

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY A. GILBERT,

Plaintiff,

vs.

ROSE MACKEY, et al.,

Defendants.

Case No. 09-10773

HON. GEORGE CARAM STEEH

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiff, Gregory A. Gilbert, brought a complaint under 42 U.S.C. § 1983 seeking an order to compel a Franks hearing to challenge defendants' conduct of allegedly submitting false information to the magistrate to support the issuance of a search warrant. This Court granted plaintiff *in forma pauperis* status, but dismissed the complaint as frivolous. Plaintiff has now filed a motion for reconsideration.

Local Rule 7.1(g)(3) of the Local Rules of the United States District Court for the Eastern District of Michigan provides:

[M]otions for rehearing or reconsideration which merely present the same issues ruled upon by the court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

Plaintiff argues that the Court misconstrued his pleadings as an attack on his underlying conviction rather than as a civil rights complaint under § 1983. Plaintiff contends he is

seeking an order compelling a Franks hearing “to develop the necessary facts associated with the faulty affidavit & warrant and the subsequent issuance of a search warrant, in order to establish the impermissible conduct in total disregard for the truth.”

Where a defendant in a criminal prosecution “makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit”, and the allegedly false statement is necessary to the finding of probable cause, a hearing must be held at the defendant’s request. Franks v. Delaware, 438 U.S. 154, 155-56 (1978). A Franks hearing is one that takes place during a criminal prosecution to test the sufficiency of evidence submitted in support of a search warrant. In this case, plaintiff was tried and convicted by a state court, served his sentence, and now seeks an order compelling a Franks hearing. Plaintiff explains that if a Franks hearing results in a determination that a violation has occurred, a separate action alleging a separate constitutional violation would be required to overturn his conviction. However, a Franks hearing is something that should have been sought prior to the trial in the state court criminal proceeding. In addition, the state court would ultimately need to address any remedy warranted in the case that the search warrant should not have issued based on the affidavit submitted. This might occur in the context of a post judgment motion based upon the newly discovered facts/documents advanced by plaintiff.

Section 1983 is an inappropriate vehicle for bringing plaintiff’s claim seeking a Franks hearing. Plaintiff admittedly is not bringing a habeas petition, nor is he seeking monetary damages for a violation of his constitutional rights. The Court finds that

reconsideration is not warranted in this case.

So ordered.

Dated: April 14, 2009

S/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on
April 14, 2009, by electronic and/or ordinary mail.

S/Josephine Chaffee
Deputy Clerk