

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

MICHAEL MORRIS,

Plaintiff,

v.

TAMMY DICKMAN, *et al.*

Defendants.

ORDER

Case No. 15-cv-712-wmc

Pro se plaintiff Michael Morris is currently incarcerated at the Wisconsin Secure Program Facility (“WSPF”) in Boscobel, Wisconsin. He claims that his right to access the courts was violated when the defendants impeded his ability to file a writ of mandamus challenging his underlying criminal conviction. Since filing his complaint, plaintiff has also filed an Amended Complaint (dkt. #10), which will serve as the operative pleading for purposes of this opinion, along with a Motion for Temporary Relief (dkt. #2). After screening the amended complaint, the court has concluded that Morris may proceed with his claims against each of the named defendants under 28 U.S.C. § 1915A, but his Motion for Temporary Relief will be denied.

ALLEGATIONS OF FACT¹

At all times relevant to his allegations, Morris was either located at WSPF or the New Lisbon Correctional Institution. The defendants are Tammy Dickman, an employee in WSPF’s business office, David Rice, an assistant attorney general for the State of

¹ In addressing any *pro se* litigant’s complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the facts above based on the allegations in Morris’s complaint.

Wisconsin, and Diane Fremgen, an employee with the Clerk of Court for the Wisconsin Court of Appeals.

In November of 2013, Morris apparently filed a writ of mandamus in the Wisconsin Court of Appeals, complaining that Fremgen and other individuals excluded motions, documents and letters from his 2000 state court criminal file. He also complained that Fremgen and others would not permit him to file documents in his case. He specifically claims that the absence of these documents denied him due process during his criminal proceeding because the excluded filings provided proof that the state's witnesses lied.

On November 18, 2013, Morris received a notice directing him to either file his indigency application or pay the \$195.00 filing fee within ten days. Allegedly, Morris attempted to send his indigency application on November 27, 2013, but Dickman, working in WSPF's business office, did not send it out at that time. Instead, Morris received a notice that the application was sent out on December 5, 2013, so he wrote a letter to appellate clerk Fremgen, explaining the delay and asking that it be excused. Morris received no response to that letter.

On April 30, 2013, a decision issued on Morris's writ. Morris does not state as much, but it appears his writ was denied for failure to pay the filing fee. Morris chose not to appeal that decision. Rather, he filed what he calls a "motion for supervisory writ," which asked the court of appeals to determine what happened to the documents that were the subject of his now rejected writ. When it was received by the court, however, he alleges appellate clerk Fremgen labeled it a "Petition for Review."

Apparently because Morris understood that his most recent motion had been filed under his now dismissed case, Morris then asked Fremgen if he could submit a partial payment, which he apparently did.

By June 2014, when Morris had still not received a response from Fremgen, he voluntarily dismissed his motion for supervisory writ, and instead sent a new writ of mandamus and petition for a supervisory writ. Late that month, Morris wrote Fremgen to ask if she received this second writ and petition. He also contacted State Assistant Attorney General Rice the following month to ask if he received them. When neither responded, Morris then contacted a Dane County circuit judge and court administrator, who explained that there was no such lawsuit. As a result, Morris wrote to appellate clerk Fremgen yet again, asking her to file his writ. He also sent copies to Assistant Attorney General Rice. Again, neither replied.

In August of 2014, Morris filed an internal complaint about WSPF's Dickman, claiming that she must not have mailed his writ. Morris also wrote to Justice Shirley Abrahamson of the Wisconsin Supreme Court. Apparently, her office conferred with Fremgen, and then it responded that his case had already been resolved. Finally, Morris apparently wrote to the court of appeals to request his money back for the partial filing fee on his later-dismissed motion for supervisory writ, but that request was denied.

OPINION

I. Screening of Amended Complaint (Dkt. #10)

Plaintiff's apparent claim before this court now is that the defendants' "refusal" to file his *second* writ of mandamus, which he allegedly sent in early June of 2014 after

withdrawing his first writ, violated his right to access the courts. A prisoner's right to access the courts is limited to the ability to file claims challenging a sentence or conditions of confinement. *See Lewis v. Casey*, 518 U.S. 343 (1996); *Bounds v. Smith*, 430 U.S. 817 (1977). To state a valid claim in this context, a prisoner must allege that he was deprived of access to the courts and suffered an actual injury as a result. *See Ortiz v. Downey*, 561 F.3d 664, 671 (7th Cir. 2009).

To make this showing here, Morris must “spell out, in minimal detail, the connection between the alleged [deprivation] and an inability to pursue a legitimate challenge to a conviction, sentence, or prison conditions.” *Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006). In other words, he must point to a concrete, non-frivolous claim or defense he might have raised but for his inability to access the courts. *See Christopher v. Harbury*, 536 U.S. 403, 415 (2002); *Marshall*, 445 F.3d at 968; *see also Eichwedel v. Chandler*, 696 F.3d 660, 673 (7th Cir. 2012) (“[A]n inmate may prevail on a right-of-access claim only if the official actions at issue hindered his efforts to pursue a legal claim.” (internal citation and quotation marks omitted)).

From Morris's pleading, the court will infer that plaintiff's first and second writs of mandamus sought to challenge his 2000 criminal conviction. While the specific time when plaintiff sought to include the documents allegedly omitted from his criminal file is unclear -- as is the propriety of Morris's attempt to file those documents -- his writs purportedly attack the validity of his conviction. Thus, although, the court has substantial doubts that the writs were non-frivolous, and even that they failed to receive

the review due them, it must read plaintiff's allegations generously to allege that his inability to file one or both of his writs thwarted his ability to attack his conviction.

Accordingly, plaintiff will be permitted to proceed on his access to courts claim against Dickman and Fremgen. First, Dickman was allegedly responsible for the initial denial of his first writ by failing to timely forward his indigency application. Second, as unlikely as it seems given her position as the District Court Administrator for four counties, Fremgen was allegedly non-responsive to plaintiff's attempts to correct the errors in his first writ and refused to act when plaintiff sought to file his second writ.

Morris may not, however, proceed against Rice. Plaintiff's only allegations involving Rice relate to his not taking action with respect to inquiries about the plaintiff's second writ, but as an assistant attorney general, Rice had no duty to ensure plaintiff's filings were made. Indeed, absent some duty, any action to assist Morris may even have been contrary to his own client or potential client. Accordingly, plaintiff has no access to court's claim against him.

II. Motion for Temporary Relief (dkt. #2).

Given the tenuous nature of plaintiff's remaining claims, his Motion for Temporary Relief will be denied. Morris requests that the court enter an order directing the prison to have a notary review a list of exhibits and confirm that his appendix includes each exhibit, apparently based on his belief that the business office at WSPF will destroy or conceal documents he wishes to file. To prevail on a motion for a preliminary injunction a litigant must, however, show: (1) a likelihood of success on the merits of his case; (2) a lack of an adequate remedy at law; and (3) an irreparable harm that will result

if the injunction is not granted. *Lambert v. Buss*, 498 F.3d 446, 451 (7th Cir. 2007). If he meets the first three requirements, then the court must balance the relative harms that could be caused to either party. *Id.*

Given his unsupported and confusing allegations, Morris has certainly not shown any likelihood of success on his claim to date. Nor has he submitted any proof that any of the defendants actually destroyed, took or refused to file documents he allegedly sought to include in his criminal file. Accordingly, Morris is not entitled to injunctive relief and his motion will be denied without prejudice to renewal at a later stage should the evidence support it.

III. Steps Going Forward

Although Morris's allegations against Fremgen and Dickman pass muster under the court's lower standard for screening, he will have to present evidence permitting a reasonable trier of fact to conclude that the defendants thwarted his access to the court, which is a high standard. To reiterate, he will have the burden to prove that: (1) Fremgen and Dickman took steps that impeded his ability to pursue his writ; and (2) that he suffered injury as a result, meaning his writ would have succeeded.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Michael Morris is GRANTED leave to proceed on his access to courts claim against defendants Fremgen and Dickman.
- (2) Plaintiff is DENIED leave to proceed against Rice, who is DISMISSED from this action.

- (3) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to the defendants' attorney.
- (4) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- (5) Pursuant to an informal agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendant.
- (6) If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for failure to prosecute.
- (7) Plaintiff's Motion for Temporary Relief (dkt. #2) is DENIED.

Entered this 9th day of January, 2017.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge