

BPS-93

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-3514

ABDEL FATTAH,
Appellant

v.

JEFFREY BEARD, PA Secretary of Department of Corrections;
DONALD KELCHNER, Superintendent at SCI Camp Hill;
JOHN PALAKOVICH, Deputy Superintendent at SCI Camp Hill;
WILLIAM YOUNG, Medical Doctor at SCI Camp Hill

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 03-cv-01314)
District Judge: Honorable James M. Munley

Submitted For Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B)

January 23, 2004

Before: NYGAARD, BARRY AND SMITH, CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B). On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the appeal is DISMISSED pursuant to 28 U.S.C. §

1915(e)(2)(B)(i). All of the above in accordance with the opinion of this Court.

ATTEST:

Marcie M. Waldron

Clerk

DATED: February 4, 2004

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(Filed: February 4, 2004)

OPINION

PER CURIAM.

On August 6, 2003, Abdel Fattah, a Pennsylvania inmate at SCI-Camp Hill, filed an "Emergency Complaint" under 42 U.S.C. § 1983 in the District Court for the Middle

District of Pennsylvania. Among other things, Fattah alleged that he was assaulted approximately nine times at SCI-Camp Hill, resulting in a lost tooth, broken nose, pain, bleeding, and bruises. He also allegedly was deprived of sleep; refused drinking water; denied a mattress, sheets, and blanket; refused clothing; denied mail; refused access to a shower; and denied the ability to engage in prayer. Fattah sought damages for the alleged violations of his constitutional rights, and he claimed that his life was in imminent danger and requested injunctive relief in the form of an immediate transfer from SCI-Camp Hill.

The District Court treated Fattah's Complaint as an application for an "emergency temporary restraining order," and it ordered the defendant prison officials (Beard, Kelchner, Palakovich, and Young) to respond. The defendants responded on August 8, 2003, and denied the allegations of harassment and mistreatment. They submitted a declaration from John Reading, an SCI-Camp Hill Lieutenant with "a thorough knowledge of Mr. Fattah's living conditions and claims of assault and harassment." According to Lieutenant Reading, Fattah "has a well-documented history of assaulting others," including eight incidents of assault upon staff at SCI-Camp Hill. Lieutenant Reading disputed each of Fattah's claims of mistreatment.

By Order entered August 8, 2003, the District Court denied Fattah's application for a temporary restraining order. The District Court noted that it was forced to make "credibility determinations" to dispose of Fattah's application, and it found, based on the sworn submission of Lieutenant Reading, that Fattah had not made a showing of likely

success on the merits of his Complaint. The District Court thus denied Fattah's injunctive request for a transfer from SCI-Camp Hill, and Fattah timely filed this appeal.

We have granted Fattah leave to proceed in forma pauperis on appeal. After a careful review of the record, we will dismiss the appeal pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) as lacking an arguable basis in law or fact.

As a threshold matter, we must consider our appellate jurisdiction. In general, an order denying a temporary restraining order is not appealable. Nutrasweet Co. v. Vit-Mar Enter., 112 F.3d 689, 692 (3d Cir. 1997). "Such a ruling is appealable, however, if it is tantamount to a ruling on a preliminary injunction," Overstreet v. Lexington-Fayette Urban County Gov't, 305 F.3d 566, 572 (6th Cir. 2002), as an order denying a preliminary injunction is immediately appealable under 28 U.S.C. § 1292(a)(1). Thus, while a district court might purport to deny a "temporary restraining order," appellate review is available "when the order in reality operates as a preliminary injunction." Populist Party v. Herschler, 746 F.2d 656, 661 n.2 (10th Cir. 1984).

Here, the District Court sought and obtained a response from the defendants, and it weighed Lieutenant Reading's declaration against the allegations in the Complaint as part of its analysis of the factors that govern an award of injunctive relief. Moreover, the relief Fattah requested (transfer from SCI-Camp Hill) would be available only by a preliminary injunction because it would extend beyond the ten-day limit of a temporary restraining order. On this record, the District Court's decision amounted to the denial of a

preliminary injunction, and thus we have appellate jurisdiction pursuant to § 1292(a)(1).

“We review the District Court's order denying a preliminary injunction under an abuse of discretion standard, its factual findings under a clear error standard, and its findings of law under a de novo standard.” Rose Art Indus., Inc. v. Swanson, 235 F.3d 165, 170-71 (3d Cir. 1999). We discern no error in the District Court's decision. Lieutenant Reading's sworn declaration indicates that Fattah does not face an imminent threat at SCI-Camp Hill, and there is simply no evidence in the present record that SCI-Camp Hill inmates or prison staff pose any real or immediate risk of future harm to Fattah. Additionally, an inmate has no constitutionally protected liberty interest in remaining at, or being transferred from, a particular institution. Meachum v. Fano, 427 U.S. 215, 225 (1976). While we express no view as to whether Fattah can ultimately prevail in this suit based on his claims of past constitutional violations, we have no reason to question the District Court's refusal to grant the requested preliminary injunctive relief.

For the foregoing reasons, we will dismiss this appeal pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). The motion for appointment of counsel and motion for injunctive relief pending appeal are denied.