

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

DENNIS NOEL,

Plaintiff,

ORDER

v.

05-C-496-C

LENARD WELLS, Chairman,
and the WISCONSIN PAROLE COMMISSION,

Defendants.

On September 19, 2005, I dismissed plaintiff's complaint pursuant to 28 U.S.C. § 1915A after concluding that there was no legal merit to plaintiff's claims that defendants violated his constitutional rights by 1) subjecting him to parole procedures implemented after the date of his sentencing; and 2) terminating his telephonic parole interview and "dieseling" him from one state to another in retaliation for his challenges to parole denial. In addition, I dismissed plaintiff's claim that defendants miscalculated the amount of time he has served, because such a claim must be raised in a petition for a writ of habeas corpus. Judgment of dismissal was entered on September 20, 2005. Now plaintiff has filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59 and a notice of appeal, which

will take effect if the Rule 59 motion is denied. Fed. R. App. P. 4(a)(4)(A)(iv), (B)(i); Florian v. Sequa Corporation, 294 F.3d 828 (7th Cir. 2002) (citing Otis v. City of Chicago, 29 F.3d 1159, 1166 (7th Cir. 1994) (en banc)).

In his Rule 59 motion, plaintiff advances the same legally meritless arguments he made to support the allegations in his complaint. Nothing in his motion convinces me that I erred in dismissing his claims. Therefore, the motion will be denied.

I turn then to plaintiff's notice of appeal, which is not accompanied by the \$255 fee for filing an appeal. Therefore, I construe plaintiff's notice to include a request for leave to proceed in forma pauperis on appeal.

In determining whether plaintiff may appeal in forma pauperis, I must consider whether he is indigent and whether his appeal is taken in good faith. Plaintiff did not submit a financial affidavit and trust fund account statement as 28 U.S.C. § 1915 requires. However, plaintiff will not be permitted to proceed on appeal in forma pauperis in any event because I must certify that his appeal is not taken in good faith.

In Lucien v. Roegner, 682 F.2d 625, 626 (7th Cir. 1982), the court of appeals instructed district courts to find bad faith where a plaintiff is appealing the same claims the court found to be without legal merit in screening his complaint.

As noted above, when I screened plaintiff's complaint, I found his constitutional claims to be without legal merit and I explained clearly that this court lacked jurisdiction to

consider in the context of a civil action under 42 U.S.C. § 1983 his claim relating to the improper calculation of his sentence. Because petitioner is appealing the same claims I have already either lack legal merit under federal law or are improperly raised in an action under § 1983, I will certify that his appeal is not taken in good faith.

A prisoner whose appeal is certified as not having been taken in good faith cannot take advantage of the initial partial payment provision of § 1915. Instead, he owes the \$255 fee in full immediately, and if the money does not presently exist in his prison account, then prison officials are required to calculate monthly payments according to the formula set out in 28 U.S.C. § 1915(b)(2) and forward those payments to the court in monthly installments until the debt is satisfied. Therefore, if plaintiff has sufficient funds in his regular account to pay the full \$255, it must be remitted promptly to the clerk of court in one payment. Plaintiff may delay payment of the fee, whether in payments because of insufficient funds or in full, only if he challenges in the court of appeals within thirty days of the date he receives this order 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 plaintiff's appeal is legally frivolous. If the court of appeals determines that this court was correct that the appeal is not taken in good faith, then the payment will once again be due in full immediately. Whatever the scenario,

plaintiff is responsible for insuring that the required sum is remitted to this court at the appropriate time. His failure to pay the fee for any reason other than destitution will be understood as a relinquishment of his right to file future suits in forma pauperis. Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996). Plaintiff is reminded that if he challenges this court's finding of bad faith in the court of appeals and loses, a strike may be recorded against him by the court of appeals if the appeal is found to be legally frivolous.

ORDER

IT IS ORDERED that plaintiff's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59 is DENIED.

Further, IT IS ORDERED that plaintiff's request for leave to proceed in forma pauperis on appeal is DENIED. I certify that plaintiff's appeal is not taken in good faith.

If plaintiff 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. Such a 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 19th day of October, 2005.

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