

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

THOMAS W. ZACH,

Plaintiff,

v.

BRENDA STACEY, Probation Officer,
Wisconsin Department of Corrections,
Div. of Community Corrections; and
LEANN MOBERLY, Probation Supervisor,
Wisconsin Department of Corrections,
Div. of Community Corrections,

Defendants.

ORDER

07-C-426-C

In an order entered on October 24, 2007, I denied petitioner's request for leave to proceed in forma pauperis in this proposed civil action brought under 42 U.S.C. § 1983. I dismissed the case on the alternative grounds. First, I ruled that petitioner's claim that he had been illegally incarcerated was barred by Heck v. Humphrey, 512 U.S. 477 (1994). Second, I found legally meritless petitioner's claim that he had been denied due process when he did not receive a preliminary hearing before his probation was revoked, because petitioner pleaded in his complaint that he signed a statement admitting to having violated

at least one condition of his probation and, therefore, was not entitled to a preliminary hearing. Now petitioner has filed a notice of appeal and a request for leave to proceed in forma pauperis on appeal.

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. However, I cannot tell whether he is indigent. He paid the \$350 fee for filing his complaint and has not submitted a trust fund account statement for the six-month period immediately preceding the filing of his appeal as 28 U.S.C. § 1915(a)(2) requires. 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 claims 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 \$455 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 30th day of November, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge