

No. 17-4299

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 23, 2019
DEBORAH S. HUNT, Clerk

DON NELL HAWKINS,
Plaintiff-Appellant,
v.
PATRICIA A. GAUGHAN,
Defendant-Appellee.

ORDER

Before: CLAY, GILMAN, and WHITE, Circuit Judges.

Don Nell Hawkins, a federal prisoner, has filed a pro se petition for rehearing of this court's order of October 26, 2018, affirming the dismissal as frivolous of a complaint he filed.

Upon consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. *See Fed. R. App. P. 40(a)(2).*

We therefore **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT

John S. Hunt

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

FILED

Oct 26, 2018

No. 17-4299

DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON NELL HAWKINS,)
v.)
Plaintiff-Appellant,)
v.) ON APPEAL FROM THE UNITED
PATRICIA A. GAUGHAN,) STATES DISTRICT COURT FOR
Defendant-Appellee.) THE NORTHERN DISTRICT OF
) OHIO
)

ORDER

Before: CLAY, GILMAN, and WHITE, Circuit Judges.

Don Nell Hawkins, a federal prisoner proceeding pro se, appeals a district court order dismissing his civil rights complaint, filed pursuant to 42 U.S.C. § 1983, as frivolous. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Hawkins was convicted, based on his guilty plea in 2007, of distributing cocaine base and was sentenced to 240 months of imprisonment. Since then, Hawkins has filed more than thirty-five appeals and other actions in this court, and even more post-judgment motions in the district court, leading both courts to disallow further filings in his criminal case. Hawkins therefore filed this civil rights action against the judge in his criminal case. Hawkins alleged that the judge lacked jurisdiction to enter the order barring him from further filings because she entered the order in response to a successive motion for a writ of audita querela that should have been transferred to this court for authorization to file a successive motion to vacate his sentence. Hawkins also filed a proposed amended complaint to add a police officer as a defendant.

Hawkins has alleged countless times in both this court and the district court that a statement by this officer that he observed drug transactions occurring at the house where Hawkins was living contradicts another statement that, on two occasions, other officers watched a confidential informant enter and exit the home to make controlled drug buys. Hawkins alleged that both the judge and the police officer were denying him access to the courts because his attempts to file Federal Rule of Civil Procedure 60(b) motions in his 28 U.S.C. § 2255 proceeding reasserting this argument were returned unfiled. The district court dismissed the complaint as frivolous and denied the motion to amend. The district court also denied a motion for reconsideration, in which Hawkins argued that the district court should have addressed his proposed amended complaint rather than his original complaint.

This appeal followed. This Court denied a motion to proceed in forma pauperis, and Hawkins has now paid the filing fee. We also denied a motion for initial en banc review. In his brief, Hawkins argues that the district court erred in addressing his original complaint rather than his proposed amended complaint. He also reasserts his argument that the defendant judge lacked jurisdiction to preclude him from filing further post-judgment motions in his criminal case in response to his successive motion for a writ of audita querela because he had not received authorization from this court to file the motion. And Hawkins repeats his argument that he needs to be able to file Rule 60(b) motions in his § 2255 proceeding to bring to the district court's attention yet again that he believes there is some contradiction between the police officer's two statements that calls his conviction into question.

This complaint was properly dismissed as frivolous for the reasons already explained by the district court and this court. This is true whether the original complaint or the proposed amended complaint is considered. Defendant, the district court judge from the criminal trial, is entitled to absolute immunity from suit, because she did not "clearly lack[] all subject matter jurisdiction" to issue the order prohibiting Hawkins from filing further motions. *Ireland v. Tunis*, 113 F.3d 1435, 1441 (6th Cir. 1997). Furthermore, the complaint was barred by the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), because it implies that the

underlying conviction is invalid. Finally, Hawkins has no claim of denial of access to the courts against either the district court judge or the police officer because he has not shown actual prejudice or injury to a non-frivolous claim. *See Lewis v. Casey*, 518 U.S. 343, 356 (1996). He alleges only that he cannot continue to raise the claim that he believes the two statements by the police officer are contradictory, even though they clearly are not, and he has raised this argument before both courts repeatedly.

Accordingly, we **AFFIRM** the district court's order dismissing this action as frivolous.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

DON NELL HAWKINS, Plaintiff, v. PATRICIA A. GAUGHAN, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN
DIVISION
2017 U.S. Dist. LEXIS 182679
CASE NO. 1: 17 CV 1978
November 3, 2017, Decided
November 3, 2017, Filed

Editorial Information: Prior History

United States v. Hawkins, 2009 U.S. Dist. LEXIS 70661 (N.D. Ohio, Aug. 10, 2009)

Counsel Don Nell Hawkins, Plaintiff, Pro se, LISBON, OH.

Judges: CHRISTOPHER A. BOYKO, United States District Judge.

Opinion

Opinion by: CHRISTOPHER A. BOYKO

Opinion

OPINION AND ORDER

CHRISTOPHER A. BOYKO, J.:

Seeking to proceed *in forma pauperis*, Plaintiff Don Nell Hawkins, a federal prisoner, has filed a Complaint in this action against Judge Patricia A. Gaughan, who presided over the Plaintiff's criminal case. See *United States v. Hawkins*, Case No. 5:06 CR 505, 2009 U.S. Dist. LEXIS 70661 (N.D. Ohio). In the case, the Plaintiff entered a guilty plea, pursuant to a Plea Agreement, to Count 3 of an indictment charging him with Possession with Intent to Distribute Cocaine Base. Judge Gaughan sentenced the Plaintiff to 240 months' imprisonment, followed by 10 years of supervised release. After the Plaintiff persisted in filing numerous subsequent, frivolous petitions under § 2255, post-judgment motions, and motions for reconsideration, Judge Gaughan enjoined him from filing any further motions in the case, a ruling that was upheld by the Sixth Circuit Court of Appeals. See, e.g., Case No. 5: 06 CR 505, Doc. Nos. 126, 176, 192, 195, 209, 214, 215.

In his present Complaint, the Plaintiff contends Judge Gaughan violated his rights by her rulings in his criminal case, including her order enjoining him from filing further motions. He seeks monetary, declaratory and injunctive relief against her pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

The Plaintiff's Complaint must be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A, which require federal district courts to review all *in forma pauperis* actions, and all actions in which prisoners seek redress from governmental officers and employees, and to dismiss before service any such action that the Court determines is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. See *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010).

It is well-settled that judicial officers are absolutely immune from civil suits for money damages.