

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

GERALD SANDERS,

Plaintiff,

v.

STATE OF INDIANA,
ATTORNEY GENERAL,
FORT WAYNE INDIANA POLICE DEPARTMENT and
IND. STATES ATTORNEY,

Defendants.

ORDER

03-C-689-C

Petitioner Gerald Sanders, a resident of Madison, Wisconsin, seeks leave to proceed in forma pauperis in this civil action for monetary relief. From the affidavit of indigency, I am satisfied that petitioner qualifies financially for indigent status. In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, the court may not grant leave to proceed if the action is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

Petitioner's claims are legally frivolous and will be dismissed. In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

In April 1976, Travis Sanders, petitioner's brother, was murdered. The State of Indiana and the Fort Wayne Police Department were involved in covering up the murder.

While petitioner was recovering from a gun shot wound in the hospital, the 37th Circuit Court of Indiana sentenced petitioner to 65 years in prison for attempted murder and battery.

The State of Indiana charged petitioner for attempted rape of his mother and siblings. He should have been charged with incest.

DISCUSSION

Petitioner appears to be seeking relief for three events: (1) the cover up of his brother's murder; (2) his prison sentence for attempted murder and battery; (3) the decision to charge him with attempted rape rather than incest. Petitioner cannot recover for any of these alleged wrongs under federal law.

The deficiencies of petitioner's complaint are numerous. Although petitioner does not identify the legal theory under which he is proceeding, I assume he means to contend

that respondents have violated his constitutional rights. If all of the events described in petitioner's complaint occurred in 1976, the time for filing a civil rights action under 42 U.S.C. § 1983 would have expired long ago. Wudtke v. Davel, 128 F.3d 1057, 1061 (7th Cir. 1997) (§ 1983 actions have six-year statute of limitations in Wisconsin); Snodderly v. R.U.F.F. Drug Enforcement Task Force, 239 F.3d 892, 895 (7th Cir. 2001) (§ 1983 actions have two-year statute of limitations in Indiana).

With respect to petitioner's claim about his brother's murder, he is seeking money damages from the State of Indiana, which he cannot do under § 1983. Williams v. Wisconsin, 336 F.3d 576, 580 (7th Cir. 2003) ("a state is not a 'person' subject to a damages action under § 1983"). Further, there is no indication in petitioner's complaint that he is acting as a representative of his brother's estate or that he otherwise has standing to bring a claim on behalf of his brother. In any event, the instances in which an individual can recover damages under federal law for a "cover up" are rare. The Court of Appeals for the Seventh Circuit has recognized such a cause of action only when the murder was *caused* by a state official and motivated by the victim's race. Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984). Petitioner does not allege that either of these elements are present in this case.

With respect to petitioner's claim about his sentence for attempted murder and battery, he states that this claim is against an Indiana state court judge, but he does not

name this judge in the caption. Regardless, few doctrines are more solidly established at common law than the absolute immunity of judges from liability for their judicial acts, even when they act maliciously or corruptly. Mireles v. Waco, 502 U.S. 9 (1991). This immunity is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, which has an interest in a judiciary free to exercise its function without fear of harassment by unsatisfied litigants. Pierson v. Ray, 386 U.S. 547, 554 (1967). The scope of judicial immunity is defined by the functions it protects, not by the person to whom it attaches. Forrester v. White, 484 U.S. 219 (1988). However, it is unquestioned that immunity applies to "the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court." Id. If petitioner believed that his sentence was imposed erroneously, his only remedy was to exhaust his direct appeals and then file a petition for habeas corpus while he was still in custody. 28 U.S.C. § 2254.

Finally, petitioner alleges that the "State of Indiana" erred in charging him with attempted rape rather than incest. To the extent that petitioner is challenging the prosecutor's discretion in charging a crime with a harsher penalty, this claim must fail. When conduct violates more than one statute, a prosecutor may choose to charge a suspect with the crime that carries a stiffer penalty. United States v. Batchelder, 442 U.S. 114 (1979). To the extent that petitioner is arguing that his conduct did not support a charge of attempted rape, this is an issue that he should have raised in state court. It cannot serve

as a basis for a civil action under federal law.

ORDER

IT IS ORDERED that petitioner Gerald Sanders's request for leave to proceed in forma pauperis is DENIED and this case is DISMISSED as legally frivolous.

Entered this 9th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge