

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-7144

JACKIE EDWARD MESSER,

Plaintiff - Appellant,

versus

PHILLIP KELLY; RICHARD L. VOORHEES; JERRY W.
MILLER; BILL HOGAN,

Defendants - Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Graham C. Mullen, District Judge. (CA-97-126-1-MU)

Submitted: October 21, 1997

Decided: November 17, 1997

Before MURNAGHAN and NIEMEYER, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed as modified by unpublished per curiam opinion.

Jackie Edward Messer, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant appeals from the district court's order dismissing his 42 U.S.C. § 1983 (1994) complaint. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm substantially on the reasoning of the district court. Messer v. Kelly, CA-97-126-1-MU (W.D.N.C. May 27, 1997). We note that Appellant's complaint should have been construed as an action under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The district court's denial of relief was nevertheless proper because the rationale in Heck v. Humphrey, 512 U.S. 477 (1994), applies in Bivens actions. See Abella v. Rubino, 63 F.3d 1063, 1065 (11th Cir. 1995); Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995). We modify the dismissal to be without prejudice to Appellant's ability to refile his claims if his conviction is overturned or called into question by the appropriate court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED AS MODIFIED