No. _____

In the Supreme Court of the United States

WILLIAM DAVID BURNSIDE,

Petitioner,

v.

T. WALTERS ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 10-5790/6368

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM DAVID BURNSIDE, Plaintiff-Appellant, v. T. WALTERS; HICKS; MONTGOMERY; CYNTHIA MAGELLON PULJIC; YMCA OF MEMPHIS & MID-SOUTH, A Domestic Tennessee Corporation, Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

O R D E R

Before: BATCHELDER, Chief Judge; McKEAGUE, Circuit Judge; FORESTER, District Judge.*

William David Burnside, an Arkansas resident proceeding through counsel, appeals the district court's judgment dismissing his civil rights complaint, and its order denying his motion for relief from judgment. Counsel has waived oral argument and, upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Burnside, proceeding in forma pauperis (IFP), filed a complaint under 42 U.S.C. §§ 1983, 1985, and 1986 against Memphis police officers T. Walters, Hicks, and Montgomery; Executive Director of the Alfred D. Mason YMCA Cynthia Magellon Puljic; the YMCA of Memphis & Mid-South; and numerous Doe defendants. Burnside alleged that the defendants "willfully, maliciously, knowingly, and/or negligently" provided "false, erroneous and/or misleading information that led to [Burnside's] warrantless arrest without probable cause and defendants . . . knowingly did willfully,

*The Honorable Karl S. Forester, United States Senior District Judge for the Eastern District of Kentucky, sitting by designation.

maliciously, and/or negligently fail to intervene to prevent such arrest . . . ." Burnside sought "judicial admonishment," injunctive relief, and compensatory and punitive damages.

The district court sua sponte dismissed his complaint under 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1), for failure to state a claim upon which relief could be granted. The district court then denied Burnside's Federal Rule of Civil Procedure 60(b) motion for relief from judgment.

Burnside's appeal of the district court's judgment dismissing his complaint was docketed as case number 10-5790, and the order denying his motion for relief from judgment was docketed as case number 10-6368. These cases were consolidated under lead case number 10-5790.

Burnside argues that the district court erred by sua sponte dismissing his IFP complaint without first affording him leave to amend because: (1) the language of the Prison Litigation Reform Act ("PLRA"), does not bar district courts from granting IFP plaintiffs leave to amend; and (2) the Supreme Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007), fatally undermines our prior decisions prohibiting the amendment of complaints under the PLRA. Burnside further argues that the district court erred by dismissing his motion for relief from judgment because: (1) he is a layperson; (2) newly discovered evidence would support his claims if he were permitted to amend his complaint; and (3) the action should proceed in the interests of justice. Burnside does not dispute the district court's conclusion that his complaint, as filed, failed to state a claim upon which relief may be granted and, therefore, he waives that issue on appeal. *See Turner v. City of Taylor*, 412 F.3d 629, 639 (6th Cir. 2005).

We review de novo a district court's judgment dismissing a complaint under § 1915(e)(2) or § 1915A. *See Hill v. Lappin*, 630 F.3d 468, 470 (6th Cir. 2010). We review for an abuse of discretion a district court's denial of a Rule 60(b) motion. *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 453-54 (6th Cir. 2008).

Burnside first argues that nothing in the language of the PLRA explicitly prohibits plaintiffs from amending their complaints before district courts sua sponte dismiss them. But we have held to the contrary, stating that the statutory language of § 1915(e)(2) and § 1915A(b) mandates that a district court "shall dismiss" a complaint if it fails to state a claim upon which relief may be granted, which

necessarily precludes amendment. *McGore v. Wrigglesworth*, 114 F.3d 601, 604 (1997), *abrogated on other grounds by Jones*, 549 U.S. 199. We concluded that the PLRA gives district courts "no discretion in permitting a plaintiff to amend a complaint to avoid a sua sponte dismissal." *Id.* at 612. *See also Rucker v. Potter*, 215 F. App'x 406, 408 (6th Cir. 2007); *Moniz v. Hines*, 92 F. App'x 208, 212 (6th Cir. 2004); *Benson v. O'Brian*, 179 F.3d 1014, 1016 (6th Cir. 1999).

Burnside next argues that *Jones* fatally undermines our prior decisions prohibiting PLRA plaintiffs from amending their complaints. In support, Burnside reasons that the Supreme Court stated that "the PLRA's screening requirement does not – explicitly or implicitly – justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself." *Jones*, 549 U.S. at 214. Burnside contends that prohibiting the amendment of complaints runs afoul of *Jones* as an unlawful deviation from the standard procedural practice of permitting the amending of complaints "once as a matter of course." Fed. R. Civ. P. 15(a)(1).

Our practice of prohibiting the amendment of complaints subject to the PLRA is based upon the statutory language of the PLRA itself that a district court "shall dismiss" the complaint under certain enumerated circumstances. 28 U.S.C. § 1915(e)(2). We reasoned that the PLRA prohibits the amendment of complaints in order to give effect to this non-discretionary, statutory language, which does not deviate "beyond the departures specified by the PLRA itself." *Jones*, 549 U.S. at 214. Burnside's argument that other circuit courts permit such amendments is unpersuasive because their practices are not binding upon us.

Burnside finally contends that the district court abused its discretion in denying his Rule 60(b) motion for relief from judgment because he is a layperson, he has newly-discovered evidence to support his complaint, and the action should proceed in the interests of justice. The action, however, cannot proceed because the complaint does not state a claim, even if it is liberally construed in his favor. And, as discussed above, the law of this circuit does not permit a litigant whose complaint was sua sponte dismissed under the PLRA to amend, so any newly-discovered evidence could not be integrated into an amended complaint. Moreover, even if Burnside were granted relief from judgment,

he has no remedy because the district court could not proceed on a deficient complaint, and has no authority to grant leave to amend.

For the foregoing reasons, we affirm the district court's judgment and order.

ENTERED BY ORDER OF THE COURT

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WILLIAM DAVID BURNSIDE,

Plaintiff,

vs.

T. WALTERS, et al.,

Defendants.

No. 09-2727-JDT/tmp

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS
ORDER OF DISMISSAL
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
NOTICE OF APPELLATE FILING FEE

On November 6, 2009, Plaintiff William David Burnside, a resident of Batesville, Arkansas, filed a pro se complaint pursuant to 42 U.S.C. § 1983, accompanied by a motion seeking leave to proceed in forma pauperis. (Docket Entries ("D.E.") 1 & 2.) The motion for leave to proceed in forma pauperis is GRANTED. The Clerk shall record the defendants as T. Walters, Hicks, Montgomery and Cynthia Magellon Puljic.[1]

The Statement of Claim portion of the complaint alleges, in its totality:

> The defendants individually, severally and/or jointly did willfully, maliciously and/or negligently knowingly provide false, erroneous and/or misleading information that led to plaintiff's warrantless arrest without probable cause and defendants individually, severally and/or jointly knowingly did willfully,

[1] Plaintiff Burnside also named numerous John and Jane Doe defendants. It is well settled that a complaint cannot be commenced against fictitious parties. Bufalino v. Michigan Bell Tel. Co., 404 F.2d 1023, 1028 (6th Cir. 1968); see also Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996) (explaining that a claim naming fictitious "John Doe" defendants does not commence an action and that a subsequent amendment identifying the defendants cannot relate back under Rule 15). The Clerk shall terminate all references to John and Jane Doe defendants on the docket.

maliciously and/or negligently fail to intervene to prevent such arrest and did so cause plaintiff to be subject to:

a. Wrongful arrest
b. False imprisonment
c. Deprivation of liberty
d. Malicious prosecution
e. Indifference to Medical Needs
f. Defamation of Character
g. Invasion of Privacy
h. Physical, Mental and Emotional distress
i. Physical Illness

(D.E. 1 at 2.) Plaintiff attached an affidavit of complaint as an exhibit which states:

> Personally appeared before me Walters, T. and made oath that on or about the 9th day of November 2008, in said County and within the jurisdiction of the Criminal Court of Shelby County, Tennessee, one William D. Burnside, age 51, sex Male, whose last known address is 3548 Walker #205, Memphis, TN 38111, did unlawfully commit the offense(s) of 911 Calls in Non-Emergency Situations Prohibited (T.C.A. 7-86-316) Aggravated and the essential facts constituting said offense(s) and the source of the affiant's information are as follows:
>
> A/O responded to a 911 call for help at 3548 Walker (The YMCA) where dispatch advised the call was for a 51 year old male having a seizure or possible stroke and was unable to get to his door for help. The room number of the call was unknown at the time. MFD Engine 18 and Unit 4 along with MPD 545B Walters, 555B Montgomery and 566B Hicks made the scene. MFD and MPD spent approximately one hour checking 70 rooms for the distressed complainant and YMCA staff forced entry on room 102, breaking the doorknob, to check on a resident with known health issues. Room 102 proved to be empty. YMCA manager Cynthia Puljic advised repair cost for the door would be about $40.00. Dispatch was unable to reach the complainant on callback attempts. A/O found the original call number to be 650-9249 which is a disconnected phone registered to Arrestee: Burnside, William. Arrestee: Burnside, William was located in room 205 at 3458 Walker and taken into custody. YMCA staff advised Arrestee: Burnside, William has falsely called 911 in the past. A copy of the 911 cal was requested from dispatch for evidence. Arrestee: Burnside, William was transported to 201 Poplar to prevent the offense from continuing. These events occurred in Memphis, Shelby County, TN. These events occurred in Shelby County, Tennessee. No misdemeanor citation was issued because defendant did not have ID.

(D.E. 1 at 4.)

Plaintiff seeks money damages and injunctive relief.

The Court is required to screen in forma pauperis complaints and to dismiss any complaint, or any portion thereof, if the action—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2). Plaintiff's complaint is subject to dismissal in its entirety.

In assessing whether the complaint in this case states a claim on which relief may be granted,

> [t]he court must construe the complaint in the light most favorable to plaintiffs, accept all well-pled factual allegations as true and determine whether plaintiffs undoubtedly can prove no set of facts consistent with their allegations that would entitled them to relief. . . . Though decidedly liberal, this standard does require more than bare assertions of legal conclusions. . . . Plaintiff's obligation to provide the "grounds" of their entitlement to relief requires more than labels and conclusions or a formulaic recitation of the elements of the cause of action. The factual allegations, assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief. . . . To state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory.

League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523 (6th Cir. 2007) (citations omitted; emphasis in original); see also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009); Minadeo v. ICI Paints, 398 F.3d 741, 762-63 (6th Cir. 2005) (complaint insufficient to give notice of statutory claim); Savage v. Hatcher, 109 F. App'x 759, 761 (6th Cir. 2004); Coker v. Summit County Sheriff's Dep't, 90 F. App'x 782, 787 (6th Cir. 2003) (affirming dismissal of pro se complaint where plaintiff "made 'bare bones,' conclusory assertions that do not suffice to state a cognizable constitutional claim"); Payne v. Secretary of Treas., 73 F. App'x 836, 837 (6th Cir. 2003) (affirming sua sponte dismissal of complaint pursuant to Fed. R. Civ. P. 8(a)(2); "Neither this court nor the district court is required to create Payne's claim for her."); Foundation for Interior Design Educ. Research v. Savannah College of Art & Design, 244 F.3d 521, 530 (6th Cir. 2001) (the complaint must "'allege a factual predicate concrete enough to warrant further proceedings'") (citation omitted); Mitchell v. Community Care Fellowship, 8 F. App'x 512, 513 (6th Cir. 2001); Lewis v. ACB Bus. Servs., Inc., 135

F.3d 389, 406 (6th Cir. 1998); Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988) ("[M]ore than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements.").

That a litigant is proceeding pro se or is a prisoner does not absolve him from the requirements of the Federal Rules of Civil Procedure. As the Sixth Circuit has explained:

> Before the recent onslaught of pro se prisoner suits, the Supreme Court suggested that pro se complaints are to be held to a less stringent standard than formal pleadings drafted by lawyers. See Haines v. Kerner, 404 U.S. 519 . . . (1972) (per curiam). Neither that Court nor other courts, however, have been willing to abrogate basic pleading essentials in pro se suits. See, e.g., id. at 521 . . . (holding petitioner to standards of Conley v. Gibson); Merritt v. Faulkner, 697 F.2d 761 (7th Cir.) (duty to be less stringent with pro se complaint does not require court to conjure up unplead allegations), cert. denied, 464 U.S. 986 . . . (1983); McDonald v. Hall, 610 F.2d 16 (1st Cir.1979) (same); Jarrell v. Tisch, 656 F. Supp. 237 (D.D.C. 1987) (pro se plaintiffs should plead with requisite specificity so as to give defendants notice); Holsey v. Collins, 90 F.R.D. 122 (D. Md. 1981) (even pro se litigants must meet some minimum standards).

Wells v. Brown, 891 F.2d 591, 594 (6th Cir. 1989); see also Lindsay v. Owens Loan, No. 08-CV-12526, 2008 WL 2795944, at *1 (E.D. Mich. July 18, 2008) ("While pro se litigants should not be held to the same stringent standard as licensed attorneys who draft pleadings . . . , it is also not the role of the court to speculate about the nature of the claims asserted."); Reeves v. Ratliff, No. Civ.A.05CV112-HRW, 2005 WL 1719970, at *2 (E.D. Ky. July 21, 2005) ("Judges are not required to construct a [pro se] party's legal arguments for him."); United States v. Kraljevich, No. 02-40316, 2004 WL 1192442, at *3 (E.D. Mich. Apr. 15, 2004); Payne v. Secretary of Treas., 73 F. App'x 836, 837 (6th Cir. 2003) (affirming sua sponte dismissal of complaint pursuant to Fed. R. Civ. P. 8(a)(2); "Neither this court nor the district court is required to create Payne's claim for her."); cf. Pliler v. Ford, 542 U.S. 225, 231 (2004) ("District judges have no obligation to act as counsel or paralegal to pro se litigants.").

The complaint contains a heading which lists 42 U.S.C. §§ 1983, 1985, and 1986. However, the allegations provide no basis for concluding that Defendant Puljic, a private

citizen acted under color of state law and, therefore, she cannot be sued under 42 U.S.C. § 1983.

Unlike § 1983, § 1985 does not require state action. Although the complaint does not specify which of the three subsections of § 1985 is at issue, Plaintiff must intend to rely on 42 U.S.C. § 1985(3). In order to maintain a claim under § 1985(3), a plaintiff must demonstrate that the defendants (1) conspired together, (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws, (3) and committed an act in furtherance of the conspiracy, (4) which caused injury to person or property, or a deprivation of any right or privilege of a citizen of the United States, and (5) and that the conspiracy was motivated by racial, or other class-based, invidiously discriminatory animus. Bass v. Robinson, 167 F.3d 1041, 1050 (6th Cir. 1999)(citing Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971); see also Johnson v. Hills & Dales Gen. Hosp., 40 F.3d 837, 839 (6th Cir. 1994). There are no allegations in the complaint that "the conspiracy was motivated by racial, or other class-based, invidiously discriminatory animus." Therefore, a vital component to the conspiracy claim is missing.

Plaintiff's allegations are insufficient to make the existence of a conspiracy plausible. Since no claim is stated under § 1985(3), no claim for relief can lie under § 1986 which creates a cause of action only in those situations where a person either neglects or refuses to prevent a conspiracy to deny equal protection despite the power to do so. A § 1986 claim is totally dependent upon § 1985 for vitality. Bass v. Robinson, 167 F.3d 1041, 1051 n.5 (6th Cir. 1999). Plaintiff's claims under §§ 1985 and 1986 lack supporting factual allegations and are "no more than conclusions" which "are not entitled to the assumption of truth." Iqbal, 129 S. Ct. at 1950.

The complaint also does not assert a valid false arrest claim. A Fourth Amendment claim for false arrest is based on an arrest without probable cause. See, e.g., Parsons v. City of Pontiac, 533 F.3d 492, 500(6th Cir. 2008); Crockett v. Cumberland College, 316 F.3d 571,

580 (6th Cir. 2003) ("Today it is well established that an arrest without probable cause violates the Fourth Amendment."). Probable cause exists where a suspect is arrested pursuant to a facially valid warrant[2] or where "'facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense." Crockett, 316 F.3d at 580 (quoting Michigan v. DeFillippo, 443 U.S. 31, 37 (1979)); see also Wolfe v. Perry, 412 F.3d 707, 717 (6th Cir. 2005) ("probable cause necessary to justify an arrest is defined as 'whether at that moment [of the arrest] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense'") (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)) (alterations in original); Gardenhire v. Schubert, 205 F.3d 303, 315 (6th Cir. 2000).[3]

The complaint and its attachments do not adequately allege that the police lacked probable cause to arrest Plaintiff. The affidavit of complaint reflects that the Defendant Officers responded to a 911 emergency call and after searching unsuccessfully for an hour for a 51 year old male having a seizure or possible stroke, who was unable to get to his door, determined that the call back number belonged to Plaintiff. Plaintiff was located and

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[2] Baker v. McCollan, 443 U.S. 137, 142-46 (1979) (arrest and detention for three days under warrant issued in plaintiff's name but meant for his brother did not state a Fourth Amendment claim); see Masters v. Crouch, 872 F.2d 1248, 1252-53 (6th Cir. 1989) (dismissing claim where warrant issued in error).

[3] The fact that an arrest does not result in a conviction does not necessarily mean that the arrestee has a valid false arrest claim. Because the relevant inquiry concerns the information available to the officer at the time of the arrest, "[a] valid arrest based upon then-existing probable cause is not vitiated if the suspect is later found innocent." Criss v. City of Kent, 867 F.2d 259, 262 (6th Cir. 1988); see also Baker, 443 U.S. at 145 ("The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released.").

determined to have a history of false 911 calls. The affidavit of complaint is sufficient probable cause to support Plaintiff's arrest and transport to 201 Poplar.

Plaintiff's complaint contains no factual allegations to support his claims of malicious prosecution, indifference to medical needs, or slander. It appears Plaintiff was not prosecuted and it is settled Tennessee law that the decision whether to prosecute rests entirely within the discretion of the district attorney general. Ramsey v. Town of Oliver Springs, 998 S.W. 2d 207, 210 (Tenn. 1999); see Tenn. Const. art. VI § 5; Tenn. Code Ann. § 8-7-103(1993). Any claim for slander is barred by the statute of limitations. In Tennessee, the statute of limitations for oral slander is six months, Tenn. Code Ann. § 28-3-103. Plaintiff was arrested on November 9, 2008 and did not file this complaint until November 6, 2009.

The Court, therefore, DISMISSES the complaint in its entirety, pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1), for failure to state a claim on which relief may be granted.

The Court must also consider whether Plaintiff should be allowed to appeal this decision in forma pauperis, should he seek to do so. The United States Court of Appeals requires that all district courts in the circuit determine, in all cases where the appellant seeks to proceed in forma pauperis, whether the appeal is frivolous. Floyd v. United States Postal Serv., 105 F.3d 274, 277 (6th Cir. 1997). Twenty-eight U.S.C. § 1915(a)(3) provides that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

Pursuant to the Federal Rules of Appellate Procedure, a non-prisoner desiring to proceed on appeal in forma pauperis must obtain pauper status under Fed. R. App. P. 24(a). Rule 24(a) provides that if a party seeks pauper status on appeal, he must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken

in good faith, or otherwise denies leave to appeal in forma pauperis, the litigant must file his motion to proceed in forma pauperis in the Court of Appeals. Fed. R. App. P. 24(a)(4)-(5).

The good faith standard is an objective one. Coppedge v. United States, 369 U.S. 438, 445 (1962). The test under 28 U.S.C. § 1915(a) for whether an appeal is taken in good faith is whether the litigant seeks appellate review of any non-frivolous issue. Id. at 445-46. It would be inconsistent for a district court to determine that a complaint should be dismissed prior to service on the defendants, but has sufficient merit to support an appeal in forma pauperis. See Williams v. Kullman, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983). The same considerations that lead the Court to dismiss the complaint also compel the conclusion that an appeal would not be taken in good faith.

It is therefore CERTIFIED, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by Plaintiff would not be taken in good faith and Plaintiff may not proceed on appeal in forma pauperis. Leave to proceed on appeal in forma pauperis is, therefore, DENIED. If Plaintiff files a notice of appeal, he must also pay the full $455 appellate filing fee or file a motion to proceed in forma pauperis and supporting affidavit in the United States Court of Appeals for the Sixth Circuit within thirty (30) days.

IT IS SO ORDERED.

s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WILLIAM DAVID BURNSIDE,

Plaintiff,

vs.

T. WALTERS, et al.,

Defendants.

No. 09-2727-JDT/tmp

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

On November 6, 2009, Plaintiff William David Burnside filed a pro se complaint pursuant to 42 U.S.C. § 1983. On June 1, 2010, the court entered an order granting Plaintiff's motion to proceed *in forma pauperis,* dismissing the action, certifying that an appeal would not be taken in good faith, and notifying Plaintiff of the appellate filing fee. Judgment was entered on June 2, 2010. On June 28, 2010, Plaintiff filed a notice of appeal. On July 8, 2010, the court entered an order reaffirming that an appeal was not taken in good faith, denying the motion to proceed on appeal *in forma pauperis* , and assessing the appellate filing fee. On September 9, 2010, Plaintiff filed the present motion, seeking relief from the order of dismissal and from the judgment [DE# 9].

A court may alter or amend a judgment if the court failed to give relief in the original judgment on a claim on which it later finds that the party is entitled to relief. See Fed. R. Civ. P. 59 and 60; Wright & Miller, Federal Practice & Procedure § 2817. That is, the court must be convinced that a mistake, either of law or in the court's assessment of the facts, has been made.

The court has reviewed the record in this case and finds no mistake or substantial ground for difference of opinion in its original order. Therefore, Plaintiff's motion is DENIED.

IT IS SO ORDERED.

s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

No. 10-5790

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 27, 2012
DEBORAH S. HUNT, Clerk

WILLIAM DAVID BURNSIDE,

Plaintiff-Appellant,

v.

T. WALTERS, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: BATCHELDER, Chief Judge; McKEAGUE, Circuit Judge; FORESTER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

* Hon. Karl S. Forester, Senior United States District Judge for the Eastern District of Kentucky sitting by designation.

28 U.S.C. § 1915 – Proceedings in forma pauperis

(a)

(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)

(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of

(1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court;

(2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636 (b) of this title or under section 3401 (b) of title 18, United States Code; and

(3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636 (c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)

(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)

(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)

(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.