

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEAN BRIGGS,

Petitioner,

ORDER

v.

03-C-278-C

DONALD W. GUDMANSON; PHIL KINGSTON;
PEGGY S. THRAN; DONNA L. BRUGGE;
LYN JENKINS; THERESA ANDERSON;
MICHAEL BAENEN; BRIAN MILLER;
STEPHEN PUCKETT; TIMIOOTHY McALLISTER;
JON E. LITSCHER; BONNIE UTECH, and
GLORIA THOMAS, sued in their individual capacities,

Respondents.

In an order dated June 26, 2003, I denied petitioner Dean Briggs leave to proceed in forma pauperis and dismissed his claim that respondents had extended his mandatory release date in violation of the Eighth and Fourteenth Amendments. I noted that when an individual challenges the length of his confinement, generally, he may not bring an action under 42 U.S.C. § 1983 unless the decision extending the sentence has been invalidated. See Heck v. Humphrey, 512 U.S. 477 (1994). Until that happens, the only remedy is a petition for a writ of habeas corpus under 28 U.S.C. § 2254. There was no indication in

petitioner's complaint that the decision to extend his mandatory release date had been overturned. However, I noted also that a writ of habeas corpus is available only to those who are still serving their sentence. Petitioner was released from prison in October 1999 and he did not state whether his term of parole has expired. (Petitioner has since been reincarcerated but, again, petitioner did not say whether this was a result of a parole violation or a new conviction.) In some cases, when habeas corpus is unavailable as a remedy, a party may pursue an action under § 1983, DeWalt v. Carter, 224 F.3d 607, 617 (2000) (citing Heck, 512 U.S. at 500 (Souter, J., concurring), and Spencer v. Kemna, 523 U.S. 1, 23 (1998) (Ginsburg, J., concurring), but this rule does not apply when the party was aware of the constitutional violation before his sentence ended but failed to file a petition for a writ of habeas corpus. Heck, 512 U.S. at 500 (Souter J., concurring). Because petitioner made clear in his complaint that he was aware of the alleged violation previously (according to petitioner, he had brought a state petition for a writ habeas corpus that was dismissed when he was released from prison), he could not proceed under § 1983 *even if* habeas corpus was no longer available to him.

In spite of these insurmountable barriers to petitioner's claim, I went on to address the merits, noting that because petitioner had been given a hearing before his mandatory release date was extended, his continued confinement did not violate due process. See Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445 (1985). In

addition, the Eighth Amendment does not prohibit extensions of a mandatory release date. If respondents miscalculated his release date in violation of state law, petitioner would have to raise that issue in state court and not in a federal court action under § 1983. Accordingly, I dismissed petitioner's claim as legally frivolous and recorded a strike against him pursuant to 28 U.S.C. § 1915(g).

Petitioner has filed a timely motion to alter or amend the judgement under Fed. R. Civ. P. 59. He has not addressed the holding that because he is challenging the length of his confinement, he must file a petition for a writ of habeas corpus rather than an action under § 1983. Instead, he makes additional arguments that respondents violated the Eighth and Fourteenth Amendments and state statutes and regulations. Nothing in his motion persuades me that I erred in concluding that his claims were frivolous.

If petitioner is still serving his sentence, he may file a *new* action *against his custodian*, petitioning for a writ of habeas corpus under § 2254. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (court may not convert § 1983 action into petition for writ of habeas corpus). However, before petitioner may do this, he must exhaust his remedies in state court, if has not already done so.

Because petitioner has filed a timely motion under Fed. R. Civ. P. 59, his motion suspended the time for filing a notice of appeal. Petitioner has 30 days from the date of this

order in which to file a notice of appeal.

ORDER

IT IS ORDERED that petitioner Dean Briggs's motion to amend or alter the judgment is DENIED.

Entered this 30th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge