

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

GARY HAWK,

Plaintiff,

vs.

Civil Action 2:09-CV-1058  
Judge Smith  
Magistrate Judge King

CITY OF ATHENS,

Defendant.

REPORT AND RECOMMENDATION

Plaintiff, a state prisoner, brings this civil action challenging his criminal conviction and requests, at a minimum, the opportunity to appeal his conviction and sentence in the Athens County Court of Common Pleas. This matter is before the Court for the initial screen of the complaint required by 28 U.S.C. §§1915(e), 1915A.

An inmate cannot pursue a claim under 42 U.S.C. §1983 that would necessarily imply the invalidity of his criminal conviction or sentence unless that conviction or sentence has previously been invalidated through, for example, the appellate process or proceedings in habeas corpus. *Heck v. Humphrey*, 512 U.S. 477 (1994). Plaintiff in this case previously challenged his conviction in a habeas corpus action instituted in this Court. *Hawk v. Warden Noble Correctional Institution*, 2:06-CV-707. This Court dismissed that action as untimely, *id.*, Doc. No. 15, and the United States Court of Appeals for the Sixth Circuit affirmed that dismissal. See *id.*, Doc. No. 22. Accordingly, plaintiff's criminal conviction has not been invalidated or vacated. Plaintiff's claim under §1983 cannot, therefore, proceed.

It is therefore **RECOMMENDED** that this action be **DISMISSED**.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1); F.R. Civ. P. 72(b). Response to objections must be filed within ten (10) days after being served with a copy thereof. F.R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teachers, Local 231 etc.*, 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

November 23, 2009

s/Norah McCann King  
Norah M<sup>c</sup>Cann King  
United States Magistrate Judge