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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 13, 2019
Lyle W. Cayce
Clerk

No. 17-20627
Summary Calendar

JASON HENDERSHOTT,

Plaintiff-Appellant

v.

WARDEN KELLY STRONG; WARDEN C. PANSY; WARDEN DAGEL; WARDEN J. SHELLY; WARDEN J. RODRIGUEZ; WARDEN WATSON; WARDEN V. LONG; WARDEN H. ORTIZ,

Defendants-Appellees

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:14-CV-3123

Before HIGGINBOTHAM, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Jason Hendershott, Texas prisoner # 1659369, appeals the district court's sua sponte dismissal of his 42 U.S.C. § 1983 civil rights action under 28 U.S.C. § 1915(e)(2)(B) as frivolous and for failure to state a claim on which relief could be granted. In his § 1983 complaint, Hendershott alleged the denial of his right to access the courts in order to pursue a federal habeas action

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

challenging his convictions of eight counts of aggravated sexual assault of a child, two counts of aggravated kidnapping, and two counts of indecency with a child. His motion to supplement his brief with additional case law is GRANTED; his motions for the appointment of appellate counsel and to strike the appellees' brief are DENIED.

We review the district court's dismissal de novo. *See Geiger v. Jowers*, 404 F.3d 371, 373 (5th Cir. 2005). Hendershott's § 1983 complaint was not time barred, *see Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995), but he has not shown that the district court erred in determining that his complaint was frivolous or failed to state a claim because he has failed to show that he suffered actual harm. *See Lewis v. Casey*, 518 U.S. 343, 349-54 (1996).

The one-year limitation period for Hendershott to file a timely § 2254 application expired before his legal materials were allegedly taken from him. *See* 28 U.S.C. § 2244(d); *Flanagan v. Johnson*, 154 F.3d 196, 197 (5th Cir. 1998); *see also Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Although he contends that a prior attempt at a § 2254 application was never received by the district court, he does not allege any facts demonstrating that the earlier § 2254 application failed to reach its destination due to the actions, intentional or otherwise, of any of the defendants and thus, he has not shown that the loss of his mail denied him access to the courts. *See Brewer v. Wilkinson*, 3 F.3d 816, 821 (5th Cir. 1993).

Long & she's once giving 2254 never mailed it,

Additionally, to the extent that Hendershott contends that the limitations period should have been equitably tolled due to the loss of this earlier application, Hendershott has not shown that the loss prevented him from filing another § 2254 application before his legal materials were allegedly taken from him. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). Hendershott also contends that other events, including a knee surgery in March 2014 and

trips to a hospital and mental facility, interfered with his ability to prepare his second § 2254 application. However, he has not provided sufficient details to state a claim that he experienced more than brief periods of incapacity or that these periods warranted equitable tolling. *See Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010); *Roberts v. Cockrell*, 319 F.3d 690, 695 (5th Cir. 2003); *Fisher v. Johnson*, 174 F.3d 710, 713-15 (5th Cir. 1999).

If liberally construed, Hendershott's appellate filings also argue that he is actually innocent. However, his legal claims challenging the offenses charged and the constitutionality of the statute do not demonstrate actual innocence in this context. *See Bousley v. United States*, 523 U.S. 614, 623-24 (1998). Moreover, none of the evidence that Hendershott alleges was confiscated from him is sufficient to establish that no reasonable factfinder would have found him guilty beyond a reasonable doubt. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

Because Hendershott has not shown that the defendants' actions prevented him from filing a § 2254 application that would not have been dismissed as time barred, he has not demonstrated the actual harm necessary to show that any relief could be granted on his access-to-the-courts claims based on his alleged facts or that his claims had an arguable basis in law or fact. *See Lewis*, 518 U.S. at 349-54; *see also Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992) (noting that we can "affirm the district court's judgment on any grounds supported by the record"). Additionally, he has not shown that the district court abused its discretion in denying his motions to appoint counsel and to compel discovery. *See Baranowski v. Hart*, 486 F.3d 112, 126 (5th Cir. 2007); *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876 (5th Cir. 2000). Accordingly, the district court's judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JASON HENDERSHOTT, TDCJ No. 1659369, Plaintiff,	§ § §	
v.	§	CIVIL ACTION H-14-3123
WARDEN KELLY STRONG, *et al.*,	§	
Defendants.	§	

FINAL JUDGMENT

For the reasons stated in the Court's Memorandum on Dismissal entered this date, this action is **DISMISSED.**

This is a **FINAL JUDGMENT.**

SIGNED at Houston, Texas, on September 12, 2017.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JASON HENDERSHOTT, TDCJ No. 1659369, Plaintiff,	§	
v.	§	CIVIL ACTION H-14-3123
WARDEN KELLY STRONG, *et al.*, Defendants.	§	

MEMORANDUM ON DISMISSAL

Plaintiff Jason Hendershott is currently held in the Texas Department of Criminal Justice-Institutional Division (TDCJ). He is serving twelve sentences under convictions in the Nueces County State District Court. Plaintiff states he is attempting to challenge these Nueces County convictions. He filed this civil-rights lawsuit raising claims that he was denied access to the courts in his attacks on these convictions. He maintains he was unable to obtain copies of the legal records and other material needed to prepare and submit his federal habeas petitions attacking these convictions. Plaintiff contends his inability to obtain these records and other legal materials is a denial of access to the courts in his federal court attack on his state convictions.

The state court convicted Plaintiff in the underlying criminal cases on July 30, 2010. He filed direct appeals in all twelve convictions. *Hendershott v. State*, 2012 WL 32 42018. He filed petitions for discretionary review in each of his convictions, which the Texas Court of Criminal Appeals refused on February 6, 2013. *See Id.*

Also contended Defendant's refused to return my property namely my legal work 2254 & Court record's & notes

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I. THE STATUTE OF LIMITATIONS ON HABEAS CORPUS CLAIMS

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended the habeas corpus statutes. The AEDPA states in part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. 28 U.S.C. § 2244(d) (West 1996).

Plaintiff's convictions became final on May 7, 2013. That date is when the time to petition for *certiorari* in the Supreme Court expired, ninety days after the Court of Criminal Appeals denied Plaintiff's PDR. Sup.Ct.R. 13.1 (West 1995). The state court mandates issued on June 20, 2013. *See* 2012 WL 3242018. The convictions were final at the latest on June 20, 2013.

The one-year federal habeas statute of limitations ran from June 20, 2013, to June

Got no court madate from court

20, 2014. Plaintiff was required to file any state habeas petitions within one year of the convictions becoming final. Plaintiff had from May 7, 2013 to June 20, 2014, to prepare and file any state habeas applications he wished to pursue. 28 U.S.C. § 2244(d)(1)(A) (West 1996). For his state court attacks on his convictions to be timely, he needed to obtain the germane legal materials and paperwork well before the habeas statute of limitations expired on June 20, 2014. He needed to allow adequate time to research, prepare, and draft his state habeas applications to properly exhaust his state court remedies. Plaintiff should have started working on his civil-rights complaint early enough to be able to obtain the legal paperwork and materials needed to prepare and timely file his federal habeas applications.

Plaintiff filed this federal civil rights complaint on September 18, 2014, raising his claims of denial of access to the courts. He generally contends prison officials refused to timely give him his legal material so that he could submit his federal writ applications under 28 U.S.C. § 2254 within the limitation period. As stated above, his convictions became final on June 20, 2013. It is without dispute that Plaintiff did not start preparations on his state habeas attack early enough to allow sufficient time to research, prepare, and submit his federal petition by the deadline of June 20, 2014.

Plaintiff needed to timely gather the necessary information and materials for his attack on his state court convictions under federal habeas review. There is no showing

June 20, 2014 2254 writ due

that any circumstances beyond his control prevented him from preparing and filing his state habeas application within the Texas limitation period. It is without dispute that he failed to do the necessary tasks, including gathering the appropriate materials, needed to prepare his state habeas application within the state limitation period. He therefore failed to file his state habeas application before the limitation period expired. Under this failure, he did not timely pursue his civil-rights claims on denial of access to the courts.

In section 1983 cases, the federal courts apply the forum state's general personal injury limitations, *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989), and its tolling provisions. *Hardin v. Straub*, 490 U.S. 536 (1989). The Texas period of limitations for personal injury actions is two years. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (2005). Federal law governs the accrual of a cause of action. *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir. 1980). Under the federal standard, "the time for accrual is when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Listi*, 611 F.2d at 1131. A plaintiff need not realize that a cause of action exists, he need only know the facts that would support a claim. *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

As stated above, Plaintiff learned the facts of the underlying habeas claims at the latest on June 20, 2013. Therefore, the statute of limitations on his habeas attacks expired one year later, on June 20, 2014. 28 U.S.C. § 2244(d). He cannot use the two-

mailed my Federal writ by handing to prison staff to mail
But they never mailed it. Feb. 2014 before time date
Should have 4 months time to file 2254 - tolling.

year limitation period for civil-rights claims to extend the one-year limitation period for habeas corpus attacks. Plaintiff filed this complaint on September 18, 2014, more than two months after the habeas limitation period expired.

Plaintiff filed his state habeas application late. Nothing in the records or the pleadings in this case shows Plaintiff was denied access to the state court to timely file his state habeas application. He failed to timely and diligently perform the necessary tasks required to prepare and file his habeas challenges within the habeas limitation period. His claim of denial of access to the state courts fails because he failed to timely and diligently pursue his habeas remedies in state court. Plaintiff's claims on access to the courts fail because the claimed denial of court access was his own fault. In so far as Plaintiff was denied access to the courts, he was denied access resulting from his own actions and failures.

Plaintiff's claim of denial of access to the state courts in his habeas attacks on his state court convictions is time barred.

II. LACK OF HARM OR PREJUDICE

Plaintiff's claims also fail for a separate reason. He has a constitutional right of access to the courts. *Johnson v. Avery*, 393 U.S. 483, 483-485 (1969). It includes, however, only "a reasonably adequate opportunity to file non-frivolous legal claims challenging [a prisoner's] conviction or conditions of confinement." *Lewis v. Casey*,

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518 U.S. 343, 356 (1996). The right of access to the courts applies only to inmates who suffer actual harm in a particular lawsuit in which they are a party. *Id.* at 349. To support a claim of denial of access to the courts, a prisoner must show that his position in a legal action was prejudiced. *Lewis*, 518 U.S. at 349; *Henthorn v. Swinson*, 955 F.2d 351, 354 (5th Cir.), *cert. denied*, 504 U.S. 988 (1992).

The thrust of Plaintiff's claim for relief is his request for the legal materials he maintains he needed to effectively challenge and overturn his twelve state convictions and sentences. There is nothing in the record which shows any reasonable probability that Plaintiff would have been able overturn any of his convictions or sentences because of any legal relief potentially available to him. He does not raise any specific facts which show harm or prejudice in his criminal prosecution based on the claims he raises here. There is no showing of prejudice. Plaintiff's claims in this lawsuit also fail, beyond the limitations bar, because there is no showing of prejudice or harm resulting from his claimed denial of access to the courts.

III. INTENTIONAL BEHAVIOR

Plaintiff's claims also fail for a third reason. To show a deprivation of the right of access to the courts, a prisoner must show intention on the defendants' part, for example, by withholding mail destined for the courts. *Jackson v. Procunier*, 789 F. 2d 307, 312 (5th Cir. 1986). The plaintiff must show intentional misconduct. *Id.* He must

1st 2254 was given to Long & Shelly they never mailed it. They intentionally failed to return my property, namely my legal document's. This so denied me to turn in my 2254 writ, since my 1st 2254 was lost in the mail. This was/is intentional misconduct. There is harm, I can't turn in my 2254 effectively without my legal documents defendants lost.

show that prison or jail officials acted to "intentional[ly] withhold ... mail destined for the courts ..." or other similar behavior. *Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988) citing *Jackson.*

Plaintiff does not raise facts which show that any Defendants acted with intent to prevent him from filing pleadings in his criminal cases. Moreover, Plaintiff does not raise any acts or omissions which show any Defendants hampered him in his ability to file pleadings or otherwise have access to the courts because of any actions or inactions by the Defendants. Did show this in more Definite statement.

This Court recognizes that the Supreme Court has said "that the .... right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with *adequate law libraries* or adequate assistance from persons trained in the law..." *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (emphasis added). An individual must have the opportunity to present a claim or defense to the appropriate court and have that court determine its merit. *Crowder v. Sinyard*, 884 F.2d 804, 814 (5th Cir. 1989). Plaintiff does not raise any claims or specific factual allegations which raise violations of the holdings in *Bounds v. Smith* or *Crowder v. Sinyard.*

IV. CONCLUSION

The district court may dismiss an action *sua sponte* if it is frivolous or fails to

Replace my legal documents

state a claim on which relief may be granted. 28 U.S.C. § 1915(e)(2)(B). Plaintiff's claim of denial of access to the courts fails essentially because he failed to timely, fully, and diligently pursue his required state court remedies before filing this federal civil rights complaint. Plaintiff's claims lack an arguable basis in law and fail to state a claims on which relief may be granted under the limitations bar. *See Ali v. Higgs*, 892 F.2d 438 (5th Cir. 1990).

SIGNED at Houston, Texas, on September 12, 2017.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE