

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

**For the Seventh Circuit
Chicago, Illinois 60604**

Submitted March 21, 2025*

Decided March 25, 2025

Before

MICHAEL B. BRENNAN, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

NANCY L. MALDONADO, *Circuit Judge*

No. 23-1333

DALLAS MCINTOSH,
Plaintiff-Appellant,

v.

NICHOLAS GAILIUS, et al.,
Defendants-Appellees.

Appeal from the United States District
Court for the Southern District of
Illinois.

No. 16-CV-1018-SMY

Staci M. Yandle,
Judge.

ORDER

Dallas McIntosh, an Illinois prisoner, alleged that police officers, prosecutors, and the City of Fairview Heights, Illinois, deprived him of his constitutional rights by prosecuting and wrongfully convicting him in 2012. *See* 42 U.S.C. § 1983. The district court first dismissed the prosecutors based on absolute immunity. McIntosh then

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

moved to dismiss without prejudice his remaining claims, *see* FED. R. CIV. P. 41(a)(2), conceding that his conviction was intact and thus *Heck v. Humphrey*, 512 U.S. 477 (1994), barred his suit. The court granted his motion but dismissed the suit with prejudice. McIntosh appeals both dismissals. When a plaintiff moves for dismissal *without* prejudice, the court may not dismiss the action *with* prejudice unless the court first provides the plaintiff a reasonable opportunity to withdraw the motion. *See Carter v. City of Alton*, 922 F.3d 824, 826 (7th Cir. 2019). The court did not supply McIntosh with that opportunity, and its use of absolute immunity was overbroad. But because *Heck* bars the entire suit, we affirm the judgment and modify it to be without prejudice.

We liberally construe and accept as true McIntosh's factual allegations. *See Echols v. Craig*, 855 F.3d 807, 812 (7th Cir. 2017). In 2012, police stopped McIntosh while he was driving lawfully. He did not remember what happened immediately after the stop, but he woke up in the hospital after the police shot him. Prosecutors allegedly instructed police officers to fabricate reports accusing McIntosh of crimes, leading him to plead guilty to those crimes for which he received a 40-year sentence. He later attempted to withdraw his guilty plea, but he was unsuccessful at the state trial and appellate levels. *See People v. McIntosh*, 146 N.E.3d 813, 831 (Ill. App. Ct. 2020).

While his state case was pending, McIntosh filed this § 1983 suit in 2016 and litigated it over the next six years. As relevant to this appeal, the prosecutors moved to dismiss his third amended complaint, citing absolute prosecutorial immunity, *Heck*, and other defenses. The district court granted the prosecutors' motion, reasoning that they were immune from this suit. Later, McIntosh moved to dismiss his fifth amended complaint without prejudice, *see* FED. R. CIV. P. 41(a)(2), because he conceded that *Heck* barred his remaining claims. The defendants responded that dismissal was proper based on *Heck* but asked for dismissal with prejudice. The court granted McIntosh's motion but dismissed his suit with prejudice. It reasoned that McIntosh spent six years litigating against the defendants and his convictions were unlikely to be overturned.

On appeal, McIntosh first focuses on the prosecutors. He asserts that, to gather evidence, the prosecutors told the police to fabricate reports against him. Because this conduct involves investigative activities rather than prosecutorial duties, absolute immunity does not shield it. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 275–76 (1993). Nonetheless, we may affirm on any ground supported by the record. *See Bennett v. Spear*, 520 U.S. 154, 166 (1997). And the prosecutors on appeal contend that McIntosh's lone claim against them is *Heck*-barred. Under *Heck*, a plaintiff cannot litigate a claim that he was prosecuted maliciously unless and until he can demonstrate that the

conviction was invalidated. 512 U.S. at 484–87. McIntosh is still convicted of the crimes for which he claims the prosecutors told police to fabricate evidence; thus, he has not satisfied this essential requirement. McIntosh also does not contest that *Heck* bars his claims against the prosecutors: In his Rule 41(a)(2) motion in the district court, he conceded that his *entire* suit is *Heck*-barred; and on appeal, he does not retreat from this conclusion. But *Heck*-barred claims do not accrue until the underlying conviction is set aside. *Savory v. Cannon*, 947 F.3d 409, 417 (7th Cir. 2020) (en banc) (citation omitted). For that reason, on the alternative ground for affirmance that the prosecutors urge—*Heck*—the judgment dismissing those claims must be modified to be without prejudice. *See Johnson v. Rogers*, 944 F.3d 966, 968 (7th Cir. 2019).

We next turn to the dismissal of the remaining claims. McIntosh argues that the district court should have dismissed his *Heck*-barred, fifth amended complaint *without* prejudice, rather than *with* prejudice. We agree. Rule 41(a)(2) gives a district court discretion to dismiss an action at the plaintiff's request "on terms that the court considers proper." *See* FED. R. CIV. P. 41(a)(2). Even if a plaintiff requests a dismissal without prejudice, the court may dismiss with prejudice, but only if it gives the plaintiff "an opportunity to withdraw [his] voluntary dismissal motion." *See Carter*, 922 F.3d at 826 (citing *Babcock v. McDaniel*, 148 F.3d 797, 799 (7th Cir. 1998)). The court did not provide McIntosh that opportunity here. That was a procedural error.

We have considered whether this misstep was harmless, but we conclude that it was not. First, the district court reasoned that because, in its view, McIntosh was not likely to get his conviction vacated, dismissal ought to be prejudicial. But an intact conviction necessitates that a dismissal on *Heck* grounds be *without* prejudice. *See Johnson*, 944 F.3d at 968. Second, the court was concerned that this case had lasted for six years at a cost to the defendants. But the defendants never invoked a cost-based reason to dismiss the case with prejudice in their response to McIntosh's motion; they argued only (and incorrectly) that *Heck* itself warrants a prejudicial dismissal. Because McIntosh could withdraw his Rule 41(a)(2) motion to avoid a prejudicial dismissal, *see Carter*, 922 F.3d at 826, the only way that the defendants could obtain dismissal with prejudice based on litigation costs would be if they invoked some rule other than Rule 41(a)(2). But they never did so in the district court, and they do not do so now. Thus, the defendants have not presented us with an alternative ground to affirm the prejudicial dismissal.

We therefore AFFIRM the judgment and MODIFY it to be without prejudice.