

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

CLYDE BAILY WILLIAMS,

Petitioner,

v.

MARGARET A. MARONEY,

Respondent.

ORDER

03-C-0549-C

On October 21, 2003, I denied petitioner's request for leave to proceed in forma pauperis in this action on the ground that his claim was legally frivolous. Later, petitioner filed a motion to alter or amend the judgment of dismissal pursuant to Fed. R. Civ. P. 59. That motion was denied in an order dated November 5, 2003. Now petitioner has filed a notice of appeal. Because the appeal is not accompanied by the \$255 fee for filing an appeal, I construe petitioner's notice to include a request for leave to proceed in forma pauperis on appeal.

In determining whether petitioner may appeal in forma pauperis, I first 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. Plaintiff does not have three strikes under §

1915(g).

Petitioner has not submitted an updated trust fund account statement as 28 U.S.C. § 1915(a) requires, so I cannot make a definitive ruling on his financial status. However, even if petitioner meets the requirements for pauper status, he will not be permitted to proceed on appeal in forma pauperis because I must certify that his appeal is not taken in good faith. Petitioner's complaint is devoid of any allegation that can be construed even liberally to suggest that his public defender, the respondent in this action, violated the ex post facto clause by successfully moving to remit portions of petitioner's sentence. Moreover, neither in his Rule 59 motion nor in a statement in support of his appeal does petitioner make any sensible argument why this court erred in finding his lawsuit against his public defender to be legally frivolous.

Because petitioner's appeal is certified as not having been taken in good faith, petitioner owes the \$255 fee for filing his notice of appeal immediately. If he does not have \$255 in his prison account, then prison officials must calculate monthly payments according to the formula set out in 28 U.S.C. § 1915(b)(2) and forward those payments to the court until the debt is satisfied. If petitioner has enough money in his regular and release accounts to pay the full \$255, it must be sent promptly to the clerk of court in one payment. Petitioner may delay payment of the fee, whether in payments because of insufficient funds or in full only if, within thirty days of the date he receives this order, he challenges in the

court of appeals this court's certification that his appeal is not taken in good faith. In that instance, the court of appeals may decide that the certification is improper, in which case the matter will be remanded to this court for collection of an initial partial payment of the fee before the court of appeals will decide whether petitioner's appeal is legally frivolous. If the court of appeals determines that this court was correct in finding that the appeal is not taken in good faith, then the payment will once again be due in full immediately. Whatever the scenario, petitioner is responsible for insuring that the required sum is sent to the court at the appropriate time. If he fails to pay for any reason other than total lack of money, he will be giving up his right to file future suits in forma pauperis. See Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996). Petitioner is reminded that if he challenges this court's finding of bad faith in the court of appeals and loses, he may be assessed a strike by the court of appeals if his appeal is found to be legally frivolous.

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.

If petitioner intends to challenge this court's certification that his appeal is not taken in good faith, he has 30 days from the date he receives this order in which to file with the court of appeals a motion for leave to proceed in forma pauperis on appeal. His motion

must be accompanied by a copy of the affidavit prescribed in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order.

Entered this 4th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge