IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

13-3049

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| **PERSON A,** | **)** | **Appeal from the** |
|  | **)** | **United States District Court** |
| Plaintiff-Appellant, | **)** | **for the Northern District of Indiana,** |
|  | **)** | **South Bend Division.** |
|  | **)** |  |
| v. | **)** |  |
|  | **)** | **No. 3:01CV0723AS** |
| **UNITED STATES OF AMERICA,** | **)** |  |
|  | **)** | **Honorable Joseph Smith,** |
| Defendant-Appellee. | **)** | **District Judge** |

BRIEF AND APPENDIX OF THE
DEFENDANT-APPELLEE UNITED STATES OF AMERICA

JOHN SMITH

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Jurisdictional Statement

The Jurisdictional Statement of the defendant-appellant is not complete and correct.

The appellant alleged in his “Notice of Tort Claim” that the district court had jurisdiction over the case pursuant to 28 U.S.C. § 1346(b). This Court has jurisdiction over the instant appeal solely pursuant to 28 U.S.C. § 1291.

The district court issued two memoranda and orders that disposed of appellant’s claims against the United States: theses memoranda and orders were issued on June 5, 2014 and July 19, 2014 respectively. As they relate to the issues being appealed, the June 5, 2014 order granted the motion to dismiss appellant’s Federal Tort Claims Act (hereinafter referred to a “FTCA”) claim and dismissed, without prejudice, plaintiff’s claim for the replacement of a stolen federal tax refund check. In its July 19, 2014 order, the district court denied appellant’s request for reconsideration of these determinations. Following the July 19, 2014 order, the clerk entered final judgment on July 22, 2014. Clarkson, on August 5, 2014, then filed his Notice of Appeal.

Statement of the Case

On December 13, 2013, Plaintiff Sharon Clarkson, proceeding pro se and in forma pauperis, filed his complaint in the form of his pleading entitled “Notice of Tort Claim.” Following that filing, District Court Judge Allen Sharp entered an order allowing plaintiff to proceed on the claim as outlined in his “Notice of Tort Claim,” directing the United States Marshal Service to serve same and ordering the United States to answer the notice.

Following service of process, in lieu of answering, the United States, through counsel, on April 9, 2014, moved to dismiss the case for lack of subject matter jurisdiction. As it related to plaintiff’s claim for a money judgment under the Federal Tort Claims Act, the United States asserted that plaintiff’s claim for damages because of his not receiving his 1998 tax return was barred by 28 U.S.C. § 2680(c). Because plaintiff was proceeding pro se, the United States, on April 10, 2014, provided plaintiff with a “Notice of Effect of Motion to Dismiss.”

On April 16, 2014 and April 17, 2014, plaintiff filed pleadings which in the first instance sought judgment on his claims (“Plaintiff’s Memorandum or Alternatively Motion for Summary Judgment”) and opposed the United States’ motion to dismiss (“Plaintiff’s Opposition to Defendant’s Motion to Dismiss”). Additionally, on April 24, 2014, plaintiff filed his motion to amend his “Notice of Tort Claim” to increase the amount of damages being sought and to include an exhibit that was not available at the time he commenced his suit.

The United States filed its combined response/opposition to plaintiff’s filings on May 15, 2014. Briefing on the United States’ motion to dismiss and/or plaintiff’s motion for summary judgment was completed on May 24, 2014, when plaintiff filed his reply memorandum.

On June 5, 2014, District Court Judge Allen Sharp issued his Memorandum and Order disposing of certain of plaintiff’s claims. In this order, the court found that “based upon the record at this point that Clarkson’s claim is not a claim for a refund but rather a claim for a replacement check.” With regard to a claim for a replacement check, the court determined that “this particular claim . . . be dismissed without prejudice to allow the Financial Management Service the opportunity to determine whether a replacement check should be issued before any claim can proceed against the United States based upon the failure to issue a replacement check.” Also, in this order, the District court dismissed plaintiff’s claims for money damages under the FTCA on its finding that any such claim “based upon the FTCA with respect to the payment of refunds is barred under Section 2680(c).” The Court determined that the viability of plaintiff’s claim for damages under the Taxpayer Bill of Rights Act could not be addressed under the United States’ jurisdictional motion.

On June 20, 2014, the United States filed its motion to dismiss plaintiff’s claim for damages under Taxpayer Bill of Rights Act. In his response to the United States’ motion, Clarkson “concede[d] that his claims lack merit,” and asked the Court to re-consider its rulings on his claim for a replacement check and for damages under the FTCA. Briefing on the United States’ motion to dismiss and plaintiff’s request for reconsideration was completed on July 8, 2014. Although Plaintiff’s “Statement of the Facts,” for the most part, merely expands on the foregoing “basic” facts, there is one area in which it is factually misleading. Plaintiff implies that the IRS, in its letter included in plaintiff’s Appendix as Exhibit 11, promised “that the appellant would receive a replacement check within six (6) weeks.” This letter, in fact, stated that ‘[y]ou will either receive a replacement check or a photocopy of the cashed refund check within 6 weeks.”

Statement of the Facts

The factual basis for Clarkson’s claims against the United States can be culled from the statements contained in the body of his Notice of Tort Claim, his Petition to Amend Notice of Tort Claim and the exhibits attached thereto. Although, as noted by the district court, “[p]laintiff’s characterization of his claims against the United States have varied somewhat throughout . . . [the] proceeding,” the factual basis for those claims are simply this: (a) plaintiff was entitled to a tax refund of $1,919.18 for the 1998 tax year; (b) a tax refund check was mailed to his “home” address; and (c) plaintiff did not receive this refund check because one of his relatives fraudulently cashed it; (d) after he found out about his relative’s crime, plaintiff contacted various Department of the Treasury components in an unsuccessful attempt to have this refund check re-issued.

Summary of Argument

In this appeal, plaintiff asks this Court to: (a) “ reverse and remand back to the district court; and (b) award . . . [him] damages sustained for the wrongful acts of the IRS by failing to re-issue . . . [him] a replacement check .” He argues, in his brief, that he is entitled to this relief because the district court erred: (a) when it ruled that the Federal Tort Claims Act (“FTCA”) did not provide it with subject matter jurisdiction over his claim for damages against the United States because federal employees allegedly failed to re-issue him a tax refund check; and (b) by not addressing the merits of his claim 31 U.S.C. § 3343 was violated.

As shown by his brief, plaintiff’s FTCA analysis has additional fatal jurisdictional flaws. Under the FTCA, the United States is liable only upon a showing that a federal employee breached a state law tort duty. Section 28 U.S.C. § 1346(b)(1) limits FTCA liability to “circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” Here, the plaintiff’s claim is not grounded upon a breach of state law, but instead is premised upon a supposed violation of a federal statute. Even if true, a breach of this federal statute cannot serve as a basis for FTCA liability.

Argument

# The District Court Correctly Found that it Lacked Subject Matter Jurisdiction over Plaintiff’s FTCA Claim for Damages Because that Claim was Barred by 28 U.S.C. § 2680(c)

## Standard of Review

This Court reviews de novo a district court’s ruling that it lacked subject matter jurisdiction. Transit Express, Inc. v. Ettinger, 246 F.3d 1018 (7th Cir. 2001).

## The District Court Lacked Subject Matter Jurisdiction over Plaintiff’s FTCA Claim Because of 28 U.S.C. § 2680(c) Which Bars Claims Arising Out of the Assessment or Collection of Tax

It is well settled that the United States, as a sovereign, is immune from suit unless it consents to be sued. USA v. Mitchell, 445 U.S. 535, 538 (1980). The FTCA is a limited waiver of the United States’ sovereign immunity. The FTCA allows the United States to be sued for money damages for causes of action sounding in tort arising out of the conduct of federal agencies or federal employees acting within the scope of their employment, but only “if a private person would be liable to the claimant in accordance with the law of the place where the act or admission occurred.” 28 U.S.C. § 1346(b).

## The District Court Did Not Abuse Its Discretion when It Dismissed Plaintiff’s Claim for a Replacement Treasury Check in Order to Allow the Secretary, in the First Instance, to Make the Statutorily Required Determinations

Given the district court’s determination that it lacked subject matter jurisdiction, that Court correctly did not reach the merits of plaintiff’s claim. In his brief, plaintiff seems to now argue that the district court could have awarded him damages because federal employees, in his view, violated the provisions of 31 U.S.C. § 3343. When plaintiff’s “merits” argument is critically examined, one sees that they are flawed.

In pertinent part, section 3343(b) of Title 31 provides that:

### The Secretary of the Treasury shall pay from the . . . [Check Forgery Insurance Fund] to a payee or special endorsee of a check drawn on the Treasury or a depositary designated by the Secretary the amount of the check without interest if in the determination of the Secretary the payee or special endorse establishes that--

### The payee or special endorsee has not participated in any part of the proceeds of the negotiation or payment.

Plaintiff argues that he met each of the forgoing three conditions and that IRS employees violated this act when they – without further ado – did not issue him a check. Plaintiff’s argument is flawed because he overlooks the express wording of the statute. Payment by the Secretary from 7, as shown by Exhibit 16 of Appellant’s Appendix, following the completion of the Secret Service investigation, plaintiff was notified by FMS that a replacement check was being issued to him in the amount of $1, 919.18. Appellant does not deny that he has received this replacement check. Given this fact that a replacement check has been provided to him, the instant appeal must be construed as an attempt by plaintiff to recover “additional” damages. This fund is dependent on the determinationthat a claimant had established certain specified facts. Clarkson’s belief that he met the section 3343(b) conditions is not a substitute for the Secretary’s determination.

Conclusion

Based upon the foregoing reasoning, the United States asks this Court to affirm the district court’s dismissal of plaintiff’s claims against the United States.

Dated: \_\_\_\_\_\_\_\_\_\_

Respectfully submitted,

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By:

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