

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

ALAN DAVID McCORMACK,

Plaintiff,

v.

OPINION AND ORDER

12-cv-558-bbc

KENNETH L. KUTZ, WILLIAM NORINE,
BURNETTE COUNTY OFFICE OF THE
DISTRICT ATTORNEY, WILLIAM A. DINGMANN,
ROBERT KELLBERG, DONALD L. TAYLOR,
BURNETT COUNTY SHERIFF'S DEPARTMENT,
UNKNOWN JOHN DOE BURNETT COUNTY
PUBLIC OFFICERS AND EMPLOYEES,
BURNETT COUNTY CIRCUIT COURT,

Defendants.

In an order entered on November 13, 2012, the court dismissed plaintiff's complaint without prejudice because his claims were barred by Heck v. Humphrey, 512 U.S. 477 (1994). Dkt. #10. Judgment was entered on November 16, 2012. Dkt. #12. In an order entered February 1, 2013, the court denied plaintiff's motions for reconsideration, to amend the judgment and to amend the complaint. Dkt. #30. On February 20, 2013, plaintiff filed a motion for an extension of time to file a Rule 59(e) motion to amend the judgment, dkt. #32, and a second motion to alter or amend the judgment. Dkt. #34.

Parties have 28 days to file a motion to amend a judgment under Fed. R. Civ. P. 59(e), and district courts do not have the power to extend the time for filing such motions.

Fed. R. Civ. P. 6(b)(2) (“A court must not extend the time to act under [Rule] 59(b), (d), and (e).”). Plaintiff had until December 11, 2012 to file his motion under Rule 59(e). Because his motion was untimely, I must treat it as a motion for relief from the judgment under Rule 60(b). Russell v. Delco Remy, 51 F.3d 746, 749 (7th Cir. 1995).

In his motion, plaintiff argues that the following claims were implicit in his complaint and not barred by Heck: (1) a due process claim challenging the state’s denial of his post conviction motions for DNA testing under § 1983, Skinner v. Switzer, 131 S. Ct. 1289 (2011); (2) a claim seeking a copy of the reporter’s trial notes from his criminal trial so he can determine whether the transcript was forged; (3) a class of one equal protection claim against the county for denying his many petitions and public records requests, see Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591 (2008). However, Rule 60(b) is an extraordinary remedy “designed to address mistakes attributable to special circumstances and not merely to erroneous applications of law.” Eskridge v. Cook County, 577 F.3d 806, 808-09 (7th Cir. 2009). Plaintiff had a chance to raise these new legal theories in a timely Rule 59(e) motion. “A legal error by the district court is not one of the specified grounds for a [Rule 60(b)] motion. In fact it is a forbidden ground.” Marques v. Federal Reserve Bank of Chicago, 286 F.3d 1014, 1017-18 (7th Cir. 2002).

In any case, plaintiff’s new legal theories lack merit. First, plaintiff did not allege in his complaint that he was seeking to challenge Wisconsin’s statutory scheme for post conviction DNA testing, Wis. Stat. § 974.07, or the judicial decisions denying his motions for post conviction DNA testing. District Attorney’s Office for Third Judicial Dist. v.

Osborne, 557 U.S. 52, 69 (2009) (holding that state procedures for post conviction DNA testing violate due process “only if they are fundamentally inadequate to vindicate the substantive rights provided”). In neither his complaint nor his current motion does he describe any procedural defects in Wisconsin’s statutory scheme or the judicial decisions in his case. Instead, plaintiff focuses on defendants’ failure to turn over physical evidence during the trial and in response to his motions for a new trial.

Second, plaintiff does not have an independent federal claim to receive the reporter’s trial notes from his criminal trial. His only federal cause of action related to the transcript is that defendants violated his right to due process on appeal by forging the trial transcript, but that claim is barred by Heck. Last, plaintiff’s new “class of one” theory is simply a way of rephrasing his due process claims that are barred by Heck. Therefore, I will deny plaintiff’s motion for relief from the judgment.

ORDER

IT IS ORDERED that plaintiff Alan David McCormack’s motion for an extension of time, dkt. #32, and his motion to alter or amend the judgement, dkt. #34, are DENIED.

Entered this 7th day of March, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge