

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

DAVID FISHER,)
Plaintiff)
vs.) Civil Action No. 96-1760
THOMAS ROCK, Parole Agent, and) Judge Donald E. Ziegler/
JANE DOE, Clerk of Minutes,) Magistrate Judge Sensenich
Defendants)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

4

I. RECOMMENDATION

It is recommended that this action be dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(e).

II. REPORT

Plaintiff, David Fisher, an inmate at the State Correctional Institution at Huntingdon, commenced this action against parole agent Thomas Rock and minute clerk Jane Doe ("Defendants"), pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. He complains that Defendants deprived him of due process in violation of the Fourteenth Amendment of the United States Constitution, for which he seeks a declaratory judgment, injunctive relief, compensatory and punitive damages, and any other relief deemed appropriate by this Court.

Plaintiff alleges that he was arrested on August 28, 1991, for various criminal charges of theft and receiving stolen property. He asserts that at the time of his arrest he was on probation for two consecutive one-year terms, but that two weeks prior to his arrest on the 28th, he had discussed "being off

parole" with Defendant Rock. (Compl. ¶ 8.) He contends that a Pennsylvania State Parole Detainer was lodged against him on August 31, 1991, which prevented him from posting bail for his arrest on August 28.

Plaintiff contends that on April 1, 1992, Defendant Rock testified in state court that he lodged a detainer against him even though he was not on parole on the date of his arrest. He contends that on November 13, 1991, Defendant Doe, a minute clerk, issued a probation detainer without the consent or knowledge of the sentencing judge.

Plaintiff's claims against Defendants Rock and Doe arose in the fall of 1991 and the spring of 1992. He filed this action in June 1996. When the alleged misconduct giving rise to constitutional violations occurred in Pennsylvania more than two years before the commencement of a lawsuit under section 1983, the claim is untimely under the applicable two-year statute of limitations. Kost v. Kozakiewicz, 1 F.3d 176 (3d Cir. 1993). When the claim accrues on a section 1983 claim is a question of federal law. Albright v. Oliver, 510 U.S. 266, 280 n.6 (1994). (Ginsburg, J. concurring). "In general, a section 1983 claim accrues when the facts which support the claim are, or should be, apparent to a person with a reasonably prudent regard for his rights and when the identity of the person or persons responsible for the alleged violation is known or reasonably should have been known to the plaintiff." Smith v. Wambaugh, 887 F. Supp. 752, 755 (M.D. Pa. 1995).

Plaintiff's claims against Defendants Rock and Doe arose on August 31, and November 13, 1991, when the detainers were issued. Although Plaintiff knew the identity of the parties and the facts he alleges support his claim for a denial of due process, he commenced this action more than two years later. His claims against Defendants Rock and Doe were filed outside the applicable statute of limitations.

On April 26, 1996, the "Prison Litigation Reform Act" (hereinafter "Act"), Pub. L. No. 104-134, was enacted to amend 28 U.S.C. § 1915, which establishes the criteria for allowing a civil rights action filed by a prisoner to proceed without payment of the filing fee. Section 1915(e) as amended, states in relevant part: "[T]he court shall dismiss the case at any time if the court determines that-- . . . (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." A claim is frivolous if it: 1) is based upon an indisputably meritless legal theory and/or, 2) contains factual contentions that are clearly baseless. Neitzke v. Williams, 490 U.S. 319, 327 (1989). A complaint can be dismissed for failure to state a claim if the court is satisfied "that no relief could be granted under any set of facts that could be proved consistent with the allegation." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41 (1957).

Although the statute of limitations is an affirmative defense that may be waived by a defendant, where a plaintiff seeks to proceed in forma pauperis, and the cause of action asserted is clearly time-barred, dismissal of the action as legally frivolous is appropriate. Myers v. Vogel, 960 F.2d 750, 757 (8th Cir. 1992). Plaintiff is barred from bringing this action by the applicable two-year statute of limitations. Consequently, it is recommended that the claims against Defendants Rock and Doe be dismissed as legally frivolous under 28 U.S.C. § 1915(e).

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation.



ILA JEANNE SENSENICH
U.S. Magistrate Judge

Dated: December 13, 1996

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

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

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6

MEMORANDUM ORDER

Plaintiff's complaint was received by the Clerk of Court on July 19, 1996, 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.

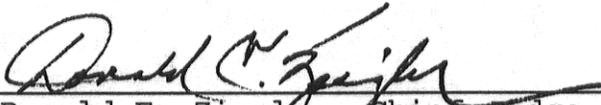
The magistrate judge's report and recommendation, filed on December 13, 1996, recommended that this action be dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(e). Plaintiff was allowed ten (10) days from the date of service to file objections. Service was made on Plaintiff by delivery to the State Correctional Institution at Huntingdon, Pennsylvania, where he is incarcerated. Objections were filed by Plaintiff on January 10, 1997. 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 15th day of Jan., 1997;

IT IS HEREBY ORDERED that this action is dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(e).

AND IT IS FURTHER ORDERED that pursuant to Rule 4(a) (1) of the F.R.App.P., that if you desire to appeal from this Order, you must do so within thirty (30) days by filing a notice of appeal as provided by Rule 3 F.R.App.P. and if you desire to prosecute that appeal in forma pauperis, you must also submit a motion for leave to proceed on appeal in forma pauperis, as well as an affidavit which includes a statement of all assets you possess as well as a certified copy of your inmate trust fund account statement for the six month period immediately preceding the filing of your notice of appeal.

The report and recommendation of Magistrate Judge Sensenich, dated December 13, 1996, 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

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S.C.I. Huntingdon
1100 Pike Street
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