UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-3993

JEREMY LYNN KERR,

Plaintiff-Appellant,

v.

ROBERT POLLEX, et al.,

Defendants-Appellees.

Before: READLER, MURPHY, and DAVIS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Toledo.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 22-3993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 11, 2023
DEBORAH S. HUNT, Clerk

JEREMY LYNN KERR,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE NORTHERN DISTRICT OF
ROBERT POLLEX, et al.,	)	OHIO
	)	
Defendants-Appellees.	)	

ORDER

Before: READLER, MURPHY, and DAVIS, Circuit Judges.

Jeremy Lynn Kerr, a pro se Ohio prisoner, appeals a district court's judgment dismissing his civil rights action filed under 42 U.S.C. § 1983. 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). As discussed below, we affirm.

In Wood County Case No. 2006-CR-0476, Kerr was convicted at a bench trial of three counts of passing bad checks and was sentenced in October 2007 to consecutive terms of incarceration of eight months, eight months, and 180 days. *State v. Kerr*, No. WD-08-008, 2009 WL 806890, at *1 (Ohio Ct. App. Mar. 20, 2009), *perm. app. denied*, 934 N.E.2d 356 (Ohio 2010). Kerr unsuccessfully moved to vacate his conviction. *State v. Kerr*, No. WD-09-084, 2010 WL 2025475, at *1 (Ohio Ct. App. May 21, 2010), *perm. app. denied*, 934 N.E.2d 356 (Ohio 2010). In October 2009, Kerr finished serving his sentence.

In Wood County Case No. 2012-CR-0389, a jury convicted Kerr in April 2013 of four counts of forgery and four counts of tampering with evidence; the trial court sentenced him to seven years and eight months in prison in June 2013. *State v. Kerr*, No. WD-13-047, 2014 WL

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7004796, at *1 (Ohio Ct. App. Dec. 12, 2014), *perm. app. denied*, 30 N.E.3d 975 (Ohio 2015). His subsequent motion to vacate his conviction was denied. *See State ex rel. Kerr v. Pollex*, No. WD-19-005, 2019 WL 2004222, at *1 (Ohio Ct. App. May 3, 2019), *aff'd*, 150 N.E.3d 907 (Ohio 2020). On January 18, 2021, Kerr completed his prison sentence.

In September 2021, Kerr filed the current action against judges, prosecutors, and other Wood County officials, stating that his action was a collateral attack on these two state-court criminal judgments. The first 22 counts of the complaint addressed Kerr's conviction in No. 2012-CR-0389. Counts 1 through 3 asserted that the judgment was void for lack of subject-matter jurisdiction, and in Count 4, Kerr alleged his wrongful confinement in violation of the Fourteenth Amendment. Next, he asserted that prosecutors and law enforcement officials violated his rights under the federal and Ohio constitutions and state law in investigating his case, prosecuting him, and securing his conviction (Counts 5, 6, 7, 10, 13, and 15) and that judges violated federal and constitutional provisions and state law in conducting his trial and postconviction proceedings (Counts 7, 8, 9, 11, 12, and 14) and by issuing a void judgment (Count 16). In Count 17, Kerr alleged that prosecutors violated the Ohio Rules of Professional Conduct and state law, and in Count 18, he maintained that the postconviction judge violated the Ohio Judicial Canons and state law. Kerr asserted in Counts 19 through 22 claims of intentional infliction of emotional distress against individual defendants.

The next 11 counts addressed Kerr's conviction in No. 2006-CR-0476 and raised similar issues. In Counts 23 and 24, Kerr asserted that the judgment was void for lack of subject-matter jurisdiction, and in Count 25, he alleged his wrongful confinement in violation of the Fourteenth Amendment. Kerr then asserted that prosecutors and a court clerk violated his rights under the federal constitution in investigating his case, prosecuting him, and securing his conviction (Counts 26, 27) and that a judge violated federal constitutional provisions in conducting his trial (Counts 27). In Count 28, Kerr alleged that prosecutors violated the Ohio Rules of Professional Conduct and state law, and in Count 29, he maintained that a court clerk violated court rules and state law by transferring his case to another judge without authorization. In Count 30, Kerr contended that

a judge violated the Ohio Judicial Canons and state law. Counts 31 to 33 alleged intentional infliction of emotional distress by the judge, prosecutors, and court clerk.

Kerr's final three claims pertained to both state cases. In Claims 34 and 35, he asserted that the prosecutor and sheriff were liable for money damages under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), because his convictions resulted from unconstitutional policies of initiating and pursuing criminal charges without probable cause. In Claim 36, Kerr contended that state indemnity law obligated the Wood County commissioners, auditor, and treasurer to pay damages assessed in suits against county employees. Kerr sought a declaratory judgment with respect to Claims 1, 2, 3, 23, and 24, and money damages as to the remaining claims.

The defendants moved to dismiss the complaint for lack of subject-matter jurisdiction and failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), (b)(6). Kerr opposed the defendants' motions and twice moved to amend his complaint. In the first motion, he sought to drop Count 36, supplement other claims, and increase the requested amount of damages. In the second motion, Kerr sought to delete paragraphs that could be construed as asserting that the judgments of conviction themselves violated the Constitution.

The district court granted the defendants' motions to dismiss. Reasoning that the *Rooker-Feldman*[1] doctrine barred Kerr from seeking federal appellate review of state-court criminal judgments, the court dismissed Claims 1, 2, 3, 16, 23, and 24 for lack of subject-matter jurisdiction. The court dismissed Claims 4 to 15, 25 to 27, 34, and 35 under *Heck v. Humphrey*, 512 U.S. 477 (1994), because Kerr's convictions had not previously been declared invalid. And Claims 17 to 22 and 28 to 33 were barred by the applicable Ohio statutes of limitations. Because all substantive claims were barred and no damages were merited, the court dismissed Claim 36 (indemnification). The district court denied Kerr's motions to amend as futile.

[1] *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 415-16 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).

Kerr moved for leave to alter or amend the judgment, contesting the dismissal of his claims and the denial of his motions to amend. *See* Fed. R. Civ. P. 59(e). The district court denied relief.

On appeal, Kerr argues that (1) *Heck* does not bar him from seeking a declaration that his state-court criminal judgments are void ab initio for lack of subject-matter jurisdiction; (2) the *Rooker-Feldman* doctrine did not deprive the district court of subject-matter jurisdiction to declare that his state-court criminal judgments are void ab initio; (3) his claims are not time-barred; (4) "[t]he District Court erred in holding that Kerr's Second Amended Complaint would be futile because Kerr abandoned his constitutional claim of Wrongful Conviction by not relying on a specific Amendment"; (5) the district court erred by concluding that his proposed amended complaints would be futile; and (6) the district court erred by denying his Rule 59(e) motion because his claims are not barred and his proposed amended complaints are not futile.

We review de novo a district court's dismissal under Rule 12(b)(1) for lack of subject-matter jurisdiction. *Askins v. Ohio Dep't of Agric.*, 809 F.3d 868, 872 (6th Cir. 2016). We also review de novo a district court's judgment dismissing claims under Rule 12(b)(6). *Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015). In determining whether a complaint states a claim, a court must construe the complaint in the light most favorable to the plaintiff, accept all well pleaded factual allegations as true, and determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 570 (2007); *see also Wesley*, 779 F.3d at 428.

Rooker-Feldman

The *Rooker-Feldman* doctrine "prevents the lower federal courts from exercising jurisdiction over cases brought by 'state-court losers' challenging 'state-court judgments rendered before the district court proceedings commenced.'" *Lance v. Dennis*, 546 U.S. 459, 460 (2006) (per curiam) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)). When a litigant believes that he did not have a reasonable opportunity to pursue an argument in the state courts, "the proper course of action is to appeal the judgment through the state-court system and then to seek review by writ of certiorari from the U.S. Supreme Court." *Abbott v. Michigan*, 474 F.3d 324, 330 (6th Cir. 2007).

Because Kerr sought to challenge state-court judgments rendered before he filed the current action, the *Rooker-Feldman* doctrine barred the district court from exercising jurisdiction over his claims seeking a declaration that his state-court criminal judgments were void ab initio. Contrary to Kerr's belief, *Twin City Fire Insurance Co. v. Adkins*, 400 F.3d 293 (6th Cir. 2005), does not support his challenge. In *Twin City*, we stated that the *Rooker-Feldman* doctrine "does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court." *Id.* at 297 (quoting *United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995)). We then concluded that an Ohio Supreme Court decision in an insurance case, *Westfield Insurance Co. v. Galatis*, 797 N.E.2d 1256 (Ohio 2003), was not void ab initio. *Twin City*, 400 F.3d at 300-02. Kerr, however, was a party to his state-court criminal actions, and he fails to identify any legal authority permitting a federal court to declare a state-court criminal judgment void ab initio.

Heck

A plaintiff may not recover damages under § 1983 for an "unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," unless "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. "Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487.

The district court properly concluded that *Heck* barred Kerr's § 1983 claims for damages. Kerr attacks the validity of his state-court criminal judgments, and he does not allege that they have been reversed, expunged, declared invalid by a state tribunal, or called into question in a federal writ of habeas corpus.

State-Law Claims

The district court properly concluded that Kerr's state-law claims of intentional infliction of emotional distress and willful misconduct are time-barred. "The applicable statute of limitations for a claim of intentional infliction of emotional distress under Ohio law is the four-year limitation

period in Ohio Revised Code § 2305.09." *Monak v. Ford Motor Co.*, 95 F. App'x 758, 761 (6th Cir. 2004) (citing *Yeager v. Local Union 20*, 453 N.E.2d 666, 672 (Ohio 1983), *abrogated on other grounds by Welling v. Weinfeld*, 866 N.E.2d 1051, 1059 (Ohio 2007)). But claims against employees of a political subdivision are subject to the two-year statute of limitations set forth at Ohio Revised Code § 2744.04(A), which "prevails over the *general* statutes of limitations contained in R.C. Chapter 2305." *Davis v. Clark Cnty. Bd. of Comm'rs*, 994 N.E.2d 905, 909 (Ohio Ct. App. 2013) (quoting *Read v. Fairview Park*, 764 N.E.2d 1079, 1082 (Ohio Ct. App. 2001)). Therefore the limitations periods expired in 2009 and 2015, several years before Kerr filed his 2021 complaint. His claims, likewise, cannot be deemed timely under the continuing-violation doctrine because the doctrine is triggered by continuing unlawful acts, rather than by a continued injury, i.e., his incarceration. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982); *Eidson v. Tenn. Dep't of Child.'s Servs.*, 510 F.3d 631, 635 (6th Cir. 2007).

Motions to Amend

Under Federal Rule of Civil Procedure 15(a)(2), leave to amend a complaint should be freely given "when justice so requires." A district court may deny a motion to amend a complaint if the amendment was brought in bad faith or for dilatory purposes, would result in undue delay or prejudice to the opposing party, or would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). When the motion to amend is denied as futile, we apply de novo review. *Williams v. City of Cleveland*, 771 F.3d 945, 949 (6th Cir. 2014).

The district court properly denied the motions to amend as futile. Even if the proposed amendments would have avoided the dismissal of certain claims under *Rooker-Feldman* and *Heck*, the claims still would have been time-barred for the reasons stated above.

Rule 59(e) Motion

"We review the denial of a Rule 59(e) motion for an abuse of discretion, which occurs when a district court relies on clearly erroneous findings of fact or when it improperly applies the law." *Nolfi v. Ohio Ky. Oil Corp.*, 675 F.3d 538, 552 (6th Cir. 2012). Because the district court properly concluded that Kerr's claims were barred and that his proposed amended complaints were futile, the court did not abuse its discretion by denying his Rule 59(e) motion.

For these reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Jeremy Kerr,

Plaintiff,

v.

Robert Pollex, *et al.*,

Defendants.

Case No. 3:21-cv-1750

JUDGMENT ENTRY

For the reasons stated in the Memorandum Opinion and Order filed contemporaneously, I deny Plaintiff Jeremy Kerr's motions for leave to amend his complaint, (Doc. Nos. 18 and 23), and grant the Defendants' motions to dismiss. (Doc. Nos. 11 and 13).

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Jeremy Kerr,

Plaintiff,

v.

Robert Pollex, *et al.*,

Defendants.

Case No. 3:21-cv-1750

MEMORANDUM OPINION
AND ORDER

I. INTRODUCTION

On September 9, 2021, *pro se* Plaintiff Jeremy Kerr filed a lawsuit alleging a variety of claims under federal and state law against Defendants Robert Pollex, Alan Mayberry, Matthew Reger, Paul Dobson, Thomas Matuszak, Aram Ohanian, Mark Wasylyshyn, Rod Smith, Cindy Hofner, Doris Herringshaw, Craig LaHote, Theodore Bowlus, Jane Spoerl, and Matthew Oestreich. (Doc. No. 1). Defendants Pollex, Mayberry, and Reger are current and former judges on the Wood County, Ohio Court of Common Pleas. Dobson, Matuszak, Ohanian, Wasylyshyn, Smith, Hofner, Herringshaw, LaHote, Bowlus, Spoerl, and Oestreich are current and former Wood County, Ohio officials and employees (collectively, the "Non-Judicial Defendants").

All Defendants have moved to dismiss Kerr's claims against them. (Doc. Nos. 11 and 13). After briefing was completed on those motions, Kerr filed a motion for leave to amend his complaint. (Doc. No. 18). The parties completed briefing on those motions. Kerr subsequently filed a second motion for leave to amend his complaint, which also is fully briefed. (Doc. No. 23).

For the reasons stated below, I grant the motions to dismiss and deny Kerr's motions for leave to amend his complaint.

II. BACKGROUND

Kerr, an inmate at the North Central Correctional Institution in Marion, Ohio, asserts 36 claims arising out of two Wood County criminal cases. In 2006, Kerr was charged by indictment with three counts of passing bad checks (the "2006 Case"). Kerr was found guilty following a bench trial before Judge Mayberry and was sentenced to two years in prison. In 2012, Kerr was charged by indictment with four counts of tampering with evidence and four counts of forgery (the "2012 Case"). He was convicted on all eight counts following a jury trial, and Judge Pollex sentenced Kerr to seven years and eight months in prison.[1]

Kerr asserts the following claims in connection with the 2006 and 2012 Cases:

- **Count One** – Kerr seeks a declaratory judgment that the 2012 Case "is void ab initio for lack of Territorial Jurisdiction/ Subject Matter Jurisdiction."
- **Count Two** – Kerr seeks a declaratory judgment that the 2012 Case "is void ab initio for lack of original subject matter jurisdiction under [Ohio Revised Code] 2931.03."
- **Count Three** – Kerr seeks a declaratory judgment that the 2012 Case "is void ab initio for lack of original subject matter jurisdiction under ORC 2901.11 and [O]RC 309.08."
- **Count Four** – false imprisonment, 42 U.S.C. § 1983, Judge Pollex (2012 Case).
- **Count Five** – malicious prosecution, § 1983, Smith (2012 Case).
- **Count Six** – malicious prosecution, § 1983, Dobson and Matuszak (2012 Case).
- **Count Seven** – civil conspiracy, § 1983, Smith, Dobson, Matuszak, and Judge Pollex (2012 Case).

[1] Also in 2012, Kerr was charged by indictment with two counts of theft in the Ottawa County, Ohio Court of Common Pleas. He was found guilty by a jury and currently is serving five years in prison as a result of that conviction. *See* https://appgateway.drc.ohio.gov/OffenderSearch/Search/Details/A686150 (last accessed September 27, 2022). Kerr's claims in this litigation do not relate to the Ottawa County case.

- **Count Eight** – violation of due process rights, Fourteen Amendment to the United States Constitution and Article I, § 10 of the Ohio Constitution, Judge Pollex (2012 case).

- **Count Nine** – admission of business records as evidence, violation of due process rights, Fourteen Amendment to the United States Constitution and Article I, § 10 of the Ohio Constitution, subject matter jurisdiction, Judge Pollex (2012 case).

- **Count Ten** – failure to prove statements in bill of particulars, violation of due process rights, "6th (sic) and 14th" Amendments to the United States Constitution and Article I, § 10 of the Ohio Constitution, Matuszak (2012 case).

- **Count Eleven** – failure to grant motions of acquittal, violation of due process rights, Fourteen Amendment to the United States Constitution and Article I, § 10 of the Ohio Constitution, Judge Pollex (2012 case).

- **Count Twelve** – issuing judgment of conviction and sentence "based on a record that is wholly devoid of any evidence that Kerr had committed an element of the charges," violation of due process rights, Fourteen Amendment to the United States Constitution and Article I, § 10 of the Ohio Constitution, Judge Pollex (2012 case).

- **Count Thirteen** – prosecutorial misconduct, violation of due process rights, Fourteen Amendment to the United States Constitution and Article I, § 10 of the Ohio Constitution, Matuszak (2012 case).

- **Count Fourteen** – failure to grant motion to vacate conviction and sentence, violation of due process rights, Fourteen Amendment to the United States Constitution and Article I, § 10 of the Ohio Constitution, Judge Reger (2012 case).

- **Count Fifteen** – reckless, wanton, and willful misconduct, § 1983, Smith (2012 Case).

- **Count Sixteen** – reckless, wanton, and willful misconduct, § 1983, Judge Pollex (2012 Case).

- **Count Seventeen** – reckless, wanton, and willful misconduct, violation of Ohio Rules of Professional Conduct, Dobson and Matuszak (2012 Case).

- **Count Eighteen** – reckless, wanton, and willful misconduct, violation of Ohio Judicial Canons, Judge Reger (2012 Case).

- **Count Nineteen** – intentional infliction of emotional distress, Smith (2012 Case).

- **Count Twenty** – intentional infliction of emotional distress, Dobson and Matuszak (2012 Case).

- **Count Twenty-One** – intentional infliction of emotional distress, Judge Pollex (2012 Case).

- **Count Twenty-Two** – intentional infliction of emotional distress, Judge Reger (2012 Case).
- **Count Twenty-Three** – Kerr seeks a declaratory judgment that the 2006 Case "is void ab initio for lack of subject matter jurisdiction under ORC 2931.03."
- **Count Twenty-Four** – Kerr seeks a declaratory judgment that the 2006 Case "is void [ab] initio for lack of subject matter jurisdiction/power/authority under Wood County Local Rule 5.02."
- **Count Twenty-Five** – false imprisonment, § 1983, Judge Mayberry (2006 Case).
- **Count Twenty-Six** – malicious prosecution, § 1983, Dobson and Ohanian (2006 Case).
- **Count Twenty-Seven** – civil conspiracy, § 1983, Dobson, Ohanian, Mayberry, and Hofner (2006 Case).
- **Count Twenty-Eight** – reckless, wanton, and willful misconduct, violation of Ohio Rules of Professional Conduct, Dobson and Ohanian (2006 Case).
- **Count Twenty-Nine** – reckless, wanton, and willful misconduct, violation of Wood County Local Rule 5.02(D), Hofner (2006 Case).
- **Count Thirty** – reckless, wanton, and willful misconduct, violation of Ohio Judicial Canons, Judge Mayberry (2006 Case).
- **Count Thirty-One** – intentional infliction of emotional distress, Dobson and Ohanian (2006 Case).
- **Count Thirty-Two** – intentional infliction of emotional distress, Judge Mayberry (2006 Case).
- **Count Thirty-Three** – intentional infliction of emotional distress, Hofner (2006 Case).
- **Count Thirty-Four** – respondeat superior, § 1983 / *Monell*, Dobson (2006 and 2012 Cases).
- **Count Thirty-Five** – respondeat superior, § 1983 / *Monell*, Wasylyshyn (2006 and 2012 Cases).
- **Count Thirty-Six** – indemnification, LaHote, Bowlus, Herringshaw, Oestreich, and Spoerl

(Doc. No. 1 at 31-81).

III. STANDARD

A party may move to dismiss claims alleged against it for lack of subject matter jurisdiction by filing a motion under Rule 12. Fed. R. Civ. P. 12(b)(1). A court lacks subject matter jurisdiction over a plaintiff's claims if those claims are not ripe for review. *Bigelow v. Michigan Dep't of Nat'l Res.*, 970 F.2d 154, 157 (6th Cir. 1992). Defendants may make either a facial or a factual attack on subject matter jurisdiction under Rule 12(b)(1). *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). A defendant's facial attack on the ripeness of the plaintiff's claims asserts the allegations of the complaint do not establish subject matter jurisdiction and implicates a similar standard of review as a Rule 12(b)(6) motion. *Id.*

Additionally, a defendant may seek to dismiss a plaintiff's complaint on the ground the complaint fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). When ruling on a motion to dismiss, a court construes the complaint in the light most favorable to the plaintiff and accepts as true well-pleaded factual allegations. *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 896 (6th Cir. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Factual allegations must be sufficient to state a plausible claim for relief. *Iqbal*, 556 U.S. at 678. Legal conclusions and unwarranted factual inferences are not entitled to a presumption of truth. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

IV. ANALYSIS

A. *HECK V. HUMPHREY* AND THE *ROOKER/FELDMAN* DOCTRINE

The Defendants argue many of Kerr's claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), and the *Rooker/Feldman* Doctrine. (*See* Doc. No. 12 at 4-5; Doc. No. 13 at 6-8).

In *Heck*, the Supreme Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive

> order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Heck, 512 U.S. at 486-87 (internal footnote omitted). "A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983." *Id.* at 487 (emphasis in original).

The *Rooker/Feldman* doctrine provides that "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994) (citing *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482 (1983) and *Rooker v. Fid. Tr. Co.,* 263 U.S. 413, 416 (1923)).

Kerr concedes his convictions in the 2006 and 2012 cases have not been overturned. He argues, however, that a United States District Court has the authority to declare his convictions void pursuant to *Twin City Fire Insurance Co. v. Adkins*, 400 F.3d 293 (6th Cir. 2005). (*See* Doc. No. 1 at 3; Doc. No. 14 at 2). Kerr asserts the *Twin City* court held "a district court has authority to declare a state court judgment void because the *Rooker/Feldman* Doctrine does not apply to state court judgment that is void." (Doc. No. 14 at 2). Once his convictions are vacated, Kerr continues, *Heck* no longer provides a barrier to his damages claims. (*Id.* at 4-5).

But *Twin City* does not say what Kerr claims it does. What that case says is that "*Rooker/Feldman* 'does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court.'" *Twin City*, 400 F.3d at 297 (quoting *United States v. Owens,* 54 F.3d 271, 274 (6th Cir.1995)) (emphasis added). Kerr indisputably was the losing party in the state court actions, and *Rooker/Feldman* plainly bars his claims seeking to declare void his criminal convictions found in Counts One, Two, Three, Sixteen, Twenty-Three, and Twenty-Four. Therefore, I dismiss those claims for lack of subject matter jurisdiction.

As I stated above, unless the allegedly unconstitutional convictions previously have been invalidated, *Heck v. Humphrey* bars an inmate's § 1983 action seeking damages for those convictions "if success in that action would necessarily demonstrate the invalidity of confinement." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (emphasis removed). Kerr seeks monetary damages under § 1983, claiming his federal constitutional rights were violated when: (1) he was falsely imprisoned following his convictions, Counts Four and Twenty-Five; (2) he was subjected to malicious prosecution leading up to his convictions, Counts Five, Six, and Twenty-Six; (3) he was the victim of a civil conspiracy, resulting in his prosecution and conviction, Counts Seven and Twenty-Seven; (4) his prosecution, trial, and post-conviction proceedings did not provide due process, Counts Eight, Nine, Ten, Eleven, Twelve, Thirteen, and Fourteen; (5) he was investigated and prosecuted without probable cause, Count Fifteen; and (6) Wood County policies led to his prosecution and conviction, Counts Thirty-Four and Thirty-Five.

Kerr could not prevail on any of these claims unless he showed his convictions were invalid. He has not done so. Therefore, these claims plainly are barred by *Heck v. Humphrey*. *See, e.g., Lassen v. Lorain Cnty., Ohio*, No. 1:13 CV 1938, 2014 WL 3511010, at *5 (N.D. Ohio July 14, 2014) (holding *Heck* bars claims for false imprisonment and malicious prosecution); *Allen v. Clark*, No. 1:13CV326, 2014 WL 3016075, at *7 (S.D. Ohio July 3, 2014) (holding *Heck* barred plaintiff's § 1983 claim that defendants unconstitutionally conspired to convict him of crimes he did not commit); *Holland v. Cnty. of Macomb*, No. 16-2103, 2017 WL 3391653, at *2 (6th Cir. Mar. 17, 2017) (holding *Heck* barred plaintiff's due process claims where those claims necessarily call into question the validity of plaintiff's conviction); *Fields v. Macomb Cnty.*, 215 F.3d 1326, at *1 (6th Cir. 2000) (unpublished table decision) (holding *Heck* barred plaintiff's *Monell* claim which alleged defendants' municipal policies led to allegedly unconstitutional conviction).

B. STATUTE OF LIMITATIONS

Defendants next argue Counts Seventeen through Twenty-Two and Counts Twenty-Eight through Thirty-Three are barred by the applicable statutes of limitation. (*See* Doc. No. 12 at 7-11). While "a motion under Rule 12(b)(6), which considers only the allegations in the complaint, is generally an inappropriate vehicle for dismissing a claim based upon the statute of limitations[,] . . . sometimes the allegations in the complaint affirmatively show that the claim is time-barred." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012). "When that is the case, as it is here, dismissing the claim under Rule 12(b)(6) is appropriate." *Id.* (citing *Jones v. Bock*, 549 U.S. 199, 215 (2007)).

Kerr argues the statute of limitations did not begin to run until January 18, 2021, when he completed his sentence in the 2012 Case. (Doc. No. 14 at 4). Kerr's position is not a correct statement of Ohio law and, therefore, I reject it and conclude these Counts are time barred.

Kerr alleges seven counts of intentional infliction of emotional distress and five counts of wanton and willful misconduct. Claims for intentional infliction of emotional distress are subject to either a two-year or four-year limitations period, "depending on the type of action which gives rise to the claim." *Freeman v. City of Lyndhurst*, No. 1:09 CV 2006, 2010 WL 908171, at *3 (N.D. Ohio Mar. 12, 2010) (citation omitted); *Hawkins v. Bruner*, No. 1:14 CV 1990, 2015 WL 418166, at *2 n.4 (N.D. Ohio Feb. 2, 2015). Similarly, tort claims against employees of political subdivisions are subject to the two-year limitations period found in Ohio Revised Code § 2744.04. *Read v. City of Fairview Park*, 764 N.E.2d 1079, 1082 (Ohio Ct. App. 2001); *Davis v. Clark Cnty. Bd. of Comm'rs*, 994 N.E.2d 905, 909-10 (Ohio Ct. App. 2013). *But see Pippin v. City of Reynoldsburg*, No. 2:17-cv-598, 2019 WL 4738014, at *9-*10 (S.D. Ohio Sept. 27, 2019) (acknowledging potential for the applicability of the general four-year limitations period to claims against political subdivision employees).

"Generally, a cause of action accrues[,] and the statute of limitations begins to run[,] at the time the wrongful act was committed . . . [or when] the plaintiff discovers, or by the exercise of

reasonable diligence should have discovered, that he or she was injured by the wrongful conduct of the defendant." *Norgard v. Brush Wellman, Inc.*, 766 N.E.2d 977, 979 (Ohio 2002). An intentional infliction of emotional distress claim accrues when "the tort is complete, that is, at the time the injury is incurred and the emotional impact is felt." *Biro v. Hartman Funeral Home*, 669 N.E.2d 65, 68 (Ohio Ct. App. 1995).

Kerr argues that, pursuant to the continuing violations doctrine, the statute of limitations did not begin to run until January 2021, when he completed his sentence in the 2012 Case. (Doc. No. 14 at 4). But "the present effects of a single past action do not trigger a continuing-violations exception to the statute of limitations." *Bd. of Educ. of Loveland City Sch. Dist. v. Bd. of Trs. of Symmes Twp.*, 111 N.E.3d 833, 842 (Ohio Ct. App. 2018) (citation omitted). Kerr's incarceration was no more than the continuing effect of the Defendants' actions in 2007 and 2013.[2] Therefore, Kerr's continuing-violation argument lacks merit.

Defendants argue the limitations period for Kerr's claims arising from the 2006 Case began to run in October 2007, when he was sentenced, and his 2012 Case claims began to run in April 2013, when he was convicted. (*See* Doc. No. 12 at 8-9). Thus, at the latest, the limitations period lapsed in April 2017. I agree.

Kerr did not file suit until September 9, 2021, well after the statute of limitations expired. Therefore, I conclude Kerr's claims for intentional infliction of emotional distress and willful or wanton misconduct found in Counts Seventeen through Twenty-Two and Counts Twenty-Eight through Thirty-Three are barred by the applicable statutes of limitation.

Finally, having concluded each of Kerr's substantive claims are barred by *Heck v. Humphrey*, the *Rooker/Feldman* doctrine, or the statute of limitations, I dismiss his claim for indemnification,

[2] To the extent Kerr asserts the limitations period was restarted through Judge Reger's denial of Kerr's motion to vacate his conviction, (*see* Doc. No. 1 at 17), I already have concluded any such claim is barred by *Heck v. Humphrey*.

(Doc. No. 1 at 80-81), because he cannot recover any damages in this litigation and thus has no right to indemnification.

C. MOTIONS FOR LEAVE TO AMEND

Kerr has filed two motions for leave to amend his complaint. In the first, he proposes to amend his complaint to dismiss his claim for indemnification, "amplif[y] previously alleged claims," and seek additional damages. (Doc. No. 18 at 2). In the second, Kerr states he has removed "any paragraphs or phrases that could be construed as plaintiff is alleging the Judgment of Convictions (sic), themselves, violate the Constitution." (Doc. No. 23 at 2) (emphasis in original). Defendants oppose Kerr's motions. (Doc. Nos. 19, 20, and 24).

Rule 15 provides a party may amend its pleadings once as a matter of course within 21 days of serving the pleading or, if a responsive pleading is required, 21 days after service of a responsive pleading. Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Head v. Jellico Hous. Auth.*, 870 F.2d 1117, 1123 (6th Cir. 1989).

I deny Kerr's motions because his proposed amendments would be futile. Leave to amend should be denied as futile if the proposed amendment would not "withstand a Rule 12(b)(6) motion to dismiss." *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 421 (6th Cir. 2000). His proposed amendments do nothing to rescue his state-law claims from the expired statutes of limitation. And while he tries to avoid the *Rooker/Feldman* and *Heck* bars by backing away from his claim that his

convictions were unlawful, (*see* Doc. No. 23 at 2), his proposed amendments would in part constitute an abandonment of his § 1983 claims, which require that a plaintiff show he was deprived of "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Finally, even if Kerr could state a plausible § 1983 claim that did not necessarily imply the invalidity of his convictions, any such claim would be barred by the two-year limitations period applicable to § 1983 claims. *See, e.g., Browning v. Pendleton*, 869 F.2d 989, 991 (6th Cir. 1989).

V. CONCLUSION

For the reasons stated above, I deny Kerr's motions for leave to amend his complaint, (Doc. Nos. 18 and 23), and grant the Defendants' motions to dismiss. (Doc. Nos. 11 and 13).

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

No. 22-3993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 11, 2023
DEBORAH S. HUNT, Clerk

JEREMY LYNN KERR,

Plaintiff-Appellant,

v.

ROBERT POLLEX, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: READLER, MURPHY, and DAVIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Jeremy Kerr,

Plaintiff,

v.

Robert Pollex, *et al.*,

Defendants.

Case No. 3:21-cv-1750

ORDER

On September 27, 2022, I dismissed all claims asserted by *pro se* Plaintiff Jeremy Kerr, having concluded those claims were barred by *Heck v. Humphrey*, the *Rooker/Feldman* doctrine, or the statute of limitations and, with respect to Kerr's indemnification claim, that he had no right to indemnification because he cannot recover on any of his substantive claims. (Doc. No. 26). I also denied Kerr's two motions for leave to amend his complaint as futile. (*Id.*). Kerr has filed a motion for reconsideration, arguing I incorrectly concluded that this Court does not have the authority to declare his state court convictions as void ab initio, as an exception to the *Rooker/Feldman* doctrine. (Doc. No. 28).

Rule 59(e) states that a party must file a motion to alter or amend a judgment within 28 days of the entry of the judgment. Fed. R. Civ. P. 59(e). The party filing a Rule 59(e) motion must demonstrate there was "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 496 (6th Cir. 2006).

Kerr again argues that, pursuant to *Twin City Fire Insurance Co. v. Adkins*, 400 F.3d 293 (6th Cir. 2005), "*Rooker/Feldman* does not bar a federal district court from declaring a state court judgment void ab initio." (Doc. No. 28 at 5); (*see also* Doc. No. 1 at 3; Doc. No. 14 at 2). But, as I previously ruled, (Doc. No. 28 at 6), *Twin City* does not help Kerr. The *Twin City* court held *Rooker/Feldman* did not apply in that case because the plaintiffs there were not involved in the state court litigation which was collaterally challenged in *Twin City*. *See Twin City*, 400 F.3d at 297 ("This doctrine is inapposite in the present case, however, because *Rooker/Feldman* 'does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court.'") (quoting *United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995)). It was only after the Sixth Circuit Court of Appeals concluded that *Rooker/Feldman* did not apply (because the plaintiffs in *Twin City* were not the losing parties in the state court litigation) that it went on to consider whether the district court had the authority to declare the state court judgment void ab initio. *See Twin City*, 400 F.3d at 297-99.

Kerr also argues my statute-of-limitations rulings were erroneous because the accrual of those claims has been deferred by *Heck v. Humphrey*, 512 U.S. 477 (1994). (Doc. No. 28 at 8). But *Heck* applies to claims brought pursuant to 42 U.S.C. § 1983, not state law tort claims. *Heck*, 512 U.S. at 486-87. *Heck* did not toll the limitations periods applicable to Kerr's state-law claims, and those claims now are time-barred. (*See* Doc. No. 26 at 8-9).

Finally, Kerr argues his motions for leave to amend are not futile because his "second amended complaint is absent of any allegations that the void state court judgment of convictions violate the federal constitution or federal law," and the "proposed amendments do not abandon his 1983 claims for Unlawful Incarceration because such claims are not required to be made on a specific guarantee of the Federal Constitution." (Doc. No. 28 at 8, 9). But *Rooker/Feldman* prohibits me from considering whether Kerr's state-court convictions are void and, as I previously ruled,

"even if Kerr could state a plausible § 1983 claim that did not necessarily imply the invalidity of his convictions, any such claim would be barred by the two-year limitations period applicable to § 1983 claims." (Doc. No. 26 at 11 (citing *Browning v. Pendleton*, 869 F.2d 989, 991 (6th Cir. 1989))). Lastly, Kerr's attempt to plead a § 1983 claim for wrongful incarceration arising from a generalized constitutional violation, rather than asserting a violation of a specific Amendment to the Constitution, (Doc. No. 26 at 9-13), does not rescue that claim from either *Heck* and *Rooker/Feldman* or the applicable statute of limitations.

For these reasons, I conclude Kerr fails to establish he is entitled to relief under Rule 59(e), and I deny his motion. (Doc. No. 26).

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge