

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

DAVID NELSON,

Plaintiff,

v.

CIVIL ACTION NO. 2:09-cv-01316

PROSECUTOR C. MICHAEL SPARKS, and
MINGO COUNTY PROSECUTOR'S OFFICE

Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court is pro se Plaintiff David Nelson's Objections to Proposed Findings and Conclusions of Law [Docket 8]. Plaintiff filed these objections to Magistrate Judge Stanley's proposed findings and recommendation (PF&R) on February 22, 2010. However, the objections were filed after the February 1, 2010 deadline and after the Court had dismissed the case on February 12, 2010. The Court now **REOPENS** the case to resolve Plaintiff's objections.

Failure to file timely objections constitutes a waiver of de novo review and the Petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); *see also Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir.1989); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984). In addition, this Court need not conduct a de novo review when a party "makes general and conclusory objections that do not direct the Court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982).

Plaintiff's objections are the type of vague and conclusory objections contemplated by *Opriano* that do not merit review by this Court. Additionally, the objections do not address the issues discussed in the PF&R. Further, the Court agrees with the Magistrate Judge's analysis that postconviction relief of this sort should be sought in West Virginia state court. "Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for the Third Judicial Circuit v. Osborne*, ___ U.S. ___, 129 S. Ct. 2308, 2320 (2009). West Virginia Code § 15-2B-14 enables prisoners to move the trial court for DNA testing and West Virginia Code § 53-4A-1 provides the framework for any postconviction relief resulting from any newly discovered evidence. Because Plaintiff has not filed such a motion in state court and has not demonstrated that the West Virginia procedures are inadequate, he cannot pursue a § 1983 claim in federal court.

Additionally, Plaintiff's allegation that his plea was made under duress is also not procedurally proper.

[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, 28 U.S.C. § 2254.

Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). Plaintiff's original convictions of first degree murder, kidnapping, sexual assault in the first degree, and three counts of conspiracy relating to those offenses were overturned and remanded for a new trial. *State v. Nelson*, 655 S.E.2d 73 (W. Va. 2007). However, on remand, Plaintiff entered a guilty plea to one count of second degree murder and one count of conspiracy to commit murder. The convictions for which he pled guilty remain intact. His § 2254 motion was also dismissed. *Nelson v. Hoke*, 2:09-cv-1023, 2010 WL

2507785 (S.D. W. Va. June 18, 2010). Because Plaintiff has not met the requirements of *Heck*, his case must be **DISMISSED** and the objections regarding a plea under duress are **OVERRULED**.

For the reasons stated above, the Court **OVERRULES** Plaintiff's Objections [Docket 8] and **DISMISSES** this case from the docket. A separate Judgment Order will enter this day implementing the rulings contained herein.

Furthermore, a district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing Section 2254 and Section 2255 Cases. Plaintiff has not made a substantial showing of the denial of a constitutional right and the Court finds no merit to Plaintiff's claims. Therefore, the Court **DENIES** a certificate of appealability in this case.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: November 28, 2011



THOMAS E. JOHNSTON
UNITED STATES DISTRICT JUDGE