

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1272

RONALD BLUE WEST,
Appellant

v.

UNITED STATES OF AMERICA

(M.D. Pa. No. 3:16-cv-02460)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, and McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**.

By the Court,

s/ Stephanos Bibas
Circuit Judge

Dated: November 15, 2019

Tmm/cc: Ronald Blue West
Timothy S. Judge, Esq.

ALD-237

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1272

RONALD BLUE WEST,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-16-cv-02460)
District Judge: Honorable Yvette Kane

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
July 18, 2019

Before: MCKEE, SHWARTZ, and BIBAS, Circuit Judges

(Opinion filed: August 21, 2019)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Ronald Blue West appeals from the denial of his motion to reopen his District Court proceeding. We will dismiss this appeal as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

West's underlying amended complaint concerns an incident that allegedly occurred in 2015 while he was incarcerated at Allenwood FCI (from which he has since been transferred). West alleged that a lieutenant wrongfully disclosed that West had a history of working with law enforcement. West further alleged that the disclosure caused an inmate named Patterson to call West to his cell, engage in a conversation, and then "push" him back out. The District Court construed West's amended complaint as one under the Federal Tort Claims Act and dismissed it.

We affirmed. See West v. United States, 729 F. App'x 145 (3d Cir. 2018). In doing so, we held that West failed to allege the physical injury required for a prisoner to assert an FTCA claim in this situation. See id. at 148. We also held that West had not stated a claim for negligence under Pennsylvania law because, *inter alia*, he failed to allege any injuries or loss. See id. at 148-49. West unsuccessfully sought rehearing.

About five months after our mandate issued, West then filed with the District Court the motion at issue here. West requested reopening of his case on the basis of new evidence, which he did not initially identify. In a subsequent brief, West specified that his new evidence was the fact that inmate Patterson has been released from prison and that Patterson has "information" about the lieutenant's alleged breach of duty.

A Magistrate Judge recommended construing West's motion as one under Fed. R. Civ. P. 60(b)(2) and denying it on the grounds that his new evidence was not material and

would not “probably have changed the outcome” of the proceeding. Bohus v. Beloff, 950 F.2d 919, 930 (3d Cir. 1991). The District Court agreed and denied West’s motion on those grounds. West appeals, and we granted his motion for leave to proceed in forma pauperis.

In light of that status, West’s appeal is subject to dismissal if it is frivolous. See 28 U.S.C. § 1915(e)(2)(B)(i). An appeal is frivolous if it “lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989). In this case, the Magistrate Judge properly explained that reopening under Rule 60(b)(2) was not warranted because the purportedly new evidence on which West relies has no conceivable bearing on the reasons that the District Court dismissed his amended complaint or on the reasons we affirmed. Neither anything in West’s numerous filings on appeal nor our own review reveals any arguable basis to challenge that conclusion.

For these reasons, we will dismiss this appeal as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). West’s motions pending in this Court are denied.

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

RONALD BLUE WEST, :
Plaintiff :
: No. 3:16-cv-2460 :
v. : (Judge Kane)
UNITED STATES OF AMERICA, :
Defendant : (Magistrate Judge Saporito)
:

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Before the Court in the above-captioned action is the December 4, 2018 Report and Recommendation of Magistrate Judge Saporito (Doc. No. 71), recommending that Plaintiff Ronald Blue West (“Plaintiff”)’s Motion to Reopen Case on the ground of newly discovered evidence (Doc. No. 64), be denied. In his Report and Recommendation, Magistrate Judge Saporito construes Plaintiff’s motion as one filed pursuant to Federal Rule of Civil Procedure 60(b)(2), and finds that the “newly discovered evidence” proffered by Plaintiff is not material to the issue that compelled this Court to dismiss Plaintiff’s case for lack of subject matter jurisdiction; namely, Plaintiff’s failure to allege a physical injury as required by 28 U.S.C. § 1334(b)(2) to maintain an action under the Federal Tort Claims Act (“FTCA”). See 28 U.S.C. § 1334(b)(2) (proving that, under the FTCA, an inmate is precluded from bringing “a civil action against the United States . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury”). Subsequent to the issuance of the Report and Recommendation, Plaintiff filed three documents: (1) a Brief in Support of Motion to Reopen Case (Doc. No. 72); (2) a Motion to Amend Brief (Doc. No. 73); and a Motion to Strike Evidence Outside the Pleading (Doc. No. 74). Plaintiff’s filings do not challenge Magistrate

Judge Saporito's conclusion that the "newly discovered evidence" proffered by Plaintiff is not material to the issue that compelled dismissal of this case.

AND SO, on this 3rd day of January 2019, upon independent review of the record and the applicable law, **IT IS ORDERED THAT**:

1. The Court **ADOPTS** the Report and Recommendation (Doc. No. 71), of Magistrate Judge Saporito;
2. Plaintiff's Motion to Reopen Case (Doc. No. 64), is **DENIED**;
3. Plaintiff's Motion to Amend Brief (Doc. No. 73), and Motion to Strike Evidence Outside the Pleading (Doc. No. 74), are **DENIED** as moot; and
4. This case shall remain **CLOSED**.

s/ Yvette Kane
Yvette Kane, District Judge
United States District Court
Middle District of Pennsylvania

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

RONALD WEST, #11353-007,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO. 3:16cv02460

(KANE, J.)

(SAPORITO, M.J.)

REPORT AND RECOMMENDATION

This is a *pro se* civil action by Ronald West, a federal prisoner, against the United States, brought pursuant to the Federal Tort Claims Act (“FTCA”). On August 23, 2017, we recommended that this matter be dismissed, *sua sponte*, because the court lacked subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure in that West’s amended complaint alleging negligence did not fall within the scope of the FTCA’s waiver of sovereign immunity. (Doc. 51). Specifically, we concluded that we lacked subject matter jurisdiction over West’s negligence claim under the FTCA because he failed to allege a physical injury as required by 28 U.S.C. § 1334(b)(2). After West filed objections to the Report and Recommendation, on September 26, 2017, the Honorable Yvette Kane of this court overruled the objections, adopted

our Report, and directed the clerk to close the case. (Doc. 56). West timely appealed to the United States Court of Appeals for the Third Circuit, which affirmed dismissal of this action for lack of subject matter jurisdiction on April 3, 2018. (Doc. 61). *See generally West v. United States*, Civil Action No. 3:16cv02460, 2017 WL 4276815 (M.D. Pa. Aug. 23, 2017) (report and recommendation), *adopted by* 2017 WL 4269461 (M.D. Pa. Aug. 26, 2017), *aff'd per curiam*, 729 Fed. App'x 145 (3d Cir. 2018).

On October 25, 2018, West filed a motion to reopen the case on the ground of newly discovered evidence which we have liberally construed as a motion filed under Fed. R. Civ. P. 60(b)(2).¹ (Doc. 64). For the reasons that follow, we recommend that the motion be denied.

I. Legal Standards

A motion to reopen a case based on newly discovered evidence is governed by Rule 60(b)(2) of the Federal Rules of Civil Procedure. This rule permits relief from a judgment based on “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to

¹ A motion to reopen is a dispositive motion requiring us to issue a Report and Recommendation. *Yunik v. McVey*, Civil Action No. 2:08-cv-1706, 2013 WL 3776794, at *2 (W.D. Pa. July 17, 2013).

move for a new trial under Rule 59(b)” Fed. R. Civ. P. 60(b)(2). Relief must be sought “within a reasonable time,” but “no more than a year after the entry of judgment or order or the date of the proceeding.” Fed. R. Civ. P. 60(c)(1). Pursuant to Rule 60(b)(2), a “district court has discretion to reopen a judgment only if the newly discovered evidence is material and would ‘probably have changed the outcome’ of the proceedings.” *Sanders v. Downs*, 622 Fed. App’x 127, 130 (3d Cir. 2015) (quoting *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991)).

II. Discussion

In his motion, West expressly asserts that his motion is based on newly discovered evidence, but he fails to describe any new evidence at all. (Doc. 64). In response to the defendant’s opposition brief (Doc. 66) and our Order directing him to file a brief in support of his motion (Doc. 67), West has stated that the “newly discovered evidence” upon which his evidence relies is the information that Patrick Patterson, the inmate to whom federal prison officials negligently revealed his pseudo-law-enforcement background, had been released from prison. (Doc. 68). He articulates no other “new evidence” whatsoever in support of his motion.

We are unable to conceive of any way this information is either

material or would “probably have changed the outcome” of prior proceedings. *See Sanders*, 622 Fed. App’x at 130. This action was dismissed for lack of subject matter jurisdiction because the FTCA expressly does not waive sovereign immunity for “mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act.” 28 U.S.C. § 1346(b)(2); *see also West*, 729 Fed. App’x at 148. Moreover, as the Third Circuit recognized in affirming the dismissal of this action, 42 U.S.C. § 1997e(e) expressly precludes the recovery of damages in civil actions brought by prisoners for “mental or emotional injury” absent “a showing of physical injury or the commission of a sexual act.” 42 U.S.C. § 1997e(e); *see also West*, 729 Fed. App’x at 148. Because West failed to allege anything more than *de minimis* physical injury—if even that—we lack jurisdiction to address his claims under the FTCA. *See West*, 729 Fed. App’x at 148 (citing *Mitchell v. Horn*, 318 F.3d 523, 536 (3d Cir. 2003)). The proffered “newly discovered evidence” that Patrick Patterson is no longer incarcerated simply has no bearing on the dispositive issue that compelled us to dismiss this action—whether West alleged the requisite physical injury necessary to proceed under the FTCA.

There is no basis for relief under Rule 60(b)(2), as the evidence proffered by West is neither material nor would it probably have changed the outcome of the proceedings. Accordingly, we recommend that the plaintiff's motion to reopen the case on the ground of newly discovered evidence (Doc. 64) be denied.

III. RECOMMENDATION

For the foregoing reasons, it is recommended that the plaintiff's motion to reopen the case on the ground of newly discovered evidence (Doc. 64) be **DENIED**.

Dated: December 4, 2018

s/ Joseph F. Saporito, Jr.
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

RONALD WEST, #11353-007,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO. 3:16cv02460
(KANE, J.)
(SAPORITO, M.J.)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing Report and Recommendation dated December 4, 2018. Any party may obtain a review of the Report and Recommendation pursuant to Local Rule 72.3, which provides:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which

objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Failure to file timely objections to the foregoing Report and Recommendation may constitute a waiver of any appellate rights.

Dated: December 4, 2018

s/ Joseph F. Saporito, Jr.
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

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ALD-237

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1272

RONALD BLUE WEST,
Appellant

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UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-16-cv-02460)
District Judge: Honorable Yvette Kane

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
July 18, 2019

Before: MCKEE, SHWARTZ, and BIBAS, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on July 18, 2019. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the appeal is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: August 21, 2019



Certified as a true copy and issued in lieu
of a formal mandate on November 25, 2019

Teste: *Patricia S. Dodszuweit*
Clerk, U.S. Court of Appeals for the Third Circuit