

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 26, 2023

Christopher M. Wolpert
Clerk of Court

RONALD E. JOHNSON,

Plaintiff - Appellant,

v.

WYANDOTTE COUNTY DISTRICT
COURT,

Defendant - Appellee.

No. 23-3019
(D.C. No. 5:23-CV-03020-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH, McHUGH,** and **CARSON,** Circuit Judges.

Ronald Johnson is a pro se inmate litigant in the custody of the Kansas Department of Corrections. He has twice attempted to remove his civil lawsuit from state court to federal district court. This appeal is a review of his third attempt to access federal district court. Because Mr. Johnson failed to comply with the applicable removal statute, we affirm the district court’s dismissal.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I. Background

Mr. Johnson is a pro se inmate litigant who has twice attempted to remove a civil lawsuit from state to federal court. But the civil removal statute does not permit plaintiffs to remove their own actions to federal court. *See* 28 U.S.C. § 1441(a) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States . . .”). Consequently, in both previous instances the federal district court remanded the case.

This appeal arises from Mr. Johnson’s third effort of removal. His latest removal notice again cites the same civil case. But the notice’s caption also references a past criminal matter. R. at 3. In that case, Mr. Johnson was found guilty of committing a murder two decades ago. As the district court observed, Mr. Johnson enjoyed a direct appeal to the Kansas Supreme Court that affirmed his conviction and advanced several unsuccessful habeas petitions. R. at 16–17.

The district court construed Mr. Johnson’s latest filing as an attempt to remove his criminal case. The criminal removal statute provides that a criminal defendant must remove his case before the earlier of 30 days after his arraignment or at any time before trial unless the court grants leave to file later. 28 U.S.C. § 1455(b)(1). Mr. Johnson’s trial has long concluded. That means Mr. Johnson cannot remove his case under the statute. But here, there was no state court to which the federal court

could remand the case; again, the case has long been closed. It dismissed the case instead.¹

II. Analysis

We consider whether the district court erred in dismissing for failure to comply with the criminal removal statute.

The district court, of course, was under a duty to afford Mr. Johnson’s filing a liberal construction. But “[t]his liberal treatment is not without limits, and this court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants.” *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007) (internal quotation marks omitted). With these guidelines in mind, the district court properly construed Mr. Johnson’s filing as an attempt to remove his prior criminal case to federal court. This construction makes sense given Mr. Johnson’s past failed attempts to invoke federal jurisdiction. By removing a case in which he had been a defendant, Mr. Johnson might adhere with the federal court’s past admonishments that removal is for defendants only.

But liberal treatment can only go so far. The district court rightly noted Mr. Johnson still failed to comply with a different statutory requirement: removing his criminal case before his trial. In his complaint and appellate briefing, Mr. Johnson raises some concerns about the legitimacy of those proceedings and advances several

¹ Because the district court dismissed rather than remanded the case, we are not barred from exercising jurisdiction over Mr. Johnson’s appeal. 28 U.S.C. § 1447(d) (“[A]n order *remanding* a case to the State court from which it was removed is not reviewable on appeal or otherwise”) (emphasis added).

theories of jurisdiction under Kansas law and the federal Constitution. But where a litigant does not properly invoke federal jurisdiction, we are without authority to consider the merits of his claim. The district court recognized this and properly dismissed Mr. Johnson's case. Because a plain reading of the removal statute compels this outcome, we affirm the court's judgment.

III. Conclusion

We affirm the district court's dismissal. Because the district court properly considered Mr. Johnson's action an attempt to remove a closed criminal case, the Prison Litigation Reform Act's filing-fee waiver does not apply. *See* 28 U.S.C. § 1915(b)(1). Accordingly, we also vacate our earlier order assessing partial payments and deny the *in forma pauperis* motion. Finally, we dismiss the appellant's remaining motions.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge