IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE L . CHERRY,

ORDER

Plaintiff,

05-cv-38-bbc

v.

GERALD BERGE, PETER HUIBREGTSE,
JOHN SHARPE and BRIAN KOOL,

Defendants.

- -

Plaintiff brought this action in 2005, contending that prison officials had violated his Eighth Amendment right to be free from cruel and unusual punishment by placing him in the "behavior management plan" for approximately two weeks at the Wisconsin Secure Program Facility. In an order dated May 17, 2005, I dismissed the case for plaintiff's failure to state a claim upon which relief may be granted. Judgment was entered in favor of defendants the same day. Plaintiff did not appeal the decision.

On March 13, 2007, plaintiff filed a motion for reconsideration, which I construed as a motion for relief from judgment under Fed. R. Civ. P. 60. In his motion, plaintiff argued that the court should reconsider its decision in light of Gillis v. Litscher, 468 F.3d

488 (7th Cir. 2006), in which the court concluded that summary judgment was inappropriate on the Eighth Amendment claim of another prisoner who had been subjected to the same program. I denied that motion because Rule 60 provides a basis for relief only when new *factual* information is discovered; a change in the law is not sufficient. Gleash v. Yuswak, 308 F.3d 758, 761 (7th Cir. 2002).

Now plaintiff has filed another Rule 60 motion, again arguing that the court should reconsider its decision in light of Ingle v. Yelton, 439 F.3d 191 (4th Cir. 2006). Plaintiff does not explain why this case represents a change in the law applicable to this case (the Ingle court concluded that the trial court erred in denying a Rule 56(f) motion to engage in additional discovery before considering the dispositive summary judgment motion.) In any case, the ruling in Ingle is irrelevant. As I have previously explained to plaintiff, Rule 60 does not permit plaintiff to take advantage of changes in the law. In Norgaard v. DePuy Orthopaedics, Inc., 121 F.3d 1074, 1077 (7th Cir. 1997), the Court of Appeals for the Seventh Circuit stated:

> If new developments of this kind permitted revisiting of old judgments, finality would be impossible to achieve. Courts also would find it hard to handle new cases, if they could never deem the old ones closed. . . .
> . . . Litigants who want to take advantage of the possibility that the law may evolve – or who seek to precipitate legal change – must press their positions while they have the chance. If the law of the circuit is against a litigant . . . the party still may appeal and ask the court to modify or overrule the adverse decision, or ask the Supreme Court to reverse the court of appeals.

The same is true here. Plaintiff could have appealed the 2005 decision but chose not to do so. Accordingly, his motion for relief from judgment under Rule 60 must be denied.

Legal error *is* an appropriate ground for a motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment. But the time plaintiff had for filing a Rule 59 motion expired only 10 days after the entry of judgment. Thus, there is no relief that this court can grant him at this time.

ORDER

IT IS ORDERED that plaintiff Eugene Cherry's motion for relief from the judgment, dkt #12, is DENIED.

Entered this 27th day of December, 2011.

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