

**CASE CLOSED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID L. FISHER, )  
 )  
 ) Plaintiff )  
 )  
 ) vs. )  
 )  
 ) THOMAS ROCK, PAROLE OFFICER, )  
 ) and JOHN (JANE) DOE, CLERK OF )  
 ) MINUTES, )  
 )  
 ) Defendants )

Civil Action No. 95-887  
Judge Donald E. Ziegler/  
Magistrate Judge Sensenich

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MEMORANDUM ORDER

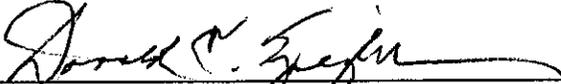
Plaintiff's complaint was received by the Clerk of Court on June 12, 1995, and was referred to United States Magistrate Judge Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on June 12, 1995, recommended that this action be dismissed as legally frivolous in accordance with 28 U.S.C. § 1915(d). The parties were allowed ten (10) days from the date of service to file objections. Service was made on plaintiff by delivery to SCI Huntingdon, where he is incarcerated and on defendants. Objections were filed by plaintiff on June 22, 1995, with Amended Objections filed on June 27, 1995. After de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 10<sup>th</sup> day of July, 1995;

IT IS HEREBY ORDERED that this action is dismissed as legally frivolous in accordance with 28 U.S.C. § 1915(d).

The report and recommendation of Magistrate Judge Sensenich, dated June 12, 1995, is adopted as the opinion of the court.

  
\_\_\_\_\_  
Donald E. Ziegler, Chief Judge  
United States District Court

cc: Ila Jeanne Sensenich  
U.S. Magistrate Judge

David Fisher, BX-0895  
SCI Huntingdon  
1100 Pike Street  
Huntingdon, PA 16654-1112

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MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that this action be dismissed as legally frivolous in accordance with 28 U.S.C. §1915(d).

II. REPORT

Plaintiff, David Fisher, an inmate at the State Correctional Institution at Huntingdon, commenced this action pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983, against his parole officer Thomas Rock, and Minute Clerk Doe of the Court of Common Pleas of Allegheny County. Plaintiff contends that defendants deprived him of due process in violation of his rights as secured by the Fourteenth Amendment of the United States Constitution and state law for which he seeks a declaratory judgment, injunctive relief, compensatory and punitive damages, and any other relief deemed appropriate by this court. He also asserts claims under state law.

Plaintiff alleges that defendant Rock lodged a parole violation detainer against him on August 31, 1991. He contends

that this detainer prevented him from posting bail for criminal charges for which he was arrested on August 28, 1991. He alleges that on April 1, 1992, defendant Rock admitted in court that he had issued the detainer to prevent plaintiff from "getting away" even though he knew that plaintiff was not on parole at the time of his arrest.

He alleges that on November 13, 1991 a probation violation detainer was issued against him by an unknown minute clerk on the recommendation of defendant Rock, without the knowledge or consent of the sentencing judge.

Plaintiff has executed the complaint on May 17, 1995, more than two years after the alleged misconduct by defendants. Although Section 1983 does not have a statute of limitations, the Supreme Court has held that this section is analogous to personal injury claims and therefore, the state's personal injury statute of limitations apply. Wilson v. Garcia, 471 U.S. 261 (1985). See also Owens v. Okure, 488 U.S. 235 (1989). Further, the state's tolling provisions are applicable in Section 1983 actions so long as those provisions conform with the goals of the federal law at issue. Hardin v. Straub, 490 U.S. 536 (1989); Callwood v. Questel, 883 F.2d 272 (3d Cir. 1989).

In Pennsylvania the two year statute of limitations for personal injury actions applies to Section 1983 actions. Bartholomew v. Fischl, 782 F.2d 1148 (3d Cir. 1986); Smith v. Pittsburgh, 764 F.2d 188, 194 (3d Cir.), cert. denied, 474 U.S. 950 (1985). Plaintiff's claim accrued when he knew or had reason

to know of the injury. Deary v. Three Un-named Police Officers, 746 F.2d 185, 197 (3d Cir. 1984). And the statute is not tolled because he is incarcerated. Sandutch v. Muroski, 684 F.2d 252, 254 (3d Cir. 1982).

Plaintiff's claim accrued in November 1991, when defendants filed the last probation detainer. No reason for tolling the two year statute of limitations from November 1991 appears in the complaint. Thus, to be timely filed, plaintiff should have commenced this action by November 1993. However, his complaint was reviewed by the Clerk of Court on June 6, 1995, after the statute of limitations had expired.

Plaintiff sought leave to commence this action without prepayment of the required filing fee. The Court of Appeals for the Third Circuit has instructed the district courts to utilize a two step analysis to determine whether to direct service of a section 1983 action brought in forma pauperis. First, the court must determine whether the litigant is indigent within the meaning of 28 U.S.C. §1915(a). Second, the court must determine whether the complaint is frivolous or malicious under 28 U.S.C. §1915(d). Roman v. Jeffes, 904 F.2d 192, 194 n.1 (3d Cir. 1990). This court has found plaintiff to be without sufficient funds to pay the required filing fee. Thus, he has been granted leave to proceed in forma pauperis.

In Neitzke v. Williams, 490 U.S. 319 (1989) the Court identified two types of legally frivolous complaints: 1) those based upon an indisputably meritless legal theory and, 2) those

with factual contentions that are clearly baseless. Id. at 327. An example of the first is where a defendant enjoys immunity from suit and an example of the second is a claim describing a fanciful delusional factual scenario. Id. at 327.

Although the statute of limitations is an affirmative defense, several courts have ruled that a complaint may be dismissed under 28 U.S.C. §1915(d) if it is not filed within the applicable time period and there is no reason to toll the statute. Myers v. Vogal, 960 F.2d 750, 751 (8th Cir. 1992); Street v. Vose, 936 F.2d 38, 41 (1st Cir. 1991) cert. denied, 112 S.Ct. 948 (1992); Henson-El v. Rogers, 923 F.2d 51, 53 (5th Cir.), cert. denied, 111 S.Ct. 2863 (1991).

Because plaintiff's complaint is barred by Pennsylvania's two year statute of limitations, it is recommended that this action be dismissed, without prejudice, as legally frivolous under section 1915(d).

  
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ILA JEANNE SENSENICH  
U.S. Magistrate Judge

Dated: June 12, 1995

cc: The Honorable Donald E. Ziegler, Chief Judge  
United States District Court

David Fisher, BX-0895  
SCI Huntingdon  
1100 Pike Street  
Huntingdon, PA 16654-1112  
(CERTIFIED MAIL - RETURN RECEIPT REQUESTED)