

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ALBERT EARL BROWN, JR., #146726 §
VS. § CIVIL ACTION NO. 4:08cv291
MAUREEN MESNER, ET AL. §

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Albert Earl Brown, Jr., an inmate confined at the Collin County Detention Facility, proceeding *pro se* and *in forma pauperis*, filed the above-styled and numbered civil rights lawsuit pursuant to 42 U.S.C. § 1983. The cause of action was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

On February 3, 2009, the Plaintiff filed a motion to voluntarily dismiss the lawsuit (docket entry #37) pursuant to Fed. R. Civ. P. 41(a). A plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment or a stipulation signed by all parties who have appeared. Fed. R. Civ. P. 41(a)(1). Otherwise, an action may be dismissed at the plaintiff's request only by court order, on terms the court considers proper. Fed. R. Civ. P. 41(a)(2). In the present case, the Defendants filed an answer and motion for summary judgment before the present motion was filed and there has not been a stipulation filed signed by all parties to dismiss the case, thus the lawsuit may be dismissed only by order on the terms the Court considers proper.

The present lawsuit concerns the facts underlying the criminal charges pending against the Plaintiff. A jury trial is set regarding the criminal charges for March 3, 2009. See <http://www.collincountytx.gov/rsp-bin/PBKR126.PGM>. In the absence of the present motion, the lawsuit ordinarily would have to be stayed until the criminal charges pending against the Plaintiff had run their course. *Wallace v. Kato*, 549 U.S. 384, 393-94 (2007); *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 655 (5th Cir. 2007); *U.S. v. \$2,067,437.08 in U.S. Currency*, No. 6:07cv319, 2008 WL 238514 (E.D. Tex. Jan. 28, 2008). Moreover, in the event that the Plaintiff is found guilty, he would not be entitled to bring a civil rights lawsuit about the facts underlying the criminal charges unless and until he can show that his conviction or sentence has been reversed, expunged, invalidated, or otherwise called into question. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). Consequently, the present motion should be granted with the stipulation that the Plaintiff may not refile the civil rights claims unless he can show that he has been exonerated in the criminal proceedings or, alternatively, show that his conviction or sentence has been reversed, expunged, invalidated or otherwise called into question.

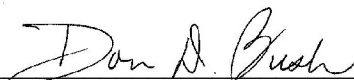
Recommendation

It is recommended that the motion to dismiss (docket entry #37) be granted and that the complaint be dismissed. Fed. R. Civ. P. 41(a)(2). It is further recommended that the Plaintiff be prohibited from refileing the civil rights claims unless he can show that he has been exonerated in the criminal proceedings or, alternatively, show that his conviction or sentence has been reversed, expunged, invalidated or otherwise called into question.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within ten days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United States Auto Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 5th day of February, 2009.



DON D. BUSH
UNITED STATES MAGISTRATE JUDGE