IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ALAN DAVID McCORMACK,

OPINION AND ORDER

Plaintiff,

12-cv-558-bbc

v.

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 this proposed complaint for injunctive relief and monetary damages under 42 U.S.C. § 1983, pro se plaintiff Alan David McCormack contends that defendants violated his constitutional rights by withholding evidence during his criminal trial and post conviction hearings and forging portions of the court transcript from his criminal trial. Plaintiff has also filed a motion for appointment of counsel, dkt. #2; a motion to join this case with Case No. 12-cv-438-bbc, dkt. #3; and a motion to substitute defendants, dkt. #9.

Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has paid his initial partial filing fee. Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his proposed complaint and dismiss any portion that

is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Having reviewed the complaint, I conclude that it must be dismissed because plaintiff's claims are barred by Heck v. Humphrey, 512 U.S. 477 (1994). I will deny the motions for appointment of counsel, for joinder and for substitution of parties as moot.

ALLEGATIONS OF FACT

Plaintiff Alan David McCormack is a prisoner at the Fox Lake Correctional Institution, located in Fox Lake, Wisconsin. Defendant Kenneth Kutz was the Burnett County district attorney, and defendant William Norine is his successor. Defendant William Dingmann was an "inspector-detective" with the Burnett County District Attorney's Office and Sheriff's Department. Defendant Donald Taylor was sheriff of Burnett County and defendant Robert Kellberg was an "undersheriff."

In 1987, plaintiff was charged with first-degree murder. State v. McCormack, Burnett County Case No. 87-cr-112. In December 1987 and April of 1988, plaintiff filed motions in the circuit court seeking disclosure of physical evidence. On January 11, 1990, the circuit court issued an order directing the state to produce all physical evidence collected during its investigation of plaintiff's case. Defendant Kutz, then the district attorney, never disclosed or allowed plaintiff to inspect (1) physical evidence collected from the crime scene; (2) the

evidence officer's physical evidence inventory from the crime scene; or (3) various types of documentary evidence, including photographs of the crime scene.

Ultimately, plaintiff was convicted. After the trial, someone "tampered" with the trial transcript. Various pages of the transcript have different fonts and margins, from which plaintiff concludes that "1 out of every 13 pages are forgeries." In addition, "major portions [were] omitted, [including] the Opening Statements and Closing Arguments." (This allegation that the missing portions show tampering is frivolous, because plaintiff argued on his direct appeal that the opening and closings were never recorded, which he argued showed evidence of ineffective assistance of counsel. State v. McCormack, 196 Wis. 2d 646, 539 N.W.2d 336 (Ct. App. 1995).) Plaintiff alerted the court and defendant Norine that the transcript had been tampered with by filing a motion for post conviction relief and a John Doe complaint, which were served on April 29, 2010. Norine has not responded or investigated.

In May 1991, the court issued subpoenas to defendants Dingmann, Kellberg and Taylor, directing them to bring specific items to court during a post conviction hearing. Defendants produced photographs taken at the scene of the crime, which showed physical evidence collected by the state but never produced.

In 2001, "two individuals" tried to come forward to testify about their involvement in the murder in 2001. They disclosed material evidence that "directly acquits" plaintiff of the crime and "exposes the extent of the prosecutorial misconduct."

In 2005, plaintiff filed a motion for production of evidence and for DNA testing with

the "court of record." Defendant Kutz responded, saying he would provide whatever evidence McCormack was requesting once a court granted the motion. Kutz's letter implies that the evidence from the case was still in defendant's control. When plaintiff filed an open records request four years later, the new Burnett County Sheriff, Dean Roland, responded that despite extensive searching he could not find anything on the case and "suggested basically that everything may have been destroyed." Plaintiff was never notified that these items were going to be destroyed.

In his complaint, plaintiff seeks monetary damages for loss of liberty; monetary fines for contempt of the court orders; and injunctions ordering defendants to produce any collected physical evidence, the files maintained by investigators and district attorneys for his case and the court reporters' original trial notes.

OPINION

Plaintiff argues that defendants violated his right to due process under the Fourteenth Amendment when (1) Kutz and other prosecutors and sheriff's officers withheld exculpatory evidence and later destroyed that evidence and (2) someone falsified portions of the transcript from his criminal trial, depriving him of a meaningful appeal. These constitutional claims are barred by Heck v. Humphrey, 512 U.S. 477 (1994), which holds that prisoners cannot use 42 U.S.C. § 1983 to challenge their convictions. In Heck, a prisoner brought a claim for money damages under § 1983, alleging that prosecutors and an investigator "'knowingly destroyed' evidence 'which was exculpatory in nature and could have proved

[petitioner's] innocence.'" Heck, 512 U.S. at 479. The Supreme Court held that the petitioner's claim necessarily implied that his sentence was invalid, so it could not be brought under § 1983 until his "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." Heck, 512 U.S. at 487.

If plaintiff were to prevail on his claims that prosecutors withheld exculpatory evidence or falsified the trial transcript, it would necessarily imply that his sentence was invalid. Skinner v. Switzer, 131 S. Ct. 1289, 1300 (2011) (Brady claims for withholding exculpatory evidence are "ranked within the traditional core of habeas corpus and outside the province of § 1983"); Nance v. Vieregge, 147 F.3d 589 (7th Cir.1998) (Heck barred inmate's claim that deprivation of access to the courts undermined inmate's ability to appeal his criminal conviction). It does not matter that plaintiff seeks money damages and an injunction ordering the production of evidence rather than a new trial. Even if a prisoner is not asking to overturn his conviction, a suit under § 1983 is not an option if success on the prisoner's claim would necessarily *imply* that his sentence is invalid.

In this case, plaintiff has already filed a habeas petition that was denied, McCormack v. Borgen, Case No. 04-cv-1095 (E.D. Wis.), as well as various post conviction motions in state court raising issues similar to those raised in this case. E.g., State v. McCormack, 2004 WI App 1, 268 Wis. 2d 844, 673 N.W.2d 411. Plaintiff is not entitled to bring an action under § 1983 simply because his other attempts to challenge his sentence have failed.

Plaintiff also argues that defendants should be found in contempt of court for violating numerous state court orders and various ethical rules adopted by the Wisconsin Supreme Court. However, a federal district court does not have a general power to enforce state court orders or rules. E.g., In re Campbell, 264 F.3d 730, 731 (7th Cir. 2001) (federal district court did not have jurisdiction over plaintiff's claim for writ of mandamus directing state court to release transcripts). Plaintiff's claim to enforce the state court orders and ethical rules must be dismissed for lack of jurisdiction.

Because I am dismissing plaintiff's § 1983 claims for failure to state a claim, I will deny his motions for appointment of counsel, for joinder and for substitution of parties as moot.

ORDER

IT IS ORDERED that

1. Plaintiff Alan David McCormack's complaint is DISMISSED without prejudice.

2. Plaintiff's motion for appointment of counsel, dkt. #2, is DENIED as moot.

3. Plaintiff's motion for joinder, dkt. #3, is DENIED as moot.

4. Plaintiff's motion to substitute a party, dkt. #9, is DENIED as moot.

5. A strike will be recorded in accordance with 28 U.S.C. § 1915(g).

6. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v.

DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

7. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 9th day of November, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge