

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

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COLIN HUDSON,

Plaintiff,

v.

MEMORANDUM and ORDER  
06-C-506-S

KEVIN J. KENNEDY,

Defendant.

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Plaintiff Colin Hudson was allowed to proceed in forma pauperis on his ex-post facto claim against the defendant Kevin J. Kennedy. He alleges that the defendant has prevented him from being placed on the ballot as a candidate for the office of Representative to the Assembly because of a pre-1996 felony conviction.

On September 27, 2006 defendant Kevin Kennedy moved to dismiss plaintiffs complaint for failure to state a claim for relief under federal law. This motion has been fully briefed and is ready for decision.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6)

a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

#### FACTS

Prior to November 5, 1996 the Wisconsin Constitution Article XIII § 3 provided that no person convicted of an "infamous crime" was eligible to hold an elective office in the State of Wisconsin.

On September 20, 1996 plaintiff committed acts which constituted a felony.

On November 5, 1996 the Wisconsin Constitution Article XIII § 3 was amended to provide that no person convicted of a "felony" is eligible to seek or hold an elective office in the State of Wisconsin.

Plaintiff filed papers with the State Elections Board in an effort to have his name placed on the ballot as a candidate for the office of state representative. In a letter dated August 7, 2006 defendant Kennedy denied plaintiff ballot access because of his unpardoned felony conviction.

Plaintiff's name had been placed on the ballot for a federal office in 2004.

#### MEMORANDUM

Plaintiff was allowed to proceed on his ex-post facto claim.

He alleges that his name was not placed on the ballot pursuant to a law which was enacted after he committed the felony.

A law violates the Ext Post Facto Clause of the United States Constitution (Article I, § 9, cl.3) where it changes the legal consequence of an act completed before its effective date. Miller v. Florida, 482 U.S. 423, 430 (1987). Prior to the enactment of the amendment to the Wisconsin Constitution in 1996 it provided that a person could not be placed on the ballot if he had been convicted of an "infamous crime". The Court held that an infamous crime was one which was punishable by imprisonment in a state prison or a felony. Becker v. Green County, 176 Wis. 120, 124, 184 N.W. 715, 717 (1922).

Accordingly, the 1996 amendment to the Constitution did not change the legal consequences of plaintiff's commission of a felony. The law prior to the amendment would also have prohibited his name from being placed on the ballot. Plaintiff's rights under the Ex Post Facto Clause of the United States Constitution have not been violated.

Plaintiff argues that because his felony was a conviction under federal law it was not a crime which was punishable by imprisonment in a state prison. This argument is without legal merit because in Becker, the Court held that Becker who had been convicted of a federal crime was guilty of an infamous crime which disqualified him from holding state office. See also In re

Complaint against Raineri, 102 Wis. 2d. 418, 419-420, 306 N.W.2d 699, 700-01(1981).

Plaintiff also argues that because he was allowed to run for federal office he should be allowed to run for state office. This argument is without legal merit because the United States Constitution does not disqualify candidates for Congress for a felony conviction but the Wisconsin Constitution does.

Plaintiff has not stated a claim for relief under federal law. Accordingly, defendant's motion to dismiss plaintiff's complaint will be granted.

ORDER

IT IS ORDERED that defendant's motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

IT IS FURTHER ORDERED that plaintiff's motions for a temporary restraining order and summary judgment are DENIED as moot.

Entered this 16<sup>th</sup> day of October, 2006.

BY THE COURT:

S/

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JOHN C. SHABAZ  
District Judge