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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>DOUGLAS BURKEYBILE,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>ZACH YOUNG; et al.,</p> <p>Defendants - Appellees.</p>
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No. 10-17432

D.C. No. 3:10-cv-00187-LRH-
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MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted October 25, 2011**

Before: TROTT, GOULD, and RAWLINSON, Circuit Judges.

Douglas Burkeybile, a Nevada state prisoner, appeals pro se from the district court’s judgment dismissing his 42 U.S.C. § 1983 action challenging his criminal conviction and sentence. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

a claim, *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order), and we affirm in part, vacate in part, and remand.

The district court properly dismissed the action because Burkeybile's claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). *See Heck*, 512 U.S. at 487 (“[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.”). However, we vacate the judgment to the extent that the court dismissed the action with prejudice, and remand for entry of dismissal without prejudice. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (per curiam) (dismissals under *Heck* are without prejudice).

Burkeybile's remaining contentions are unpersuasive.

Burkeybile's “Motion to Request Calendaring,” filed on December 10, 2010, is denied as moot.

Burkeybile shall bear his own costs on appeal.

AFFIRMED in part, VACATED in part, and REMANDED.