

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 26 2019

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

ROBERT GRIMSLEY,

Plaintiff-Appellant,

v.

STATE OF OREGON, by actions of agents
employed by the department of corrections
(ODOC); et al.,

Defendants-Appellees.

No. 19-35066

D.C. No. 3:18-cv-02019-MC
District of Oregon, Portland

ORDER

Before: TASHIMA, M. SMITH, and BENNETT, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). On February 15, 2019, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's February 15, 2019 order, and the opening brief received on March 21, 2019, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 5) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

APPENDIX A - 3 pages

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

ROBERT GRIMSLEY (pro se),

Case No. 3:18-cv-02019-MC

Plaintiff,

ORDER OF DISMISSAL

v.

STATE OF OREGON – by actions of agents
employed by the department of corrections
(ODOC); TIM WELSH (Prison Term Analyst),
JOHN/JANE DOE (OISC Supervisor),
BETHANY SMITH (OISC Administrator), and
HEIDI STEWARD (Assistant Director), sued in
their individual and official capacities,

Defendants.

MCSHANE, District Judge:

Plaintiff, an inmate at Snake River Correctional Institution, files this civil rights complaint under 42 U.S.C. § 1983 and applies to proceed in forma pauperis. Pursuant to the Prison Litigation Reform Act, a prisoner proceeding in forma pauperis is required to pay the full filing fee of \$350.00 when funds exist. 28 U.S.C. § 1915(b)(1). Plaintiff has authorized the agency having custody of him to collect the filing fee from his prison trust account when funds exist, and plaintiff has been without sufficient funds for the six months immediately preceding

the filing of his Complaint. Accordingly, plaintiff's application is allowed, and the court will not assess an initial partial filing fee. However, plaintiff's Complaint is deficient and is dismissed.

In federal court, dismissal of a pro se complaint for failure to state a claim "is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him to relief." *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). The court must construe pro se pleadings liberally and afford the plaintiff "the benefit of any doubt." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). "Unless it is absolutely clear that no amendment can cure" defects in the complaint, "a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action." *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam).

Plaintiff alleges that defendants improperly calculated his sentence and did not credit him with time he was awarded by a sentencing judge. Plaintiff seeks damages and an injunction requiring defendants to award him credit toward his sentence, "correct" and reduce his 64-month sentence, and vacate his term of post-prison supervision. Compl. at 10. However, it is well established that a plaintiff may not seek damages or injunctive relief under § 1983 based on a challenge to the duration of his confinement, unless his sentence has previously been deemed invalid. *Nelson v. Campbell*, 541 U.S. 637, 647 (2004). ("a § 1983 suit for damages that would "necessarily imply" the invalidity of ...the length of an inmate's sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence."). Here, plaintiff requests damages and injunctive relief based on the incorrect calculation of his sentence, and his claims necessarily imply that the length of his sentence is invalid. Until the duration of plaintiff's sentence has been found invalid in a separate proceeding, his claims under § 1983 are barred.

Arguably, plaintiff could seek “correction” of his sentence through a petition for writ of habeas corpus under 28 U.S.C. § 2254. Before bringing a federal habeas petition, plaintiff must exhaust his available remedies in state court by presenting his federal constitutional claims to the state’s highest court. 28 U.S.C. § 2254(b)(1)(A); *Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011) (“Exhaustion requires the petitioner to ‘fairly present’ his claims to the highest court of the state.”). In his Complaint, plaintiff maintains that he learned of his miscalculated sentence in April 2018 and raised his claims in an administrative grievance process between the months of April and August 2018. Clearly, plaintiff has not sought appropriate relief or exhausted his claims in the Oregon courts.

Accordingly, the court will not construe his Complaint as a federal petition for writ of habeas corpus, and this action is DISMISSED.

IT IS SO ORDERED.

DATED this 20th day of December, 2018.

s/ Michael J. McShane
Michael J. McShane
United States District Judge