IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KENNETH P. SARAUER,

ORDER

Plaintiff,

05-C-57-C

v.

STATE OF WISCONSIN,

Defendant.

- -

Plaintiff Kenneth P. Sarauer is currently on parole supervision after spending time in prison for a conviction of committing a substantial battery in violation of Wis. Stat. § 941.19(3). He has filed an action in this court designated as a civil complaint under 28 U.S.C. § 1331 and has paid the civil case filing fee of $150. In his complaint, plaintiff contends that his constitutional rights were violated when he was charged with, tried and convicted of committing a substantial battery. He requests that this court "restore [his] precious and rightful status of innocence" and "grant [him] a judgment of acquittal" or reverse his conviction and grant him a new trial.

This court does not have jurisdiction to consider plaintiff's claims in a civil action under 28 U.S.C. §1331. The habeas corpus statute, 28 U.S.C. § 2254 provides the exclusive

remedy in federal court for persons convicted of state crimes who are contending that they are "in custody" in violation of the Constitution. Preiser v. Rodriguez, 411 U.S. 475 (1973). A parolee is still "in custody" for the purpose of § 2254, because his liberty is still restrained. Jones v. Cunningham, 371 U.S. 236 (1963).

Although the potential exists for a substantial overlap between the civil rights and habeas corpus statutes, the Supreme Court has held on multiple occasions that when a person can obtain relief for a violation of federal law through a petition for a writ of habeas corpus, he may not bring a civil rights claim under § 1331 or 42 U.S.C. § 1983 until he has prevailed under § 2254. E.g., Preiser v. Rodriguez, 411 U.S. 475 (1973). Even when a person seeks only money damages and not release, habeas corpus remains the sole federal remedy when a ruling in the plaintiff's favor would call into question the validity of his confinement. Heck v. Humphrey, 512 U.S. 477 (1994).

In applying these principles to the facts of this case, it is clear that plaintiff's claim against the State of Wisconsin is a challenge to the validity of his conviction and the fact of his confinement on parole. His proposed pleading is accompanied by copies of his appeals through the state's court of appeals and supreme court, which upheld his conviction. Thus, it appears he has exhausted his state court remedies as § 2254 requires and that his suit may be considered by this court under that statute.

However, the Court of Appeals for the Seventh Circuit has given somewhat mixed

signals regarding what district courts should do when a pro se prisoner mislabels his pleadings. In Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996), the court stated: A "district court [is] not authorized to convert a § 1983 action (or § 1331 action) into a § 2254 action. . . . When a plaintiff files a [civil] action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice." However, in Valona v. United States Parole Commission, 165 F.3d 508 (7th Cir. 1998), the court held that the district court had erred in refusing to convert a habeas corpus action into a mandamus action if that was how the suit should have been styled. The court wrote, "If Valona is entitled to a writ of mandamus, then the district court should have provided him that relief in the suit he has filed, rather than requiring him to start over." Id. at 510. See also Williams v. Wisconsin, 336 F.3d 576 (7th Cir. 2003) (considering merits of habeas corpus petition that was brought under § 1983).

One way that these cases can be reconciled is if they are interpreted not as setting forth rigid rules without exceptions but as general guidelines that should be followed when the reasons for doing so are present. In Moran v. Sondalle, 218 F.3d 647, 649 (7th Cir. 2000), the court noted that "[p]risoners may be tempted to choose one route rather than another to avoid limitations imposed by Congress." See also Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (noting different procedural requirements and consequences of § 1983 and habeas corpus statutes as reasons for refusing to convert action).

In this case, plaintiff has avoided no limitations by filing his petition as a civil rights action. The filing fee for civil actions is $150 as opposed to $5 for actions brought under 28 U.S.C. § 2254. In addition, he has named his custodian as the defendant, so this action could proceed under § 2254 without substituting any parties. Dismissing this case and requiring plaintiff to file a new one would accomplish nothing but to waste both this court's and plaintiff's time and resources. Graham v. Broglin, 922 F.2d 379 (7th Cir. 1991) (converting action permissible when "all [inmate] has done is mislabel his suit").

Although I will not dismiss this case, I decline to convert plaintiff's action until he has clarified his intentions. The relief he seeks is not available except in a habeas corpus action. Nevertheless, it is possible that plaintiff purposely filed a civil rights action because he is interested in seeking a monetary award in addition to a reversal of his conviction. Therefore, I will give plaintiff two weeks to inform the court in writing whether he wants his case to be treated as a civil action or as a petition for a writ of habeas corpus. Plaintiff should bear in mind that if he chooses to proceed under the civil rights statute, I will promptly dismiss the case for lack of jurisdiction. If he chooses to proceed in a habeas corpus action under § 2254, I will direct the clerk of court to refund to him the $145 he paid over the $5 fee for filing a habeas corpus action.

ORDER

IT IS ORDERED that plaintiff Kenneth Sarauer may have until February 16, 2005, in which to inform the court whether he wishes this court to treat his pleading as a petition for a writ of habeas corpus under 28 U.S.C. § 2254 or as a complaint in a civil action under 28 U.S.C. § 1331. If plaintiff chooses to proceed under the habeas corpus statute, I will treat his pleading as such and direct the clerk of court to refund $145 of his filing fee. If plaintiff fails to respond to this order by February 16, 2005, I will dismiss this case on the court's own motion because it lacks jurisdiction to consider plaintiff's claims in a civil action under § 1331.

Entered this 2nd day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge