just. Ctr., 492 F.3d 1158, 1162 (10th Cir. 2007); see Petty v. Manpower, Inc., 591 F.2d 615, 617 (10th Cir. 1979).

Under Rule 8, complaints must contain “a short and plain statement of the claim showing that the [plaintiff] is entitled to relief” and “a demand for the relief sought.” Fed. R. Civ. P. 8(a)(2)–(3). A complaint fails under Rule 8 if its allegations are conclusory and unsupported by the facts. Cotner v. Hopkins, 795 F.2d 900, 902 (10th Cir. 1986).³

The district court determined the allegations in Petitioner’s amended complaint were vague and conclusory because he failed to explain how either Defendant violated his federal rights. Though the amended complaint contains factual allegations, they do not demonstrate how the named Defendants violated Petitioner’s federal rights. The facts do not support Petitioner’s allegations that Defendant Gallagher “refuse[d] to listen to

² Although the language of Rule 41(b) requires that the defendant move to dismiss, the Rule has long been interpreted to permit courts to dismiss actions sua sponte for a plaintiff’s failure to prosecute or comply with the rules of civil procedure or court’s orders. Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962).

³ Though construed liberally, pro se pleadings are not exempt from “the same rules of procedure that govern other litigants.” See Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005) (quoting Nielsen v. Price, 17 F.3d 1276, 1277 (10th Cir.1994)); Green v. Dorrell, 969 F.2d 915, 917 (10th Cir. 1992).

[him].” Defendant Gallagher issued multiple orders describing pleading requirements to Petitioner and included a plain language illustration from Nasious: “a complaint must explain what each defendant did to him or her; when the defendant did it; how the defendant’s action harmed him or her; and, what specific legal right the plaintiff believes the defendant violated.” 492 F.3d at 1163. The district court also properly concluded that if Petitioner intended his second amended complaint to create a new civil action, the two Defendants named here are not the proper defendants for such an action. We conclude the district court did not abuse its discretion and properly dismissed the complaint for failure to comply with Rule 8.

III.

Petitioner next challenges the dismissal of his prisoner complaint based on sovereign immunity. Sovereign immunity and subject matter jurisdiction are intertwined, and we view dismissal of a claim based on sovereign immunity as dismissal for lack of subject matter jurisdiction. Wyoming v. United States, 279 F.3d 1214, 1225 (10th Cir. 2002); Fletcher v. United States, 116 F.3d 1315, 1323 (10th Cir. 1997). We review district courts’ subject matter jurisdiction determinations de novo. Sierra Club v. Lujan, 972 F.2d 312, 314 (10th Cir. 1992) (citing Kunkel v. Continental Casualty Co., 866 F.2d 1269, 1273 (10th Cir.1989)).

The United States and its agencies enjoy sovereign immunity from liability under Bivens. See F.D.I.C. v. Meyer, 510 U.S. 471, 484 (1994). We construe an official capacity claim against a government officer as a claim against the government that employs the officer. See Brandon v. Holt, 469 U.S. 464, 471–72 (1985). To clear the

immunity threshold, plaintiffs must identify a waiver of immunity. Mocek v. City of Albuquerque, 813 F.3d 912, 932 (10th Cir. 2015). After reviewing the record, we conclude Petitioner failed to identify a waiver of immunity and fails to meet his burden. The district court properly dismissed Petitioner’s claims against the United States District Court and Magistrate Judge Gallagher in his official capacity.

Petitioner also asserted a claim against Magistrate Judge Gallagher in his individual capacity. Bivens recognized an implied cause of action for damages against individual officers acting under color of federal law to deprive a plaintiff of a constitutional right. 403 U.S. at 389. Judges are immune from suit, however, unless the actions at issue are not taken in the judge’s official capacity, or the actions are “taken in the complete absence of all jurisdiction.” Mireles v. Waco, 502 U.S. 9, 11–12 (1991). “[T]he necessary inquiry in determining whether a defendant judge” acted without jurisdiction “is whether at the time he took the challenged action he had jurisdiction over the subject matter before him.” Stump v. Sparkman, 435 U.S. 349, 356 (1978). Allegations of bad faith or malice do not overcome judicial immunity. Mireles, 502 U.S. at 11.

Petitioner fails to overcome the immunity hurdle for two reasons. First, Petitioner does not make clear what relief he seeks, but it is clear he does not request the monetary damages required by Bivens in his second amended complaint. Bivens, 403 U.S. at 397. [ROA at 160.] Second, there is no question that Magistrate Judge Gallagher performed the challenged actions in his judicial capacity. Further, Petitioner did not argue, nor does it appear that Magistrate Judge Gallagher acted without jurisdiction.

IV.

Petitioner also moved to proceed in forma pauperis under 28 U.S.C. § 1915(a)(1). The district court certified “pursuant to 28 U.S.C. § 1915(a)(3) that any appeal . . . would not be taken in good faith.” Herrington v. Gallagher et al., No. 22-cv-00483, ECF No. 47 (D. Colo. July 13, 2022). We agree with the district court’s certification under the statute. Thus, Petitioner’s motion to proceed in forma pauperis is denied.

The district court’s dismissal of Petitioner’s complaint and action without prejudice is AFFIRMED and his motion to proceed in forma pauperis is DENIED.

Entered for the Court

Joel M. Carson III
Circuit Judge