IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALAN DAVID McCORMACK,

Plaintiff,

OPINION AND ORDER

12-cv-558-bbc

v.

KENNETH L. KUTZ, WILLIAM NORINE,
BURNETTE COUNTY OFFICE OF THE
DISTRICT ATTORNEY, WILLIAM A. DINGMANN,
ROBERT KELLBERG, DONALD L. TAYLOR,
BURNETT COUNTY SHERIFF'S DEPARTMENT,
UNKNOWN JOHN DOE BURNETT COUNTY
PUBLIC OFFICERS AND EMPLOYEES,
BURNETT COUNTY CIRCUIT COURT,

Defendants.

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In an order entered on November 13, 2012, I dismissed plaintiff's complaint with prejudice because his claims were barred by Heck v. Humphrey, 512 U.S. 477 (1994). After the court entered judgment, plaintiff filed a timely motion to amend the judgment. Dkt. #15. He also filed a notice of appeal, dkt. #16, and a motion for leave to proceed in forma pauperis on appeal. Dkt. #23. After filing his notice of appeal, plaintiff also filed a motion for an evidentiary hearing, dkt. #21, a motion for a Spears hearing, dkt. #26, a motion to remove his criminal case, dkt. #25, and a motion to amend the complaint. Dkt. #27.

Plaintiff then asked the Court of Appeals for the Seventh Circuit to allow him to remove his appeal. It granted his request and dismissed his appeal. Dkt. #29. Accordingly,

his motion to proceed in forma pauperis on appeal is now moot. Because plaintiff has not identified any reason why this court should take any further action in this case, all of his motions will be denied.

MOTION FOR REMOVAL

In his motion to amend the judgment, dkt. #15, at 23; dkt. #25, plaintiff asks to remove the criminal proceeding against him in Burnett County to this court under 28 U.S.C. § 1443, which permits a defendant to remove a state civil or criminal proceeding in which the defendant "is denied or cannot enforce . . . a right under any law providing for the equal civil rights of citizens of the United States." Plaintiff has not suggested that his race played any part in the criminal prosecution, which he would need to do before he could rely on § 1443 (Indiana v. Haws, 131 F.3d 1205, 1209 (7th Cir. 1997) ("Supreme Court has interpreted [§ 1443] to apply only if the right alleged arises under a federal law providing for civil rights *based on race*") (citing Georgia v. Rachel, 384 U.S. 780 (1966)) (emphasis added), but plaintiff has a bigger problem. The case he is complaining about was resolved more than 14 years ago. There is nothing to remove. Therefore, his separate motion for removal, in which he asks to remove his criminal case under 28 U.S.C. § 1441 must be denied as well. In any event, that provision applies only to civil actions. Plaintiff's motion to remove his criminal case will be denied.

MOTION TO AMEND THE JUDGMENT

Plaintiff has filed a motion for reconsideration and to amend the judgment. First, he asks the court to stay this case until his Burnett County case is resolved, rather than dismiss it without prejudice. (In this instance, when refers to his "Burnett County case," he seems to be talking about motions for post conviction relief that he has filed in his criminal case in Burnett County, not about his original criminal proceeding.) In Wallace v. Kato, 549 U.S. 384, 393-94 (2007), the Supreme Court explained that district courts have discretion to stay a § 1983 claim if Heck bars a civil action and a statute of limitations might run before the criminal case was complete. However, there is no danger that plaintiff's claims will be barred by a statute of limitations. Plaintiff alleges that the prosecutor and sheriffs withheld and destroyed evidence and that someone falsified portions of the trial transcript. These due process claims would not accrue until after plaintiff has his conviction overturned. Johnson v. Dossey, 515 F.3d 778, 782 (7th Cir. 2008). Therefore, there is no concern for statute of limitations problems and plaintiff's case was correctly dismissed.

Plaintiff next asks this court to amend the judgment to stay the collection of the filing fee, because the collection will make it more difficult for him to pursue his other cases and to file additional cases. The order will not be stayed to make it easier for plaintiff to pursue his existing cases; plaintiff must decide how to budget his resources on litigation. If plaintiff files an additional case in the future, his financial ability to pay will be taken into consideration when assessing his initial partial filing fee.

Last, plaintiff asks the court to reconsider its dismissal order in light of several legal

theories, most of which I have rejected in plaintiff's other cases. First, he invokes civil rights statutes that do not apply to his claims. He cites 42 U.S.C. §§ 1985 and 1986, but to state a claim under these provisions a plaintiff must allege facts to suggest that the "defendants were motivated in their actions by racial or some other type of invidious, class-based discrimination." Lowe v. Letsinger, 772 F.2d 308, 311 (7th Cir. 1985) (§ 1985(2) & (3)); Williams v. Saint Joseph Hospital, 629 F.2d 448, 452 (7th Cir. 1980) (violation of § 1985 is a prerequisite to violation of § 1986). Neither the complaint nor the motion to amend mentions class-based discrimination. Plaintiff also invokes 42 U.S.C. § 1988, but that provision does not create a private cause of action. Section 1988 only specifies which procedures apply for cases brought under other civil rights provisions. Moor v. County of Alameda, 411 U.S. 693, 702 (1973).

Plaintiff also asserts that 28 U.S.C. § 1652 authorizes this court to apply state law, so the court could grant plaintiff a discretionary reversal under Wis. Stat. § 752.35 or find the defendants in contempt under Wis. Stat. § 785. As I have explained to plaintiff previously, the Rules of Decision Act, 28 U.S.C. § 1652, is not an independent source of federal court jurisdiction. It instructs a federal court whether to apply state or federal law in a claim over which the court has jurisdiction for another reason. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

Last, plaintiff argues that the case should be allowed to proceed as a habeas corpus petition under 28 U.S.C. § 2254. M. to Amend Jmt., dkt. #15, at 23; M. for Spears Hrg. dkt. #26, at 2. The Court of Appeals for the Seventh Circuit has held that "[w]hen a

plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice" rather than convert it into a petition for habeas corpus. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. 477); Williams v. Wisconsin, 336 F.3d 576, 580 (7th Cir. 2003) ("collateral attacks disguised as civil rights actions" should be dismissed without prejudice because that "resolution allows the plaintiff to decide whether to refile the action as a collateral attack after exhausting available state remedies."). The fact that plaintiff now wants to challenge his conviction is not sufficient grounds to alter the judgment. However, plaintiff is free to file a motion for habeas corpus relief if he has exhausted his state court remedies and has not filed such a motion previously.

In his motion to amend the judgment, plaintiff also moved under Fed. R. Civ. P. 15 to amend his complaint to include the legal theories discussed above. M. to Amend Jmt. dkt. #15, at 23. This motion will be denied as futile, because the complaint fails to state a claim under the new theories. Garcia v. City of Chicago, 24 F.3d 966, 970 (7th Cir. 1994) (leave to amend may be denied for proposed amendments "failing to state a valid theory of liability") (citation omitted).

MOTION TO AMEND THE COMPLAINT

In his motion to amend, plaintiff seeks to add a claim for abuse of process. M. to Amend, dkt. #27. The motion to amend will be denied as futile because abuse of process is not a cause of action under federal law. The Supreme Court has explained that "a state

actor's random and unauthorized deprivation of [a protected] interest cannot be challenged under 42 U.S.C. § 1983 so long as the State provides an adequate postdeprivation remedy." Albright v. Oliver, 510 U.S. 266, 283-84 (1994) (J. Kennedy, concurring); Newsome v. McCabe, 256 F.3d 747, 751 (7th Cir. 2001) (describing J. Kennedy's opinion in Albright as controlling). Because Wisconsin allows a cause of action for abuse of criminal process, Thompson v. Beecham, 72 Wis. 2d 356, 362, 241 N.W.2d 163 (1976), plaintiff cannot bring a constitutional claim under that theory.

MOTION FOR A HEARING

Plaintiff has filed two motions for an evidentiary hearing. Dkts. ## 21, 26. Plaintiff argues that an examination of the evidence that someone tampered with his trial transcript and suppressed evidence would help the court determine whether his claims have a factual and legal basis. These motions will be denied. A hearing is unnecessary because plaintiff's claims would remain barred by Heck, regardless what the quantity or quality is of the evidence to support them.

ORDER

1. Plaintiff Alan David McCormack's motion to amend the judgement, dkt. #15, is DENIED.

2. Plaintiff's motion for an evidentiary hearing, dkt. #21, is DENIED.

3. Plaintiff's motion to proceed in forma pauperis on appeal, dkt. #23, is DENIED

as moot.

4. Plaintiff's motion for removal to this court of Burnett County Case 87-CR-112, dkt. #25, is DENIED.

5. Plaintiff's motion for a Spears hearing, dkt. #26, is DENIED.

6. Plaintiff's motion to amend the complaint, dkt. #27, is DENIED.

Entered this 1st day of February, 2013.

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