

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

CLYDE BAILY WILLIAMS,

Petitioner,

v.

ROBERT REPISCHAK,

Respondent.

ORDER

03-C-740-C

In an order dated April 1, 2004, I dismissed this action brought under 42 U.S.C. § 1983 because petitioner's claim called into question the validity of his confinement, a matter that may be challenged only in a petition for a writ of habeas corpus. On April 6, 2004, petitioner filed a notice of appeal. Three days later, on April 9, 2004, petitioner filed a document titled "Letter-Brief Opposing Motion to Dismiss." For reasons unknown, the "Letter-Brief . . ." was processed separately from the notice of appeal and did not get forwarded to chambers until April 14, 2004. In the meantime, on April 12, 2004, I denied petitioner's request for leave to appeal in forma pauperis and certified that his appeal is not taken in good faith.

It is not at all clear what argument petitioner is attempting to make in his "letter-

brief,” but because he filed the document within 10 days of the date judgment was entered in the case, I construe it as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59.

A notice of appeal filed before the district court rules on a Rule 59(e) motion does not take effect until the motion is disposed of. Fed. R. App. P. 4(a)(94)(A)(iv), (B)(i). Until then the appeal is suspended. Florian v. Sequa Corporation, 294 F.3d 828 (7th Cir. 2002) (citing Otis v. City of Chicago, 29 F.3d 1159, 1166 (7th Cir. 1994) (en banc)). Therefore, when I ruled on petitioner’s request for leave to proceed in forma pauperis on appeal, the matter was not ripe for consideration. Nevertheless, the outcome will remain the same.

Petitioner’s Rule 59 motion is loaded with legal phrases and citations that bear no relation to his case. Petitioner speaks of “judicially imposed exhaustion,” but his case was not dismissed for his failure to exhaust. It was dismissed because his claim can only be raised in a habeas corpus action, which has a statutory exhaustion requirement. Also, he appears to be making some kind of argument about judicial immunity, but he did not sue a judge and this issue is unrelated to his underlying complaint and the ground on which the case was dismissed. Finally, he speaks of the “ex post facto” clause, apparently attempting to advance another reason why he believes his sentence is illegal. However, this claim, like his earlier claim challenge the validity of his custody, is not cognizable in a § 1983 action.

Because nothing in petitioner’s Rule 59 motion convinces me that I erred in

dismissing his case, the motion will be denied.

With the denial of the Rule 59 motion, the appeal is in effect. For the reasons stated in this court's order of April 9, 2004, I will reiterate that petitioner is denied leave to proceed in forma pauperis on appeal and certify that the appeal is not taken in good faith.

ORDER

IT IS ORDERED that

1. Petitioner's motion pursuant to Fed. R. Civ. P. 59 to alter or amend the judgment is DENIED.

2. For the reasons stated in this court's order of April 9, 2004, petitioner is denied leave to proceed in forma pauperis on appeal and I certify that his appeal is not taken in good faith.

Entered this 15th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge