IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JOHNATHAN FRANKLIN,

Plaintiff, ORDER

v. 12-cv-779-bbc

ADA JOHN R. BURR, CHIEF OF POLICE
LT. DAVENPORT, DET. REINSTRA,
DET. RICKEY, DET. MIKE MONTIE,
DET. LINDA DRAEGER and
CITY OF MADISON POLICE DEPARTMENT,

Defendants.

- -

Plaintiff Johnathan Franklin, a prisoner at the Stanley Correctional Institution, submitted a complaint under 42 U.S.C. § 1983, alleging that various law enforcement personnel violated his constitutional rights by interrogating him after he had requested counsel. In a January 8, 2013 order, I dismissed the case pursuant to Heck v. Humphrey, 512 U.S. 477 (1994), which prohibits a plaintiff from bringing claims for damages if judgment in favor of the plaintiff would "*necessarily* imply the invalidity of his conviction or sentence," while noting also that even if Heck did not apply, the case would have to be dismissed because it would be barred by the statute of limitations.

Now plaintiff has filed several motions, each of which I will deny. First, plaintiff has filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59. In his motion,

plaintiff argues that the statute of limitations is tolled by Wisconsin statutes allowing extra time for incarcerated persons, citing Wis. Stat. §§ 893.17 and 893.18. However, those statutes do not apply to causes of action accruing after July 1, 1980 and thus do not apply here. He argues also that this court should not have raised the statute of limitations issue sua sponte, but district judges have discretion to invoke a statute of limitations sua sponte if the defense is apparent from the complaint or another document in the court's files. Gleash v. Yuswak, 308 F.3d 758, 760 (7th Cir. 2002).

Finally, plaintiff argues that Heck and the Wisconsin statute of limitations do not apply because he has asserted his claims in a previous lawsuit and he wants his current allegations to "relate back" to the previous complaint under Fed R. Civ. P. 15(c). What I understand plaintiff to be arguing is that his complaint in the present case should be treated as an amended complaint in a case he brought previously in this court, Franklin v. Reinstra, 97-cv-552-jcs. In that case, plaintiff brought similar claims while his state criminal case was still pending. The court dismissed that case without prejudice under Younger v. Harris, 401 U.S. 37 (1971), so as not to interfere with the state criminal proceedings. I understand plaintiff to be arguing that if his 1997 complaint can be reopened with his current complaint as the operative complaint, the statute of limitations would not have run.

What plaintiff's motion amounts to is a request to reopen his 1997 case because the court erred in dismissing it rather than staying the case pending the outcome of the criminal proceedings. Wallace v. Kato, 549 U.S. 384, 393-94 (2007) (where plaintiff raises false-arrest claim before being convicted, "it is within the power of the district court, and in

accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended"). However, even if I construed plaintiff's motion as a Fed. R. Civ. P. 60 motion in his 1997 case, district courts may not reopen cases because there has been a change in the law, Gleash, 308 F.3d at 761, and thus I cannot "undo" the dismissal of his 1997 case. Accordingly, I will deny plaintiff's motion for reconsideration, whether it is considered a Rule 59 motion in the present case or a Rule 60 motion in his 1997 case.

Next, plaintiff has filed a notice of appeal. Because plaintiff has not paid the $455 filing fee for filing an appeal, I will construe his notice of appeal as a request to proceed in forma pauperis on appeal.

A district court has authority to deny a request for leave to proceed in forma pauperis under 28 U.S.C. § 1915 for one or more of the following reasons: the litigant wishing to take an appeal has not established indigence, the appeal is taken in bad faith or the litigant is a prisoner and has three strikes. § 1915(a)(1),(3) and (g). Sperow v. Melvin, 153 F.3d 780, 781 (7th Cir. 1998). Plaintiff's request for leave to proceed in forma pauperis on appeal will be denied, because I am certifying 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 in cases in which a plaintiff is appealing the same claims the court found to be without legal merit. Lee v. Clinton, 209 F.3d 1025, 1027 (7th Cir. 2000). Plaintiff is trying to appeal the same claims on which I denied him leave to proceed. Because there is no legally meritorious basis for plaintiff's appeal, I must certify that the appeal is not taken in good faith.

Because I am certifying plaintiff's appeal as not having been taken in good faith, he cannot proceed with his appeal without prepaying the $455 filing fee unless the court of appeals gives him permission to do so. Under Fed. R. App. P. 24, plaintiff has 30 days from the date of this order in which to ask the court of appeals to review this court's denial of leave to proceed in forma pauperis on appeal. Plaintiff must include with his motion an affidavit as described in the first paragraph of Fed. R. App. P. 24(a), with a statement of issues he intends to argue on appeal. Also, he must send along a copy of this order. Plaintiff should be aware that he must file these documents in addition to the notice of appeal he has filed previously. If he does not file a motion requesting review of this order, the court of appeals may choose not to address the denial of leave to proceed in forma pauperis on appeal. Instead, it may require plaintiff to pay the full $455 filing fee before it considers his appeal further. If he does not pay the fees within the deadline set, it is possible that the court of appeals will dismiss the appeal.

Plaintiff has filed also a motion for the court's assistance in recruiting counsel to assist him with this case. I will deny the motion because the case is now closed and there is no reason to reopen it. To the extent that plaintiff seeks counsel for his appeal, he will have to make that request to the court of appeals.

Plaintiff has filed a document requesting "all if any necessary portions of the transcripts" and a waiver of fees for transcripts. However, there are no transcripts in this case so I will deny that request as unnecessary.

Finally, plaintiff requests a copy of the "Practitioner's Handbook for Appeals to the

United States Court of Appeals for the Seventh Circuit." I will deny this motion because this court does not have copies of the handbook. This is another request that plaintiff should make to the court of appeals.

ORDER

IT IS ORDERED that

1. Plaintiff Johnathan Franklin's motion to alter or amend the judgment in this case, dkt. #10, is DENIED.

2. Plaintiff's request for leave to proceed in forma pauperis on appeal, dkt. #21, is DENIED. I certify that his appeal is not taken in good faith. The clerk of court is directed to insure that plaintiff's obligation to pay the $455 fee for filing his appeal is reflected in the court's financial records.

3. Plaintiff's motion for the court's assistance in recruiting counsel, dkt. #11, is DENIED.

4. Plaintiff's motion for preparation of transcripts, dkt. #17, is DENIED as unnecessary.

5. Plaintiff's motion for a copy of the "Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit," dkt. #17, is DENIED.

Entered this 11th day of March, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge