

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 17 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KEVIN ABDUL GILBERT,

Plaintiff-Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF CORRECTIONS; et al.,

Defendants-Appellees.

No. 17-35923

D.C. No. 3:17-cv-05100-RBL

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Submitted July 10, 2018**

Before: CANBY, W. FLETCHER, and CALLAHAN, Circuit Judges.

Washington state prisoner Kevin Abdul Gilbert appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging constitutional claims based on unlawful confinement. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Wilhelm v. Rotman*, 680 F.3d 1113, 1118

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

(9th Cir. 2012) (dismissal under 28 U.S.C. § 1915A); *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii)). We affirm.

The district court properly dismissed Gilbert's claims alleging unlawful incarceration because success on Gilbert's claims would necessarily demonstrate the invalidity of his confinement or its duration, and Gilbert failed to allege that his conviction or sentence has been invalidated. *See Wilkinson v. Dotson*, 544 U.S. 74, 80-82 (2005) (a prisoner's § 1983 claims for damages and declaratory relief are barred if success "would necessarily demonstrate the invalidity of confinement or its duration[,]” unless “the conviction or sentence has already been invalidated” (citation and internal quotation marks omitted)).

To the extent Gilbert claims legal error in any Washington state proceedings, dismissal was proper because the *Rooker-Feldman* doctrine bars any such claim. *See Noel v. Hall*, 341 F.3d 1148, 1155-57 (9th Cir. 2003) (*Rooker-Feldman* doctrine bars de facto appeal of a state court decision).

AFFIRMED.

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No. 17-35923

D.C. No. 3:17-cv-05100-RBL
Western District of Washington,
Tacoma

ORDER

Before: CANBY, W. FLETCHER, and CALLAHAN, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See Fed. R. App. P. 35.*

Gilbert's petition for rehearing en banc (Docket Entry No. 14) is denied.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEVIN ABDUL GILBERT,
Plaintiff,

v.

WASHINGTON STATE
DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

CASE NO. 3:17-cv-05100-RBL-JRC

REPORT AND RECOMMENDATION

NOTED FOR: OCTOBER 27, 2017

This 42 U.S.C. § 1983 civil rights matter has been referred to Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. §§ 636 (b)(1)(A) and (B) and Local Magistrate Judge Rules MJR 1, MJR 3, and MJR 4.

Plaintiff Kevin Abdul Gilbert brings this § 1983 action. He claims that he is currently being held unlawfully because his warrant of transfer, placing him in the custody of the Department of Corrections, is deficient. However, a finding in plaintiff's favor because of a faulty warrant of transfer necessarily implies the invalidity of the warrant and is therefore inappropriate as a § 1983 action. Because the Court has already indicated this to plaintiff in two

1 orders to show cause and because plaintiff has failed to remedy the deficiency in both amended
2 complaints, the Court recommends that plaintiff's action be dismissed without prejudice.

3 BACKGROUND

4 Plaintiff is currently housed at the Stafford Creek Corrections Center. Dkt. 13 at 2. He
5 claims that he was unlawfully transferred from the custody of King County to the custody of the
6 Washington Department of Corrections ("DOC"). *Id.* at 3. He alleges that the warrant of transfer
7 was never signed and therefore the DOC does not have the jurisdiction to confine him. *Id.* He
8 states the named defendants are violating his 4th and 14th Amendment protections from
9 unwarranted seizure because the DOC has imprisoned him without legal authority or valid due
10 process. *Id.* He further claims that while incarcerated, he has suffered a series of physical harms.
11 *Id.* at 4. Plaintiff requests \$2,500.00 for each day he was held prisoner unlawfully, beginning
12 with the alleged "unlawful conduct on 2-2-06 and 2-3-06." *Id.* at 5.

13 STANDARD OF REVIEW

14 A complaint must contain a "short and plain statement of the claim showing that the
15 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Mere conclusory statements in a complaint
16 and "formulaic recitation[s] of the elements of a cause of action" are not sufficient. *Id.*; *Chavez v.*
17 *United States*, 683 F.3d 1102, 1108-09 (9th Cir. 2012). "Dismissal can be based on the lack of a
18 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
19 theory." *Ballistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). The pleading
20 must be more than an "unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.*

21 While the Court must accept all the allegations contained in the Complaint as true, the
22 Court does not have to accept a "legal conclusion couched as a factual allegation." *Id.* When a
23 plaintiff is proceeding *pro se*, his allegations must be viewed under a less stringent standard than
24

1 allegations of plaintiffs represented by counsel. *Haines v. Kerner*, 404 US 519 (1972), *reh'g*
2 *denied*, 405 U.S. 948 (1972); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985) (en
3 banc) (petitioner should be afforded the “benefit of any doubt”). However, the court need not
4 accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual
5 allegations. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

6 PROCEDURAL HISTORY

7 Plaintiff was granted leave to proceed *in forma pauperis* on February 15, 2017. Dkt. 3.
8 On February 27, 2017, the Court ordered plaintiff to show cause or amend his complaint, noting
9 that plaintiff had named improper defendants, that he does not have a liberty interest in avoiding
10 transfer between prisons, and that, insofar as he alleges he is unlawfully incarcerated due to an
11 invalid transfer or judgment, his claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).
12 Dkt. 5. After the Court granted a motion for extension of time (Dkt. 7), plaintiff filed a first
13 amended complaint on April 28, 2017 (Dkt. 8). The Court, for a second time, ordered plaintiff to
14 show cause or amend, noting again that he has no liberty interest in avoiding transfer between
15 prisons, that his claims are barred under *Heck*, and adding that he cannot recover if his claims are
16 based solely on supervisory liability. Dkt. 10. After a second order granting an extension of time
17 (Dkt. 12), petitioner filed his second, current amended complaint on August 7, 2017 (Dkt. 13).

18 DISCUSSION

19 The first step in a § 1983 claim is to identify the specific constitutional right allegedly
20 infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). To state a claim for relief under 42
21 U.S.C. § 1983, at least two elements must be met: (1) the alleged infringement must have been
22 proximately caused by a person acting under color of state law and (2) defendants’ conduct must
23 have deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws
24

1 of the United States. *Paratt v. Taylor*, 451 U.S. 527 (1981). A third element of causation is
2 implicit in the second element. *See Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429
3 U.S. 274, 286-87 (1977); *Flores v. Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980), *cert denied*,
4 449 U.S. 875 (1980). A plaintiff must allege facts showing how individually named defendants
5 caused, or personally participated in causing, the harm alleged in the complaint. *See Arnold v.*
6 *IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

7 In his second amended complaint, plaintiff requests money damages for the days he has
8 allegedly been unlawfully incarcerated due to a faulty warrant of transfer. As noted in both of
9 this Court's previous orders to show cause (Dkts. 7, 10), plaintiff's claims are barred under *Heck*.
10 A civil rights complaint under § 1983 cannot proceed when "a judgment in favor of the plaintiff
11 would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint
12 must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has
13 already been invalidated." *Heck*, 51 U.S. at 487. The action "is barred (absent prior
14 invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of
15 the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—if
16 success in that action would necessarily demonstrate the invalidity of confinement or its
17 duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005).

18 Here, success on plaintiff's claim would necessarily demonstrate the invalidity of his
19 current confinement. Plaintiff seeks money damages for his days of alleged unlawful
20 incarceration: Dkt. 13 at 5. Despite this Court's orders to show cause or amend, plaintiff still
21 bases his claims on an allegedly faulty warrant of transfer. *Id.* at 3. If plaintiff succeeds, this
22 Court would necessarily be finding that the warrant of transfer was invalid. To find the warrant
23 of transfer invalid is to "demonstrate the invalidity of the confinement or its duration," a finding
24

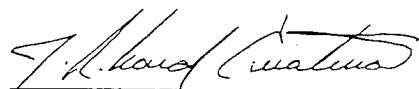
1 that is inappropriate in a § 1983 action. *Wilkinson*, 544 U.S. at 81-82. If plaintiff wants to pursue
2 his current action, he must first invalidate the warrant by exhausting his state remedies and, if
3 necessary, filing a federal habeas petition. Because plaintiff has not yet proven the warrant is
4 invalid through the habeas process and the invalidity of the warrant is necessary for plaintiff to
5 recover, the Court recommends plaintiff's action be dismissed without prejudice.

6 **CONCLUSION**

7 For the reasons set forth above, the Court recommends that plaintiff's action be dismissed
8 without prejudice. His claims are barred by *Heck* because a finding in plaintiff's favor
9 necessarily demonstrates the invalidity of his current confinement. Further, the Court has already
10 provided plaintiff with two opportunities to correct his *Heck* barred claims and two extensions of
11 time, all with no effect. Because of this, the Court recommends that plaintiff not be given leave
12 to amend and that the District Court Judge dismiss the case without prejudice.

13 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
14 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.
15 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo*
16 review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a result in a waiver
17 of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Miranda v.*
18 *Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the time limit
19 imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **October 27,**
20 **2017** as noted in the caption.

21 Dated this 4th day of October, 2017.

22 

23 J. Richard Creatura
24 United States Magistrate Judge