UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ANDREW McCURVIN, Plaintiff,	:	
v.	:	CIVIL ACTION NO. 3:98CV182 (SRU)
LAW OFFICES OF KOFFSKY & WALKLEY, and JOHN T. WALKLEY, Defendants.	:	

RULING AND ORDER

In 1995, Andrew McCurvin was convicted of federal narcotic offenses. McCurvin, who is currently confined at F.C.I. Allenwood in White Deer, Pennsylvania, brought this action pro se and in forma pauperis. McCurvin alleges both that, following his conviction, the trial court appointed the defendants to represent him on appeal, and that the defendants breached fiduciary duties in representing him. In addition, McCurvin requests leave to amend his complaint to allege that the defendants violated his Sixth Amendment right to effective assistance of counsel. (doc. #30). For the reasons set forth below, McCurvin's request to amend the complaint is denied and the complaint is dismissed.

Background

McCurvin claims that on the day of the jury verdict, the trial court granted his trial attorney's motion to withdraw, and appointed the defendant, Attorney Walkley, to represent him on appeal. McCurvin alleges that Walkley spoke with him by phone at the Hartford Correctional Center on April 1, 1996 and that, during that conversation, Walkley confirmed that he would represent McCurvin and file a notice of appeal. McCurvin further claims that the April 1, 1996 conversation was the last contact

he had with Walkley, despite his numerous attempts to contact Walkley by mail and phone.

When McCurvin discovered that a timely notice of appeal had not been filed on his behalf, he filed a petition under 28 U.S.C. § 2255 in order to reinstate his right to appeal. The trial court granted McCurvin's petition and appointed Attorney Seifert to represent him on appeal. The Second Circuit heard the merits of the appeal.

McCurvin filed the present action, claiming that the defendants breached fiduciary duties by failing to meet with him, to respond to his phone calls and letters, and to timely file a notice of appeal. Because the trial court reinstated McCurvin's right to appeal and the Second Circuit heard the merits of the appeal, the Court ordered McCurvin to show cause why his Complaint should not be dismissed either: (1) as frivolous under 28 U.S.C. § 1915; or (2) as moot. (doc. # 28). McCurvin responded that the defendants' failure to timely file a notice of appeal was not cured by the trial court reinstating his right to appeal and the Second Circuit hearing the appeal. (doc. # 30). Rather, McCurvin argues that "the defendant's failure to provide plaintiff with the effective legal representation that they were appointed to provide can only be vindicated if plaintiff's subsequent legal representation in this proceeding was of the same quality that it is presumed the defendants would have provided." (doc. # 30). Proceeding under this theory, McCurvin argues that if subsequent legal counsel also failed to provide effective representation, the defendants are liable for any harm that results from subsequent counsel's ineffectiveness. Id. Thus, because McCurvin claims that Seifert's representation resulted in McCurvin receiving an erroneous sentence, McCurvin seeks to amend his complaint to allege that the defendants, as the proximate cause of Attorney Seifert's conduct, violated his Sixth Amendment right to effective assistance of counsel.

The defendants dispute essentially all of McCurvin's allegations. The defendants argue that the defendants did not injure McCurvin because the trial court reinstated McCurvin's appellate rights and the Second Circuit heard McCurvin's appeal.

Standard of Review

McCurvin has met the requirements of 28 U.S.C. § 1915(a) and has been granted leave to proceed in forma pauperis in this action. Pursuant to 28 U.S.C. § 1915(e)(2)(B), "the court shall dismiss the case at any time if the court determines that . . . the action . . . is frivolous or malicious; . . . fails to state a claim on which relief may be granted; or . . . seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(i) - (iii).

An action may be considered "frivolous" "when the claim lacks an arguable basis in law." Benitez v. Wolff, 907 F.2d 1293, 1295 (2d Cir. 1990) (per curiam). An action should be dismissed for failure to state a claim when, after accepting plaintiff's allegations as true, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991); see also Walker v. City of New York, 974 F.2d 293, 298 (2d Cir. 1992), cert. denied, 507 U.S. 961 (1993) (pro se plaintiffs are entitled to a higher level of deference when deciding whether a complaint fails to state a claim).

Discussion

McCurvin's complaint must be dismissed because, even if it were amended to raise the Sixth Amendment Claims, it fails to state a claim upon which relief can be granted and is frivolous. Interpreting McCurvin's allegations in the most favorable light, McCurvin alleges that either: (a) the defendants violated his Sixth Amendment right to effective assistance of counsel and his conviction

should be overturned or his sentence reduced, or (b) the defendants violated his Sixth Amendment right to effective assistance of counsel and the defendants should pay compensatory damages, or (c) the defendant committed legal malpractice. McCurvin fails to appropriately state a claim under any of these theories.

First, if McCurvin believes that the defendants violated his Sixth Amendment right to effective assistance of counsel and that his conviction should be overturned or his sentence reduced, McCurvin's only option to obtain such post-conviction relief is to file a habeas corpus petition under 28 U.S.C. § 2255. Ferguson v. State, WL 1056727 (D. Del.1996) ("Petitions for writs of habeas corpus are the proper means to challenge the fact or duration of confinement."); 28 U.S.C. § 2255 ("A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . .. may move the court which imposed the sentence to vacate, set aside or correct the sentence."). McCurvin has not filed a habeas petition, raising these issues. Even after construing the complaint as broadly as possible, the complaint cannot be considered the equivalent of a habeas petition because this action is against a lawyer and law firm, not against the person with custody over McCurvin.

Second, assuming both that the trial court appointed the defendants to represent McCurvin and that they failed to effectively represent him, the Sixth Amendment to the U.S. Constitution does not afford McCurvin a private right of action against court-appointed attorneys. While McCurvin might have been able to assert a private right of action against his attorneys if they were federal agents or officers, see Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 (1971), the defendants

did not assume a federal status by being appointed defense counsel. See Cox v. Hellerstein, 685 F.2d 1098, 1099 (9th Cir. 1982); see also Polk County v. Dodson, 454 U.S. 312, 325 (1981). Thus, in the absence of a private right of action under the Sixth Amendment, McCurvin is unable to seek monetary damages against the defendants.

Third, to the extent that McCurvin is making a legal malpractice claim under Connecticut law, the claim fails because McCurvin, who is currently incarcerated, has not sought either appellate or post-conviction relief prior to instituting this claim. The Connecticut Supreme Court would likely hold that Connecticut law, like the majority of jurisdictions, requires that an incarcerated criminal defendant seek appellate or post conviction relief prior to maintaining a legal malpractice suit. See Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999) (collecting cases). The arguments favoring this rule are: (1) without obtaining relief from the conviction or sentence, the criminal defendant's own actions must be presumed to be the proximate cause of the injury; (2) monetary remedies are inadequate to redress the harm to incarcerated criminal defendants; (3) appellate or post-conviction remedies are available to address ineffective assistance of counsel; (4) requiring appellate or post-conviction relief as a prerequisite to filing a malpractice claim will preserve judicial economy by avoiding the re-litigation of previously decided matters; and (5) relief from the conviction or sentence provides a bright line for determining when the statute of limitations runs on the malpractice action. Steele v. Kehoe, 747 So. 2d at 933; see also Levine v. Kling, 123 F.3d 580 (7th Cir. 1997).

Moreover, even if McCurvin's legal malpractice complaint was allowed to continue, McCurvin would lose on the merits. Under Connecticut law, the plaintiff in a legal malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission;

(3) causation; and (4) damages. Beecher v. Greaves, 808 A.2d 1143, 1145 (Conn. App. 2002). Even if McCurvin could demonstrate proof of the other elements, no reasonable jury could find that the defendants' failure to file a timely notice of appeal injured McCurvin. The trial court reinstated McCurvin's right to file a notice of appeal and the Second Circuit heard the appeal. Thus, the defendant's delay in filing the notice of appeal did not damage McCurvin.

In addition, even if Seifert was ineffective and McCurvin received a longer sentence because of his ineffectiveness, there is no arguable basis in law to hold the defendants liable for Seifert's conduct. The defendants can be held liable only for their conduct, not for the conduct of another lawyer with whom they were not in any way legally associated. Thus, McCurvin's attempt to impose liability on the defendants for Seifert's conduct is frivolous.

Accordingly, the court will dismiss the complaint sua sponte for failure to state a claim and as frivolous.

Conclusion

The complaint is DISMISSED with prejudice to the extent it raises Sixth Amendment claims and is DISMISSED without prejudice to the extent it raises legal malpractice claims that may be re-filed if and when McCurvin successfully obtains post-conviction relief vacating his conviction on the ground of actual innocence. See 28 U.S.C. § 1915 (e)(2)(B)(i) and (ii). It is certified that any appeal in forma pauperis from this order would not be taken in good faith because such an appeal would be frivolous. 28 U.S.C. § 1915(a). The clerk shall enter judgment and close the file.

SO ORDERED this _____ day of January 2003, at Bridgeport, Connecticut.

Stefan R. Underhill
United States District Judge