

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW HOLDER : CIVIL ACTION
: NO. 03-4288
v. :
:
JANNIS SMARRO AND PAUL RILEY :

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

March 24, 2005

Plaintiff, Andrew Holder, filed this action challenging his criminal convictions and sentence. Holder claims Defendants, Paul Riley and Janis Smarro, violated his civil rights and committed legal malpractice during his 1997 murder trial. Defendants claim Holder fails to state a claim under 42 U.S.C. § 1983 and his claim is time-barred under Pennsylvania's two year legal malpractice statute of limitations. For the reasons that follow, we grant Defendants' Motion to Dismiss.

FACTS¹

Holder was convicted of murder in the Philadelphia Court of Common Pleas on May 8, 1997. Holder filed this civil action on July 23, 2003, challenging his criminal convictions and sentence. He claims prosecutor Paul Riley, defense attorney Janis Smarro and Common Pleas Judge Lisa Richette, violated the Fifth, Sixth and Fourteenth Amendments when they conspired against

¹In a motion to dismiss, we view the evidence in the light most favorable to the non-moving party, in this case Holder. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002).

him, fabricated and concealed evidence, and admitted inconsistent evidence at trial. Holder seeks relief from his prison sentence, as well as compensation for pain and suffering.

Holder's complaint was served on Defendants on November 1, 2004. Smarro filed a Motion to Dismiss on November 8, 2004 and Riley filed a Motion to Dismiss on January 7, 2005. On January 24, 2005, Holder filed a Voluntary Motion to Dismiss.² Then, on January, 28, 2005, Holder filed a Motion for Appointment of Counsel.

DISCUSSION

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. *Holder v. City of Allentown*, 987 F.2d 188, 194 (3d Cir. 1993). When considering a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12b(6), the court must accept all well pleaded allegations in the complaint as true and view them in the light most favorable to plaintiff. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). The court must consider only the facts alleged in the complaint and its attachments, without reference to other items in the record. *Id.* The court may not dismiss the complaint unless the plaintiffs can prove no set of facts which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

“[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment,

² Specifically, Holder filed a “Motion to Dismissed [sic] both of the Petition [sic] filed by Andrew Holder.” The court will consider this a Motion for Voluntary Dismissal. “Voluntary dismissal upon motion of the plaintiff after the defendant has filed its answer falls within the discretion of the district court.” *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991)(citing *Ferguson v. Eakle*, 492 F.2d 26, 28 (3d Cir. 1974)). We decline to grant Holder's Motion for Voluntary Dismissal.

or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.” *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). Consequently, when a prisoner seeks damages in a § 1983 suit, the court must determine whether judgment in the plaintiff’s favor would invalidate the plaintiff’s conviction or sentence. *Id.* at 487. If it would, the claim must be dismissed. *Id.* “Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.” *Id.* at 489.

Holder’s complaint alleges Riley and Smarro engaged in unlawful acts that led to his conviction and sentence. Holder’s conviction and sentence have not been reversed or invalidated by a grant of a writ of habeas corpus. Accordingly, Holder’s § 1983 claim for relief must be dismissed.

Dismissal is still appropriate even if we were to view Holder’s claim as a claim for legal malpractice. In Pennsylvania, legal malpractice is generally subject to a two-year statute of limitations. 42 Pa.C.S. § 5524.³ The statute of limitations begins to run from the time the negligent

³ In some cases, the statute of limitations is greater. For example, if the action is based on an alleged breach of oral contract of hiring, or breach of an implied contract, the statute of limitations is four years. 42 Pa.C.S. § 5525(3) and (4). If the action is based upon a written contract, the statute of limitations is six years. 42 Pa.C.S. § 5527(2). Neither the four year, nor the six year statute of limitations however, is relevant in this case. Even if they were, the action is still time barred because more than six years has passed since the alleged negligent act.

act is done. *Moore v. McComsey*, 459 A.2d 841, 844 (Pa. Super. Ct. 1983).

Under the Pennsylvania statute of limitations for legal malpractice, Holder's action is time barred. Holder did not file his claim until more than six years after the alleged malpractice. This is well outside the two-year statute of limitations.

We also decline to appoint Holder counsel. 28 U.S.C. § 1915(d) gives district courts broad discretion to appoint counsel to indigent civil litigants. *Tabron v. Grace*, 6 F.3d 147, 153 (3d Cir. 1993). "Such litigants [however,] have no statutory right to appointed counsel." *Id.* "Before the court is justified in exercising its discretion in favor of appointment, it must first appear that the claim has some merit in fact and law." *Id.* at 155. Because Holder's conviction and sentence have not been reversed or invalidated by a grant of a writ of habeas corpus, Holder's claim against Defendants Smarro and Reily lacks merit. We therefore decline to appoint counsel. Accordingly, we enter the following:

ORDER

And Now, this 24th day of March, 2005, Defendant's Motion to Dismiss is Granted (Doc. 9 & Doc. 12). Plaintiff's Motion to Amend Petition (Doc. 13) is Denied. Plaintiff's Motion to

Dismiss (Doc. 15) is Denied. Plaintiff's Motion to Appoint Counsel is Denied (Doc. 16). The clerk is directed to mark civil actions 03-4287 and 03-4288, closed.⁴

BY THE COURT:

\s\ Juan R. Sánchez

Juan R. Sánchez, J.

⁴ Plaintiff originally filed two claims, docketed at civil action number 03-4287 and 03-4288. Judge Kelly consolidated the claims so Holder would only have to pay one filing fee. Both civil actions state duplicate § 1983 claims against different defendants. Since we find Holder cannot bring a § 1983 claim challenging the validity of his conviction or sentence because such conviction or sentence has not been invalidated by the grant of a writ of habeas corpus we dismiss all § 1983 challenges.