

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

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DEAN M. ALLEN,

Plaintiff,

OPINION AND ORDER

v.

12-cv-154-wmc

RICHARD S. BROWN, PAUL LUNDSTEN,  
PAUL B. HIGGINBOTHAM, MARGARET J.  
VERGERONT, GARY E. SHERMAN, BRIAN  
BLANCHARD and JAMES M. FREIMUTH,

Defendants.

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Plaintiff Dean M. Allen brings this action pursuant to 42 U.S.C. § 1983 against several judges serving on the Wisconsin Court of Appeals and the Assistant Attorney General who represented the State of Wisconsin in connection with Allen's state court criminal proceeding. Allen requests leave to proceed *in forma pauperis* and he has paid an initial partial filing fee in compliance with 28 U.S.C. § 1915(b)(1).

Because Allen is incarcerated, the court is required by the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915A(b), to determine at the outset whether his proposed complaint is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. After reviewing the pleadings as required, the court concludes that the complaint must be dismissed because it does not state a claim on which relief can be granted under 42 U.S.C. § 1983.

## ALLEGATIONS OF FACT

In addressing any *pro se* litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court accepts plaintiff's well-pleaded allegations as true and assumes the following probative facts.<sup>1</sup>

Allen is currently incarcerated in the Wisconsin Department of Corrections at the Stanley Correctional Institution as the result of his conviction in Marathon County Case No. 90CF628. In September 1991, a jury found Allen guilty of first-degree intentional homicide, which carries a mandatory life sentence. The Circuit Court for Marathon County initially delayed sentencing until the Wisconsin Supreme Court issued a decision in *State v. Borrell*, 167 Wis.2d 749, 482 N.W.2d 883 (April 27, 1992), regarding the discretion to set parole eligibility for offenders sentenced to life under Wis. Stat. § 973.014(2). After the *Borrell* decision was handed down, the circuit court sentenced Allen, in early May 1992, to life imprisonment without eligibility for parole until 2025.

On direct appeal, Allen argued that the ten-month delay between the jury's guilty verdict and the circuit court's pronouncement of his sentence violated his right to a speedy trial. The Wisconsin Court of Appeals rejected that argument and affirmed the

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<sup>1</sup> The court has supplemented the alleged facts with available dates and procedural information about plaintiff's underlying criminal case from the electronic docket posted at Wisconsin Circuit Court Access, <http://wcca.wicourts.gov> (last visited May 14, 2013). The court draws all other facts from the complaint and any attached exhibits, which are deemed part of that pleading. *See* FED. R. CIV. P. 10(c); *see also* *Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) (explaining that documents attached to the complaint become part of the pleading, meaning that a court may consider those documents to determine whether plaintiff has stated a valid claim).

conviction. *See State v. Allen*, 179 Wis.2d 67, 505 N.W.2d 801 (Wis. Ct. App. 1993). The Wisconsin Supreme Court subsequently denied Allen's petition for review from that decision.

Following these direct appeals, Allen filed a motion for post-conviction relief back in state circuit court pursuant to Wis. Stat. § 974.06, arguing that he was denied effective assistance of counsel because his defense attorney failed to raise an equal protection challenge to his sentence. Specifically, Allen argued that by delaying sentencing until after the *Borrell* decision, and then relying on *Borrell* to set a parole eligibility date of 2025, the circuit court violated his right to have his parole eligibility determined in the same manner as other offenders who were sentenced pre-*Borrell*. The circuit court denied Allen's post-conviction motion and the Wisconsin Court of Appeals affirmed. *See State v. Allen*, 2004AP2763 (Wis. Ct. App. Oct. 7, 2005). In doing so, the Court of Appeals concluded that Allen's equal protection argument was without merit because the delay in sentencing was rationally related to a legitimate interest in correctly applying the law. *Id.* The Court of Appeals also denied his motion for reconsideration, the Wisconsin Supreme Court refused his petition for review, and the United States Supreme Court denied his petition for a writ of certiorari. *See Allen v. Wisconsin*, 549 U.S. 852 (2006).

In the pending civil rights complaint, Allen now argues that defendants Richard S. Brown, Paul J. Lundsten, Paul B. Higginbotham, Margaret Vergeront, Gary E. Sherman and Brian Blanchard violated his constitutional right to due process of law while serving as judges on the Wisconsin Court of Appeals. In particular, Allen appears to allege that

these defendants “conspired” with each other and Assistant Attorney General James Freimuth to rule in favor of the State of Wisconsin and against him in his criminal case. Allen seeks declaratory relief regarding the constitutional violations in his case and he asks this court to intervene on his behalf pursuant to *Ex parte Young*, 209 U.S. 123 (1908).

#### OPINION

Liberally construed, Allen contends that he has been imprisoned without the possibility of parole until 2025 in violation of his constitutional rights to equal protection and due process of the laws as a result of the Wisconsin Court of Appeals erroneously affirming his sentence on direct appeal and denying his post-conviction motion for relief pursuant to Wis. Stat. § 974.06. Even assuming that Allen’s allegations are true, he cannot prevail on a civil rights claim under 42 U.S.C. § 1983.

To prevail in a civil rights action stemming from a prisoner’s “unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid,” the plaintiff must prove “that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determinations, or called into question by a federal court’s issuance of a writ of habeas corpus [under] 28 U.S.C. § 2254.” *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). If a judgment in favor of the plaintiff under 42 U.S.C. § 1983 would “necessarily imply the invalidity of his conviction or sentence,” then the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been so invalidated. *Id.*

Here, Allen's allegations would, if true, necessarily implicate the validity of his sentence in Marathon County Case No. 90CF628. Moreover, Allen's own pleading acknowledges that his conviction has not been invalidated or set aside by an authorized state tribunal or by a federal habeas corpus proceeding under 28 U.S.C. § 2254.<sup>2</sup> Absent a showing that his sentence has been invalidated or set aside, therefore, the rule in *Heck* precludes a claim for damages or declaratory relief under 42 U.S.C. § 1983.

In an attempt to avoid a dismissal of his complaint under *Heck*, Allen relies primarily on *Ex parte Young*, 209 U.S. 123 (1908), which held that, when absolutely necessary for protection of constitutional rights, federal courts have the power to enjoin state officers from instituting criminal actions. The holding in *Young* does not assist Allen, however, because a federal court cannot interfere in an ongoing state court criminal proceeding. *See Younger v. Harris*, 401 U.S. 37, 45-46 (1971). Instead, the rule in *Heck* otherwise bars a civil action in which the plaintiff is claiming that he has been deprived of due process of law or otherwise deprived of his federal civil rights during the course of a state court prosecution that has resulted in a conviction. 512 U.S. 477, 486-87 (1994). Accordingly, his complaint must be dismissed pursuant to 28 U.S.C. § 1915A(b).

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<sup>2</sup> Allen concedes further that federal habeas corpus review of his claims is now foreclosed by the governing one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1)(A).

ORDER

IT IS ORDERED that:

1. Plaintiff Dean M. Allen's motion for leave to proceed is DENIED, and the complaint is DISMISSED for failure to state a claim upon which relief can be granted pursuant to 28 U.S.C. § 1915A(b).
2. A strike will be assessed for purposes of 28 U.S.C. § 1915g.
3. Plaintiff Dean M. Allen is obligated to pay the unpaid balance of his filing fee in monthly installments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the state prison where plaintiff is in custody, advising the warden of his obligation to deduct payments from plaintiff's inmate trust fund account until the filing fee has been paid in full.

Entered this 29th day of May, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge