

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

STONEY BURET MCINTYRE,

Plaintiff-Appellant.

v.

No. 99-6301

DANIEL L. STIENEKE; JUDY H. SILLS;

JOY R. SMITH,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, Senior District Judge.
(CA-98-846-BR)

Submitted: June 23, 1999

Decided: August 26, 1999

Before WILKINS and LUTTIG, Circuit Judges, and
PHILLIPS, Senior Circuit Judge.

Affirmed as modified by unpublished per curiam opinion.

COUNSEL

Stoney Buret McIntyre, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit. See
Local Rule 36(c).

OPINION

PER CURIAM:

Stoney McIntyre appeals the district court order dismissing his 42 U.S.C.A. § 1983 (West Supp. 1998) action alleging that the North Carolina Department of Corrections's refusal to transfer him to federal custody violates the conditions of his state sentence and thus violates his due process rights. We affirm as modified.

McIntyre's claim challenging the execution of his state sentence falls within the traditional scope of habeas corpus. See Preiser v. Rodriguez, 411 U.S. 475, 486 (1973). Consequently, McIntyre may not use § 1983 as a remedy to challenge his sentence because he has not yet exhausted his claims in state court. See id. at 489-94. Similarly, McIntyre cannot recover damages in a § 1983 action without first establishing the invalidity of his sentence by the issuance of a writ under 28 U.S.C.A. § 2254 (West 1994 & Supp. 1998). See Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). Therefore, we affirm the district court's order as modified to reflect dismissal without prejudice to provide McIntyre with the opportunity to refile his claim in a § 2254 petition after satisfying the exhaustion requirement by presenting his claim to appropriate state institutions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED AS MODIFIED

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