No. 08-35902

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN P. CARR,

Plaintiff-Appellant,

v.

STATE OF OREGON; CITY OF PORTLAND; LINDA MENG, in her official capacity as City Attorney of the City of Portland; HARDY MYERS, in his official capacity as Attorney General of the State of Oregon,

Defendants-Appellees.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

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APPELLEE'S BRIEF

STATEMENT OF JURISDICTION

The district court dismissed the complaint for a lack of subject-matter jurisdiction. Plaintiff timely appealed the dismissal on October 28, 2008. 28 U.S.C. § 2107. This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court correctly dismiss the complaint when it concluded that it lacked subject-matter jurisdiction under the *Rooker-Feldman* doctrine and that a statute of limitations barred a claim for damages?

2. Even if the district court erred, should the dismissal of the State of Oregon and Hardy Myers be affirmed nonetheless?

3. Did the district court properly exercise its discretion when it denied plaintiff's motion to amend the complaint to add an additional claim?

STATEMENT OF THE CASE

On March 31, 2008, plaintiff filed a complaint alleging that the City of Portland and Linda Meng, acting in her official capacity as City Attorney (hereinafter, "city defendants,") and the State of Oregon and Hardy Myers, acting in his official capacity as the Attorney General of the State of Oregon (hereinafter, "state defendants") violated his equal protection and due process rights by publishing a record of an allegedly unlawful arrest in November 2004.

Plaintiff requested that the district court "seal" his arrest record and award damages from the allegedly unlawful arrest.

Pursuant to Fed. R. Civ. P. 12(b)(6), defendants moved to dismiss plaintiff's complaint, asserting that plaintiff's claims were barred by the *Rooker-Feldman* doctrine, principles of *res judicata* (collateral estoppel, claim preclusion, and issue preclusion), a statute of limitations, and qualified and sovereign immunity. Plaintiff opposed that motion and sought leave to amend his complaint to add a claim related to other proceedings involving the citation and impoundment of his vehicle for parking violations.

The district court denied plaintiff's motion to amend and granted defendants' motions to dismiss. With respect to the motion to amend, the district court concluded that plaintiff's proposed additional claims were "frivolous" and that adding them would be futile and cause undue delay and prejudice to the defendants. With respect to the motion to dismiss, the court concluded that plaintiff's equal protection and due process claims were barred by the *Rooker-Feldman* doctrine because they collaterally challenged a prior state court decision that denied plaintiff's request to set aside his arrest record. The district court also concluded that the *Rooker-Feldman* doctrine barred plaintiff's damages claim to the extent that it challenged the state court decision, and otherwise, that a two-year statute of limitations barred this claim.

On October 21, 2008, the district court dismissed plaintiff's complaint with prejudice. Plaintiff timely appealed.

SUPPLEMENTAL STATEMENT OF FACTS

On October 27, 2004, Clark County Superior Court in Vancouver, Washington issued a permanent "order of protection" restraining plaintiff from "knowingly" coming or remaining within 300 feet of his ex-wife. (City of Portland's Excerpt of Record ("C.E.R.") 13-14, Complaint). On November 5, 2004, City of Portland police arrested plaintiff at a restaurant for allegedly violating the restraining order. (C.E.R. 2, Complaint). Plaintiff alleges that a Portland Police Bureau record of his arrest states that the arrest was for "trespass," "domestic violence," and a civil violation of a restraining order. (C.E.R. 2, Complaint). Plaintiff was not charged with any crime related to the arrest. (C.E.R. 1, Complaint).

In May 2005, plaintiff challenged the validity of the restraining order in Washington state court. (C.E.R. 14, Complaint). The Washington court denied relief, and plaintiff filed a subsequent action in United States District Court for the District of Western Washington to void the restraining order. The district court dismissed that case and it is presently pending on appeal in this court. (C.E.R. 14-15, Complaint).

In November 2005, plaintiff requested that the Multnomah County Circuit Court set aside his arrest record pursuant to Or. Rev. Stat. § 137.225. (C.E.R. 2, Complaint). Plaintiff contended that the arrest record should be set aside because the protection order was invalid, that his arrest was "criminal" in nature such that it qualified for the statutory set-aside remedy, and that "due process" required setting aside the arrest record. (C.E.R. 2, Complaint; C.P. 29, Plaintiff's Declaration, Ex. 7, State Court Transcript, pp. 3-5). The state court denied relief, concluding that his arrest record did not qualify for the set-aside remedy in Or. Rev. Stat. § 137.225 because violation of a protection order was not a criminal offense in Oregon. (C.E.R. 11, Complaint). Plaintiff appealed the circuit court's decision in Oregon appellate courts unsuccessfully, with the Oregon Supreme Court denying review on March 5, 2008. (C.E.R. 2, Complaint).

Soon thereafter, plaintiff initiated this action. He seeks to "seal" his November 5, 2004 arrest record and to recover damages. (C.E.R. 17, Complaint. Plaintiff alleges that the publication of his arrest record violated his rights to equal protection and due process, and that he suffered damages as a result of the allegedly unlawful arrest. (C.E.R. 4-15, Complaint).

Defendants moved to dismiss, asserting that the *Rooker-Feldman* doctrine and principles of *res judicata* bar plaintiff's equal protection and due

process claims because he already litigated the issue of setting aside his arrest record in state court to a final judgment and that the statute of limitations barred plaintiff's damages claim. (C.P. 22, State Defendants' Memorandum on Motion to Dismiss, p. 2; C.P. 19, City Defendants' Motion to Dismiss, pp. 1-2). Plaintiff opposed the motion.

While defendants' motions to dismiss were pending, plaintiff moved to amend the complaint to add claims for alleged violations of his due-process rights during a parking violation proceeding. (C.P. 35, Motion to Amend Complaint). Plaintiff asserted that someone stole his vehicle, that police later cited and impounded the vehicle for parking violations, and claimed that the circuit court violated his due process rights by requiring plaintiff to post a bond prior to a hearing and failing to provide him sufficient time to obtain police records to dispute the fines. (C.P. 36, Plaintiff's Declaration, ¶¶ 6, 10, 13). Defendants objected, arguing that the additional claim was futile and that any amendment would cause prejudicial delay. (C.P. 37, State Defendants' Response on Motion to Amend, p. 2; C.P. 41, City Defendants' Response on Motion to Amend, p. 2).

The district court denied plaintiff's motion to amend and granted defendants' motions to dismiss. It concluded that amendment of the complaint was futile because the new claims were frivolous and would cause undue delay

and prejudice defendants. (C.E.R. 26-27, Order). It further concluded that the *Rooker-Feldman* doctrine barred plaintiff's equal protection and due process claims (Counts I through IV) because they "attempt[ed] to enlist the federal court in overturning [the state court] decision." (C.E.R. 32-34, Order). And the court concluded that, to the extent plaintiff's claim for damages was not similarly barred by *Rooker-Feldman*, that Oregon statute of limitations for § 1983 claims, Or. Rev. Stat. § 12.110(1), barred it. (C.E.R. 34-35, Order).

SUMMARY OF ARGUMENT

1. Dismissal of plaintiff's claims

The district court correctly dismissed plaintiff's claims against the State of Oregon and the Attorney General. The state defendants enjoy sovereign immunity from claims for injunctive relief and damages in federal court. Although a state officer may be subject to federal injunctive relief if a plaintiff alleges that the officer acted in violation of plaintiff's constitutional rights, in this case, plaintiff made no specific allegations that the Attorney General committed any action that violated his rights. Thus, the state defendants are immune from suit in federal court.

In addition, should the state defendants be subject to any claims, the claims are barred by the *Rooker-Feldman* doctrine, claim preclusion, and Or. Rev. Stat. § 12.110(3), the statute of limitations for plaintiff's claims arising

under 42 U.S.C. § 1983. In this federal action, plaintiff seeks damages and to set aside the record a November 2004 arrest record, relief that an Oregon state court previously denied. Because plaintiff already litigated whether his arrest record should be set aside, and did not appeal the adverse state court decision to the United States Supreme Court, the *Rooker-Feldman* doctrine precludes the district court from reviewing the correctness of the prior state court decision. Similarly, claim preclusion bars the federal court from hearing plaintiff's claims against the state defendants because it involves the same claims and factual transaction at issue in prior state court litigation. Lastly, to the extent that plaintiff's damages claim survives these doctrinal bars, Oregon's two-year statute of limitations bars any recovery for damages from his allegedly unlawful arrest and incarceration.

2. Denial of leave to amend complaint

The district court properly exercised its discretion when it denied plaintiff's motion to amend. Plaintiff filed his motion to amend after defendants filed motions to dismiss plaintiff's complaint, and plaintiff's proposed claims were frivolous.

ARGUMENT

I. The district court correctly dismissed plaintiff's complaint.

A. Standard of review

This court reviews a dismissal under the *Rooker-Feldman* doctrine *de novo*. *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003). District courts are presumed to lack subject-matter jurisdiction and plaintiff has the burden to establish that jurisdiction exists. *Vacek v. U.S. Postal Service*, 447 F.3d 1248, 1250 (9th Cir. 2007). This court may affirm a district court's dismissal on any ground supported in the record. *Doe v. American Nat. Red Cross*, 112 F.3d 1048, 1050 (9th Cir. 1997).

B. The State of Oregon has sovereign immunity from plaintiff's claims in federal court.

Although the district court properly dismissed the complaint because the *Rooker-Feldman* barred plaintiff's claims (discussed herein), it is immediately apparent that the district court's dismissal of the claims against the state defendants was correct for an alternative reason: because the state defendants are immune from suit. Under the Eleventh Amendment of the United States Constitution, states are "immune from private damage actions or suits for injunctive relief brought in federal court." *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988) (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 907, 79 L.Ed. 2d 67

(1984)). Although a state can waive its immunity from suit in federal court, *Pennhurst*, 465 U.S. at 99, the state has not waived its immunity from suit in federal court in its tort claims act. Or. Rev. Stat. § 30.265; *Micomonaco v. State of Washington*, 45 F.3d 316, 322 (9th Cir. 1995) (state tort claims acts do not operate as a waiver of Eleventh Amendment immunity in federal court). As a result, the district court correctly dismissed the action against the state defendants.

C. The Attorney General for the State of Oregon is immune from suit.

Similarly, Myers, who was sued in his official capacity[1] as the Attorney General for the State of Oregon is immune from suit in federal court on plaintiff's claims. The bar against claims against states for injunctive or monetary relief extends to actions against "state officials when 'the state is the real, substantial party in interest.'" *Pennhurst*, 465 U.S. at 101 (citation omitted). To determine whether a state is the real party in interest, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Id*. (citation omitted). Although the Attorney General, as a state official pursuant to Or.

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[1] The pleadings make clear that this action truly is an "official capacity" suit against his, and not a mislabeled individual capacity suit. The

Footnote continued…

Rev. Stat. 180.410, can be subject to suits for injunctive relief if the suit "challeng[es] the constitutionality of a state official's action," *Pennhurst*, 465 U.S. at 102 (citing *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L .Ed. 714 (1908), plaintiff does not challenge *any* action by the Attorney General and only alleges that he has a duty to represent the State of Oregon in federal and state courts. (C.E.R. 3, Complaint). Moreover, the Attorney General does not have any power to "seal" or set aside an arrest record; that power lies with the state circuit courts. *See* Or. Rev. Stat. § 137.225 (granting circuit courts authority to set aside "any arrest"). Because plaintiff does not allege any conduct by the Attorney General, seeks relief against the state, and requests injunctive relief that the Attorney General cannot provide, the Attorney General is immune from plaintiff's claims in federal court.

D. The *Rooker-Feldman* doctrine bars plaintiff's federal constitutional claims against the state defendants.

Even if immunity did not bar the claims against the state defendants, the *Rooker-Feldman* doctrine would. That doctrine bars a losing party in state court "from seeking what in substance would be appellate review of the state judgment in a United States district court[.]" *Johnson v. De Grandy*, 512 U.S.

(…continued)
complaint expressly states that it is against him in Myers' "official capacity" and does not identify any specific actions taken by Myers personally.

997, 1005-06, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994) (citing *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 473, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S. Ct. 149, 68 L. Ed. 362 (1923)). This doctrine bars two types of claims in federal district court: (1) "complain[ts] of harm caused by a state court judgment that directly withholds a benefit from (or imposes a detriment on) the federal plaintiff, based on an allegedly erroneous ruling by that court[;]" and (2) "complain[ts] of a legal injury caused by a state court judgment, based on an allegedly erroneous legal ruling, in a case in which the federal plaintiff was one of the litigants." *Noel*, 341 F.2d at 1163. Here, plaintiff seeks "[an order sealing] the records of the arrest of [plaintiff] on November 5, 2004 by Portland Police Bureau[,]" (C.E.R. 17, Complaint), which is a remedy for the harm caused by a state court's prior conclusion that it could not set aside his arrest on federal constitutional grounds. (C.E.R. 1, Complaint).

Because plaintiff's seeks to remedy the harm caused by an allegedly erroneous state court ruling, the *Rooker-Feldman* doctrine bars his claims. Plaintiff's individual claims state or imply that the state court failed to consider his federal constitutional rights in the earlier state proceeding. (*See* App Br 12, plaintiff asserts that "[he] had asked the state court to consider Fourteenth Amendment issues" but that "the state courts did not consider those issues, not

because they were 'meritless', but because the state courts did not have jurisdiction to consider those issues"; C.E.R. 4, 8, 12, Complaint, plaintiff alleges that the state court "did not address relief under the Fourteenth Amendment of the [United States] Constitution" (Count I), that the state court "conclu[ded] that they did not have jurisdiction to expunge or correct the [arrest] records" (Count III), and that the state court conducted proceedings that "do not comply with the requirements of due process" (Count IV)). Adjudication of these federal claims would require the district court to conclude that the state court legally erred (on federal constitutional grounds) when it denied plaintiff's request to set aside his arrest record. Because plaintiff effectively seeks to reverse the effects of an allegedly erroneous state court decision, the *Rooker-Feldman* doctrine bars these claims.

Plaintiff contends that the *Rooker-Feldman* does not apply because he alleged that the state court concluded that it lacked any jurisdiction to hear his federal claims (or that it failed to address them).[2] (App Br 12-13). This

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2 Plaintiff does not contend that any of his claims are generalized facial challenges to Or. Rev. Stat. § 137.225. *See Noel*, 341 F.3d at 1157 (recognizing that *Rooker-Feldman* does not bar facial challenges that are "unrelated to any particular application" of the challenged statute to the federal plaintiff). In all events, this argument fails because plaintiff's claims require the district court to "go beyond mere review of the state rule *as promulgated*, to an examination of the rule *as applied* by the state court to the particular factual circumstances of [plaintiff's] case," which *Rooker-Feldman* prohibits.

Footnote continued…

argument fails because plaintiff points out that he did raise Fourteenth Amendment issues in the state court proceeding, (App Br 12), and the state court was competent to resolve all of his federal constitutional claims in the proceedings to set aside his arrest under Or. Rev. Stat. § 137.225. *See Feldman*, 460 U.S. at 483, n. 16 (noting that state courts are competent to adjudicate federal constitutional claims and that state courts should have the first opportunity to consider federal constitutional arguments to state statutes and, if appropriate, apply a saving construction); *see also Springer v. State*, 50 Or. App. 5, 621 P.2d 1213, 1217 (1981) (concluding that a former version of Or. Rev. Stat. § 137.225 did not violate an arrestee's right to equal protection when it allowed persons convicted of certain felonies (but did not allow persons who were not convicted) to set aside their arrest record). Plaintiff could have sought federal appellate review of the denial of his effort to set aside his arrest record in state court, but failed to do so. *Rooker-Feldman* precludes plaintiff from challenging the correctness of the state court's denial of his request to set aside his arrest record.

(…continued)
Worldwide Church of God v. McNair, 805 F.2d 888, 892 (9th Cir. 1986) (citation omitted) (emphasis in original).

E. Claim preclusion bars plaintiff's claims against the state defendants.

Finally, to the extent that plaintiff's claims against state defendants are not barred otherwise, claim preclusion bars plaintiff's claims against the state defendants in this action. In actions arising under 42 U.S.C. § 1983, federal courts will apply state-law principles of *res judicata*[3] to resolve claims or issues previously decided in state court. *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81, 85, 104 S. Ct. 892, 79 L.Ed. 2d 56 (1984). Here, claim preclusion applies.

Claim preclusion bars all of plaintiff's claims against the state defendants because he already litigated his entitlement to set aside his arrest record in state court. Claim preclusion provides:

> [A] plaintiff who has prosecuted one action against a defendant through to a final judgment * * * is barred [i.e., precluded] * * * from prosecuting another action against the same defendant where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy

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[3] In Oregon, use the terms "claim preclusion" or "issue preclusion" when determining the claim preclusive or issue preclusive effect of prior state court decisions. *Drews v. EBI Companies*, 310 Or. 134, 795 P.2d 531, 534-35 (1990).

> additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action.

Rennie v. Freeway Transport, 294 Or. 319, 656 P.2d 919, 921 (1982). Plaintiff's claim involves the same factual transaction and seeks the same relief sought in state court, which the state court denied in a final appealable order. *See State v. K.P.*, 324 Or. 1, 921 P.2d 380, 382-83 (1996) (a final order in proceeding under Or. Rev. Stat. 137.225 is appealable). All of plaintiff's federal constitutional claims were or could have been asserted in the prior litigation. (*See* C.P. 29, Plaintiff's Declaration, Ex. 7, State Court Transcript, pp. 3-5, plaintiff claimed that due process required setting aside his arrest record); *Springer*, 621 P.2d at 1217 (state appellate court considered equal protection claims in proceedings arising under Or. Rev. Stat. § 137.225). Because plaintiff already litigated his entitlement to set aside his arrest record in state court, claim preclusion bars a second federal action.

F. Or. Rev. Stat. § 12.110 bars plaintiff's § 1983 claim for damages.

Finally, plaintiff's claim for damages (Count V) is time-barred. In claims arising under 42 U.S.C. § 1983, this court will apply the applicable state statute of limitations for personal injury claims. *Wilson v. Garcia*, 471 U.S. 261, 267-269, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985). Or. Rev. Stat. § 12.110(1), Oregon's personal injury statute of limitations, requires plaintiff to bring a

personal injury action within two years after the action accrues. *Sanok v. Grimes*, 306 Or. 259, 760 P.2d 228, 230 (1988). Section 1983 claims accrue at "the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful." *Chardon v. Fernandez*, 454 U.S. 6, 8, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981) (emphasis in original). Here, plaintiff's damages claim accrued either when he was arrested, incarcerated, or his arrest record was generated. At the latest, his claim accrued in November 2005, (when plaintiff requested the state court to set aside his arrest record). Because plaintiff filed his federal action more than two years later, Or. Rev. Stat. § 12.110(1) bars this claim.

II. The district court properly exercised its discretion when it denied plaintiff's motion to amend his complaint.

A. Standard of review

This court reviews a district court's denial of a motion to amend a complaint for abuse of discretion. *Chappel v. Lab. Corp.*, 232 F.3d 719, 725 (9th Cir. 2000).

B. Plaintiff's additional claim was a new cause of action, frivolous and allowing amendment would cause undue delay and prejudice defendants.

Pursuant to Fed. R. Civ. P. 15(a), a party may seek leave to amend their pleadings and that "leave shall be freely given when justice so requires." But leave may be denied if circumstances demonstrate undue delay, prejudice to the

opposing party, futility of the amendment, or if proposed additional claims are frivolous. *Bonin v. Calderon*, 59 F.3d 815, 845-46 (9th Cir. 1995). In addition, amendment cannot be granted if the amendment would introduce a "separate, distinct and new cause of action." *Planned Parenthood of Southern Arizona v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997) (citation omitted).

Here, the district court correctly denied leave. Plaintiff's additional claims related to parking enforcement proceedings and were unrelated to his causes of action relating to his arrest record. For that reason alone, the court properly denied leave to amend. *Id.* In addition, plaintiff's additional claims lack merit because plaintiff seeks an injunction to compel the state court to conduct discovery and the trial proceeding or to dismiss the parking citation. (C.E.R. 24, Proposed Amendment). 28 U.S.C. § 2283 prohibits a district court from enjoining state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." None of those exceptions apply here and the district court could not grant any relief on these claims. Because plaintiff's claims lacked merit and would cause undue delay for resolving the pending motions to dismiss, the district court correctly denied plaintiff leave to amend his complaint.

CONCLUSION

For all the above reasons, this court should affirm the district court's judgment.

Respectfully submitted,

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/s/ Matthew J. Lysne

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the is proportionately spaced, has a typeface of 14 points or more and contains 3,758 words.

DATED: February 12, 2009.

/s/ Matthew J. Lysne

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIAN P. CARR, Plaintiff-Appellant, v. STATE OF OREGON; CITY OF PORTLAND; LINDA MENG, in her official capacity as City Attorney of the City of Portland; HARDY MYERS, in his official capacity as Attorney General of the State of Oregon, Defendants-Appellees	U.S.C.A. No. 08-35902 STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for appellee

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State of Oregon, certifies that this case may be related to *Carr v. Reed*, Docket No. 07-35962.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2009, I directed the to be filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Matthew J. Lysne
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