

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM R. HOLT,

Plaintiff,

vs.

CIVIL ACTION
No. 05-3204-SAC

ROGER WERHOLTZ, et al.,

Defendants.

ORDER

The matter is before the court on a pro se complaint filed under 42 U.S.C. 1983 by a prisoner while incarcerated in El Dorado Correctional Facility in El Dorado, Kansas.

Plaintiff alleges error in his state criminal conviction and in his direct appeal, and seeks specific injunctive relief concerning his ability to file pleadings in his pending state court appeal. By an order dated May 18, 2005, the court granted plaintiff additional time to supplement the complaint to show full exhaustion of administrative remedies on plaintiff's claim of being denied his right of access to the courts, and on plaintiff's allegation of deliberate indifference to his medical needs. The court further indicated that habeas relief under 28 U.S.C. 2254, after full exhaustion of plaintiff's state court remedies, was the exclusive remedy for seeking relief for alleged constitutional error in plaintiff's state court conviction and appeals therefrom. See Preiser v. Rodriguez, 411 U.S. 475 (1973)(state prisoner's challenge to fact or duration of

confinement must be presented through petition for writ of habeas corpus after exhausting state court remedies).

In response, plaintiff filed pleadings¹ to detail his frustration with prison regulations that allegedly impair, by the denial of copies and the denial of postage, plaintiff's filing of original actions and appellate pleadings in the state appellate courts.² Plaintiff also cites rotator cuff pain that he claims will render him work disabled upon his release if corrective surgery is not provided.

The court has reviewed plaintiff's pleadings and exhibits, and is willing to assume plaintiff's full exhaustion of administrative remedies as required under 42 U.S.C. 1997e(a). Based on plaintiff's lack of financial resources, the court finds no initial partial filing fee may be imposed at this time due to plaintiff's limited resources, and grants plaintiff leave to proceed in forma pauperis. See 28 U.S.C. 1915(b)(4) (where inmate has no means to pay initial partial filing fee, prisoner is not to be prohibited from bringing a civil action). Plaintiff

¹The materials submitted by plaintiff include a collection of documents received by the court with a postal authority apology and notice of damaged mail. This material, which includes copies of pleadings plaintiff drafted and/or submitted to the Kansas appellate courts, has been assembled by the court for review and docketed as exhibits in support of plaintiff's complaint.

²Plaintiff's motion for "relief from judgment or order" (Doc. 7) is liberally construed by the court as plaintiff's response and objection to the findings entered by the court in the order dated May 18, 2005.

remains obligated to pay the full \$250.00 district court filing fee in this civil action, through payments from his inmate trust fund account as authorized by 28 U.S.C. 1915(b)(2).

Because plaintiff filed this action while he was incarcerated, the court is required to screen his complaint and to dismiss the complaint or any portion thereof that is frivolous, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. 1915A(a) and (b).

In this case, the court finds the supplemented complaint should be dismissed as stating no claim for relief under 42 U.S.C. 1983. See 42 U.S.C. 1997e(c) (the court is to dismiss on its own motion any action brought with respect to prison conditions if satisfied the case fails to state a claim upon which relief can be granted).

First, the court remains convinced that relief under 28 U.S.C. 2254 must be pursued on all allegations of constitutional error in plaintiff's state criminal proceeding, after first exhausting available state court remedies.³ See Preiser v. Rodriguez, 411 U.S. 475 (1973) (state prisoner's challenge to fact or duration of confinement must be presented through petition for writ of habeas corpus after exhausting state court remedies). Section 1983 is not a substitute for a habeas action.

Second, to allege a valid claim under 42 U.S.C. 1983, the

³Plaintiff's direct appeal in his criminal proceeding appears to still be pending in the Kansas appellate courts.

plaintiff must assert the denial of a right, privilege or immunity secured by federal law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); Hill v. Ibarra, 954 F.2d 1516, 1520 (10th Cir. 1992). Thus, plaintiff's allegations of defendants' violation of state statutes, rules, and regulations, states no claim of constitutional deprivation.

Third, to the extent plaintiff claims prison restrictions on his pro se appellate filings violate his right of access to the courts, the court finds no showing has been made that plaintiff was denied the right to present a nonfrivolous legal claim to the state courts concerning his conviction and sentence, or concerning the conditions of his confinement. See Lewis v. Casey, 518 U.S. 343, 356 (1996)(actionable claim of denied access to the court is stated when a prisoner shows injury of being prevented from attacking sentence or challenging conditions of confinement). The "impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." Id.

Fourth, to the extent plaintiff seeks an order directing any specific action in his pending state court appeal, this court's mandamus power does not extend to state court officials. See 28 U.S.C. 1361 (U.S. district court has original jurisdiction of any action in the nature of mandamus to compel "an officer or *employee of the United States or any agency thereof* to perform a duty owed to the plaintiff")(emphasis added). This court has no authority to issue such a writ to "direct state courts or their

judicial officers in the performance of their duties." Van Sickle v. Holloway, 791 F.2d 1431, 1436 n.5 (10th Cir. 1986)(quotation omitted). See also Younger v. Harris, 401 U.S. 37 (1971)(discussing abstention doctrine counseling against federal intervention in an ongoing state court action).

Fifth, plaintiff's allegation that defendants failed to provide corrective rotator cuff surgery that would alleviate future work restraints is insufficient to state a claim of deliberate indifference by any defendant to a serious medical need of plaintiff. See Estelle v. Gamble, 429 U.S. 97, 104 (1976)(prison officials violate the eighth amendment when they are deliberately indifferent to a prisoner's serious medical needs); Medcalf v. State of Kansas, 626 F.Supp. 1179, 1182 (D.Kan. 1986)(denial of care must be continuing, unsupported by a competent and recognized school of practice, and must equal a denial of needed treatment).

And finally, plaintiff's claims against prison officials for declaratory and injunctive relief on plaintiff's allegations of constitutional error were rendered moot by plaintiff's release from prison on June 8, 2005. See Martin v. Sargent, 780 F.2d 1334 (8th Cir. 1985)(claim for injunctive relief moot if no longer subject to conditions); Cox v. Phelps Dodge Corp., 43 F.3d 1345, 1348 (10th Cir. 1994)(declaratory relief subject to mootness doctrine).

IT IS, THEREFORE, BY THE COURT ORDERED that plaintiff is granted leave to proceed in forma pauperis.

IT IS FURTHER ORDERED that plaintiff's motions for a temporary restraining order (Doc. 3), service of the complaint (Doc. 4), appointment of counsel (Doc. 5), for relief from judgment or order (Doc. 7), and for discovery (Doc. 10) are denied.

IT IS FURTHER ORDERED that the supplemented complaint is dismissed as stating no claim for relief under 42 U.S.C. 1983.

IT IS SO ORDERED.

DATED: This 14th day of June 2005 at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge