

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

ROBERT LEE JORDAN,

Petitioner,

OPINION and ORDER

v.

06-C-607-C

ROBERT FLANCHER, D.A.;
PEG LAUTENSCHLANGER, Att. Gen.; and
MATTHEW FRANKS, Secretary, Corr.,

Respondents.

On November 3, 2006, petitioner Robert Lee Jordan, an inmate at the Stanley Correctional Institution in Stanley, Wisconsin, filed a pleading alleging that respondents Robert Flancher, Peg Lautenschlager and Matthew Frank violated his constitutional rights by refusing to compensate him for time he spent wrongly convicted from 1965-1974. Initially, petitioner requested relief in the form of both money damages and early release from prison.

In an order dated October 26, 2006, I asked petitioner to specify whether he wished to file his lawsuit as a petition for a writ of habeas corpus under, or as a suit for money damages under 42 U.S.C. § 1983. In response, petitioner has indicated that he wishes to

proceed under § 1983, and seek money damages only for the alleged past violation of his constitutional rights. He has paid the initial partial payment of the filing fee required under 28 U.S.C. §1915(b).

In this order, I will screen his complaint as required under 28 U.S.C. § 1915(e)(2), to determine whether the claim he raises is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a defendant who is immune from such relief. Because petitioner has pleaded facts making it clear that the statute of limitations has run on his due process claim, he will be denied leave to proceed in forma pauperis.

I draw the following allegations from petitioner's complaint.

ALLEGATIONS OF FACT

A. Parties

Petitioner Robert Jordan is a prisoner confined at the Stanley Correctional Institution in Stanley, Wisconsin.

Respondent Robert Flancher is the District Attorney of Racine County, Wisconsin.

Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections.

Respondent Peg Lautenschlager is Attorney General of the state of Wisconsin.

B. Wrongful Conviction

In 1965, when petitioner was 16 years old, he was charged with burglary and attempted robbery. Although he was innocent, under pressure from his mother and from law enforcement officers, petitioner pleaded guilty to both offenses. At sentencing, the judge departed from the district attorney's recommendation of a noncustodial sentence and sentenced petitioner to three years' imprisonment.

Petitioner was angry and frightened while in prison, and upon release was unable to comply with the law. He was arrested for parole violations and spent nine years in prison as a result of his failure to comply with the conditions of his parole.

Later, petitioner paid a lawyer to help him expunge his conviction. On July 3, 1974, the conviction was expunged. Sometime thereafter, petitioner received a letter from the state informing him that he would be compensated for his wrongful conviction. Petitioner lost the letter.

Sometime in the mid-1990s, petitioner wrote to the State Claims Board, requesting compensation. He was told that there was no record of any previous claim by him. In 2004, petitioner obtained a copy of his expungement order and filed another request with the claims board for \$25,000 compensation. In June 2006, the State of Wisconsin Claims Board advised petitioner that he would have to submit clear and convincing evidence of his innocence. Also, it advised petitioner that there was no record of his having filed an earlier

claim for compensation. Petitioner does not indicate whether he has received any further response to his request for compensation from the claims board.

In his lawsuit, petitioner seeks \$2 million in compensatory damages from respondents.

DISCUSSION

Under 42 U.S.C. § 1983, a person may bring suit against any state actor who violates his rights under the Constitution or under federal law. In this case, petitioner has sued three state officials, a district attorney, the state attorney general and the secretary of the Wisconsin Department of Corrections, seeking money damages for time he spent incarcerated for an offense that was later expunged from his criminal record.

Several problems are immediately apparent. First, a defendant can be held liable under §1983 only if he has been personally involved in the alleged violation of a plaintiff's constitutional rights. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). It is difficult to see how the current attorney general and secretary of the Wisconsin Department of Corrections could have been personally involved in the events petitioner recounts, which occurred more than thirty years ago.

Second, it is not clear which of petitioner's rights respondents are alleged to have violated. Although petitioner alleges that he is innocent of the crimes to which he pleaded guilty in 1964, he does not assert that respondents coerced him into pleading (although he suggest his mother may have done so), or otherwise violated any of his constitutional rights. The Constitution affords people many rights, including the right to due process. However, there is no constitutional right not to be convicted wrongly. Therefore, even if petitioner had named proper defendants, it is difficult to see how his claim is one that arises under §1983.

Finally, the dispositive problem with petitioner's claim is that is untimely. Although § 1983 has no statute of limitations itself, courts have held that actions for damages under § 1983 are governed by analogous state statutes of limitations. Gonzalez v. Entress, 133 F.3d 551, 554 (7th Cir. 1998). Under Wisconsin law, which governs this case, the statute of limitations for a § 1983 claim is six years. Gray v. Lacke, 885 F.2d 399, 407-09 (7th Cir. 1989). Actions begin to accrue under § 1983 at the time a plaintiff becomes aware of his injury and of its probable cause. United States v. Kubrick, 444 U.S. 111, 122 (1979). Although a statute of limitations is an affirmative defense that a plaintiff need not "anticipate or plead around" in his complaint, Leavell v. Kieffer, 189 F.3d 492, 494 (7th Cir. 1999), a litigant may plead himself out of court if he alleges facts that conclusively demonstrate that his claim is time-barred, Kauthar SDN BHD v. Sternberg, 149 F.3d 659,

670 n.14 (7th Cir. 1998).

In his complaint, petitioner alleges that he was convicted in 1964. Later, he hired a lawyer, who succeeded in expunging the conviction on July 3, 1974. From these facts, it is reasonable to infer that petitioner was aware of his wrongful conviction at the time it was expunged, if not earlier. Consequently, any claim under § 1983 would have to have been filed by July 3, 1980. Because it is clear that petitioner's claim has missed the statute of limitations by more than twenty-five years, his request for leave to proceed in forma pauperis in this action must be denied.

ORDER

IT IS ORDERED that

1. Petitioner Robert Lee Jordan's request for leave to proceed in forma pauperis is DENIED.

2. The unpaid balance of petitioner's filing fee is \$345.99; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted" Because the court did not dismiss petitioner's case for one of the reasons enumerated in § 1915(g), a strike will not be recorded against him under § 1915(g).

4. The clerk of court is directed to close the file.

Entered this 27th day of November, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge