NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 13, 2023*
Decided April 18, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 22-1622

BRETT KIMBERLIN,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:21-cv-02506-TWP-MPB

Tanya Walton Pratt,
Chief Judge.

O R D E R

More than 40 years ago, juries convicted Brett Kimberlin of felonies related to a series of bombings in Speedway, Indiana. He maintains his innocence and, after a host of unsuccessful direct appeals, collateral attacks, and adjacent civil litigation, he sued the United States Department of Justice, the Bureau of Alcohol, Tobacco, and Firearms

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

and Explosives, the Indiana State Police, state and federal officials, as well as a juror and her husband—all of whom, he alleges, conspired to convict and imprison him. The district court screened the complaint and dismissed it after concluding that most of Kimberlin's claims were barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), and that the remainder of his complaint failed to state a claim. We affirm the judgment.

Over three jury trials during the early 1980s, Kimberlin was convicted of nearly three dozen counts related to eight bombs that exploded in Speedway, Indiana in the first week of September 1978. With minor exceptions, we upheld the convictions on direct appeal, rejected his collateral attacks, and denied relief in additional follow-on cases. *See United States v. Kimberlin*, 805 F.2d 210, 216 & n.2 (7th Cir. 1986) (affirming in four consolidated appeals and collecting prior cases); *United States v. Kimberlin*, 781 F.2d 1247, 1249 (7th Cir. 1985) (collecting additional cases). Relevant to our current purposes, on direct appeal Kimberlin contended that there were several irregularities at his trial, including the admission of tape recordings of Indiana State Police Detective Brook Appleby interviewing witnesses using hypnosis. While acknowledging the dangers of hypnosis testimony, we noted that the guilty verdict was supported by "strong, albeit circumstantial" evidence and concluded that the hypnosis testimony did not affect Kimberlin's substantial rights, even if it were inadmissible. *See* FED. R. EVID. 103(a); *Kimberlin*, 805 F.2d at 221, 223.

In 2018—almost 20 years after his prison sentence ended—Kimberlin began a new campaign of litigation. He first petitioned for a writ of error *coram nobis* to vacate his conviction. As relevant here, he alleged that the government had committed a "fraud upon the court" by failing to reveal that one of the jurors was Appleby's distant relative through marriage. Kimberlin later added a claim that a 2015 Department of Justice memo reviewing historical cases involving microscopic hair analysis invalidated the use of that evidence at the trial at which it was presented. The district court denied the petition, and we affirmed. *Kimberlin v. United States*, No. 21-1691, 2022 WL 59399, at *1 (7th Cir. Jan. 6, 2022) (nonprecedential decision). Second, Kimberlin moved under 18 U.S.C. § 3600 for DNA testing on the same decades-old hair evidence and, when the government was unable to locate it, argued that his convictions should therefore be vacated. The district court denied the motion and we affirmed, concluding that the motion was untimely and, in any event, it was not clear how a DNA test result from the hair could undermine Kimberlin's conviction. *United States v. Kimberlin*, No. 21-2714, 2022 WL 1553257, at *2 (7th Cir. May 17, 2022) (nonprecedential decision).

In September 2021—in the midst of these appeals—Kimberlin sued various federal and state agencies and officials, including Appleby, the supposedly related juror, and the juror's spouse for damages and declaratory relief. He alleged the defendants had violated his constitutional rights by fabricating the hair and hypnosis evidence, tampering with the jury, failing to intervene to stop these misdeeds, and committing a "fraud upon the court" by covering up the conspiracy to this day. *See* 42 U.S.C. §§ 1983, 1985; *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). He next alleged that the federal government violated his due-process rights and Department of Justice policy by failing to preserve what he believed was exculpatory hair evidence for DNA testing. Finally, Kimberlin alleged that Appleby had violated his Fourth Amendment rights by illegally surveilling him, and that the Indiana State Police also violated his rights by failing to properly supervise or keep adequate records of Appleby's "secret, rogue investigation."

The district court promptly dismissed Kimberlin's complaint for failure to state a claim. It principally determined that the claims regarding evidence fabrication, jury tampering, failure to intervene, "fraud upon the court," and destruction of exculpatory DNA evidence necessarily implied the invalidity of his conviction and were therefore barred under *Heck*, 512 U.S. at 486–87. His Fourth Amendment claim likewise failed, according to the court, because he did not allege an injury besides his conviction. The court otherwise concluded that Kimberlin's claim against the Indiana State Police, a state agency, was barred by the Eleventh Amendment.

The court gave Kimberlin an opportunity to amend his complaint. In his proposed amended complaint, Kimberlin removed the Indiana State Police as a defendant and added the agency's superintendent, as well as the attorney who had litigated his recent postconviction cases on behalf of the federal government. He also added new claims under 42 U.S.C. § 1986, and the Administrative Procedure Act, *see* 5 U.S.C. § 702. And Kimberlin now argued that the defendants had engaged in concerted misconduct to "deprive him of meaningful and effective access to the Courts." The district court entered judgment against Kimberlin after determining that his proposed amended complaint failed to correct the deficiencies noted in the screening order, was untimely under § 1986, and failed to state an APA claim.

On appeal, Kimberlin argues only that *Heck* does not bar any of his claims. He has therefore forfeited, if not waived, any challenge to the district court's resolution of his claims dismissed on other grounds. *See Klein v. O'Brien*, 884 F.3d 754, 757 (7th Cir. 2018). *Heck* holds that a § 1983 plaintiff seeking damages on a theory that implies the

invalidity of his conviction or imprisonment must first show the favorable termination of his conviction or sentence. 512 U.S. at 486–87. Although released from prison, Kimberlin's convictions have not been expunged and so the *Heck* bar continues to apply to him. *See Savory v. Cannon*, 947 F.3d 409, 419 (7th Cir. 2020) (en banc). Kimberlin, however, contends that his claims fall outside *Heck*'s rule because they do not necessarily undermine his conviction or, alternatively, because he has alleged that the defendants' actions prevented him from invalidating his criminal conviction through the courts. We review de novo the district court's dismissal for failure to state a claim, accepting Kimberlin's factual allegations as true and drawing all reasonable inferences in his favor. *Schillinger v. Kiley*, 954 F.3d 990, 994 (7th Cir. 2020).

We agree with the district court that, just as in *Heck* itself, most of Kimberlin's claims amount to allegations of malicious prosecution: a conspiracy by state and federal actors to fabricate and destroy evidence, lie to the court, improperly influence the jury, and then cover up their misdeeds. 512 U.S. at 479. Without this conspiracy, Kimberlin says, he "would not have been convicted and his conviction would never have been upheld on appeal." And the damages he seeks stem entirely from his conviction and imprisonment. These claims therefore necessarily imply the invalidity of his conviction and are barred by *Heck*. *Id.* at 484–86; *Clemente v. Allen*, 120 F.3d 703, 705 (7th Cir. 1997) (applying *Heck* to *Bivens* actions); *see also Amaker v. Weiner*, 179 F.3d 48, 52 (2d Cir. 1999) (applying *Heck* to claims under § 1985). That Kimberlin alleges the conspiracy to imprison him continued long after he was convicted does not change things. Proof that the defendants violated his rights as he describes would necessarily undermine the conviction, the maintenance of which was the alleged objective of that conspiracy.

Kimberlin cannot escape this conclusion by recasting his claim as alleging a denial of access to courts. In *Burd v. Sessler*, we held that *Heck* barred such claims when the remedy sought necessarily implied the invalidity of the underlying judgment—for example, when the plaintiff seeks damages resulting from his imprisonment. 702 F.3d 429, 434–35 (7th Cir. 2012), *abrogated on other grounds by Savory*, 947 F.3d at 425. As in *Burd*, Kimberlin seeks damages from his conviction and does not identify any prospective relief related to his access-to-courts claim that might fall outside of the *Heck* bar. *Id*. at 433; *cf. Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (*Heck* does not prevent § 1983 plaintiffs from seeking changes to parole procedure).

Kimberlin argues alternatively that his claims should be allowed to proceed under the doctrine of equitable tolling, which allows a plaintiff to sue under certain circumstances if a statute of limitations has expired through no fault of his own. *See, e.g.*,

Madison v. U.S. Dep't of Labor, 924 F.3d 941, 946–47 (7th Cir. 2019). But that theory is a poor fit for this situation. Claims barred under *Heck* do not even accrue until the favorable termination of the underlying criminal proceedings, so no limitations period has started, let alone passed, to require tolling. *Savory*, 947 F.3d at 427.

Next, Kimberlin maintains that he has stated a Fourth Amendment claim for Appleby's alleged illegal searches. We agree with Kimberlin that this claim is not barred by *Heck* because it does not necessarily imply the invalidity of the criminal conviction. *See Dominguez v. Hendley*, 545 F.3d 585, 589 (7th Cir. 2008) (citing *Wallace v. Kato*, 549 U.S. 384 (2007)). And although the district court dismissed this claim because Kimberlin did not allege damages unrelated to his conviction, it is not clear that he needed to—nominal damages are presumptively available for completed constitutional violations. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021); *Calhoun v. DeTella*, 319 F.3d 936, 940–41 (7th Cir. 2003).

But Kimberlin's illegal-search claim fails for a different reason: it is untimely. His § 1983 claims fall under Indiana's two-year statute of limitations. IND. CODE § 34-11-2-4; *Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir. 2012). Illegal-search claims generally accrue at the time of the search—here, as the state notes, more than 40 years before Kimberlin filed this suit in September 2021. *Dominguez*, 545 F.3d at 589. His amended complaint further confirms that he became aware of Appleby's searches, at the absolute latest, in the spring of 2019, when he discussed the investigation in his *coram nobis* proceedings. The state officers raised the issue of timeliness in their brief on appeal—their first opportunity, c*f. United States v. Williams*, 62 F.4th 391, 393 (7th Cir. 2023) (exhaustion defense properly raised first on appeal)—and Kimberlin does not explain in his reply brief how his claim could be timely. The district court therefore properly dismissed Kimberlin's Fourth Amendment claim, but we modify its judgment so that this dismissal is with prejudice.

Finally, throughout this case, Kimberlin has asserted that our resolving his suits primarily on procedural grounds implied that, had we reached the merits, he would have prevailed. But precisely because we did not reach the merits, we took no position on the veracity of his claims then, nor do we now. Under *Heck,* that determination cannot be made through a civil suit in the first instance but must await the invalidation of his conviction by other means. 512 U.S. at 487.

AFFIRMED AS MODIFIED