

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

On April 2, 2004, judgment was entered dismissing this case on the finding that petitioner could not bring a civil action pursuant to 42 U.S.C. § 1983 on his claim that respondent subjected him to vindictive prosecution because he would not enter a plea of guilty to separate charges. In reaching this conclusion, I found that because petitioner is presently serving two consecutive sentences of 30 years' imprisonment as a result of the alleged malicious prosecution, his § 1983 action could not be resolved without inquiring into the validity of his confinement. Challenges that affect the validity of confinement must be brought in habeas corpus pursuant to 28 U.S.C. § 2254. Now petitioner has filed a notice of appeal. The notice is not accompanied by the \$255 fee required for filing an appeal. Therefore, I construe petitioner's notice of appeal to include a motion for leave to proceed

on appeal in forma pauperis.

In determining whether petitioner may appeal in forma pauperis, I must consider whether he has three strikes under 28 U.S.C. § 1915(g) and, if not, whether he is indigent and whether his appeal is taken in good faith. Petitioner does not have three strikes and I am aware from the trust fund account statement he submitted approximately four months ago that he is indigent. Nevertheless, petitioner cannot proceed in forma pauperis on appeal because I must certify that his appeal is not taken in good faith.

I presume petitioner intends to raise on appeal the claims he raised in his complaint. The Court of Appeals for the Seventh Circuit has instructed district courts to find bad faith where a petitioner is appealing the same claims the district court found to be without legal merit in his complaint. Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000). Because petitioner is attempting to raise on appeal the same legally meritless claim he raised in his complaint in this court, I must certify his appeal as not being taken in good faith.

Because I am certifying petitioner's appeal as not having been taken in good faith, petitioner cannot proceed with his appeal without prepaying the \$255 filing fee unless the court of appeals gives him permission to do so. Pursuant to Fed. R. App. P. 24, petitioner has 30 days from the date of this order in which to ask the court of appeals to review this court's denial of leave to proceed in forma pauperis on appeal. His motion must be accompanied by an affidavit as described in the first paragraph of Fed. R. App. P. 24(a) and

a copy of this order. Petitioner should be aware that if the court of appeals agrees with this court that the appeal is not taken in good faith, it will send him an order requiring him to pay all of the filing fee by a set deadline. If petitioner fails to pay the fee within the deadline set, the court of appeals ordinarily will dismiss the appeal and order this court to arrange for collection of the fee from petitioner's prison account.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on appeal is DENIED. I certify that petitioner's appeal is not taken in good faith.

Entered this 9th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge