

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

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WILMER B. GAY, et al.

Plaintiffs

vs.

ERNEST D. PREATE, JR., et al.

Defendants

CIVIL NO. 93-1079
(Judge Kosik)

MEMORANDUM

Plaintiffs, Wilmer B. Gay, William C. Mueller, Alan B. Davis, Richard Hollihan and John W. Taylor, "illegally convicted and falsely imprisoned men, women and children of Pennsylvania," instituted the instant civil rights action "in behalf of all men at SCIP Death Camp Prison." Before the court are the plaintiffs' objections to the report and recommendation of Magistrate Judge J. Andrew Smyser dated October 7, 1993 wherein the Magistrate Judge recommends that the plaintiffs be granted leave to proceed in forma pauperis, that the plaintiffs' motion for disqualification be denied and that the complaint be dismissed pursuant to 28 U.S.C. §1915(d).

If objections are filed to the report of a Magistrate Judge, the court is required to make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objections are made. The court may accept, reject or modify, in whole or in part, the Magistrate Judge's findings or recommendations. 28 U.S.C §636(b)(1) and Local Rule 904.2.

The Magistrate Judge correctly points out that the instant complaint is not easy to characterize. The first seven [7] pages of the complaint contain lists of cases which have been filed by plaintiffs and other inmates in this circuit and other circuits and which have been "dismissed through bribery, graft and corruption in public office." Thereafter, the plaintiffs identify the parties including the defendants, Ernest D. Preate, Attorney General of Pennsylvania; two deputy attorney generals; Joseph D. Lehman, Commissioner, Pennsylvania, Department of Corrections; Maurice B. Cohill, Jr., Chief Judge, United States District Court, Western District of Pennsylvania; Andy Domovich, Superintendent at SCIP Death Camp Prison and his racketeering agents; and ACLU Attorney Jere Krakoff and his agents. The plaintiffs allege that they have been "diligently and earnestly litigating civil rights complaints in the state and federal forums of court for the past ten [10] years and longer" involving state and federal officials "illegal convictions and false imprisonments of the plaintiffs and the class they represent for "holding" them in conditions of slavery under or by color of the authority of the United States racketeering instrument 28 U.S.C. §2254(b) and (c) for five [5] to twenty [20] years or longer in merry-go-round proceedings in exhaustion of state court remedies." Additionally, plaintiffs claim that actions challenging the unlawful conditions of confinement at SCIP Death Camp Prison are still being litigated ten years later as a result of a "criminally concealed and covered-up by those state and federal officials, who received or accepted bribes to refrain from

discharging their legal and official duties" and that state and federal officials have embezzled moneys allotted to improve prison conditions. They also allege that the policies concerning the limits on legal materials to be possessed by SCI-Pittsburgh prisoners constitute a criminal attempt to keep plaintiffs from having their "core legal materials."¹

In their request for relief, plaintiffs seek a declaratory judgment that defendants' conduct violated their constitutional rights, an injunction prohibiting defendants from confiscating and destroying plaintiffs' "core legal materials" and prohibiting defendants from transferring plaintiffs to any other institution during the pendency of this action. The plaintiffs also seek that defendant Lehman submit a declaration of unconstitutionality of the defendants' motion dated May 25, 1993.²

With the complaint, plaintiffs filed a temporary restraining order and order to show cause for a preliminary injunction and a supporting memorandum. The motion for temporary restraining order and injunctive relief relates to the injunctive relief requested in the complaint, prohibiting the enforcement of the May 25, 1993 motion and the confiscation and destruction of plaintiffs "core legal materials."

1. It appears from plaintiffs' complaint that this issue is pending before the court in Tillery v. Owens, W.D.Pa., Civ. No. 87-1537.

2. This request apparently relates to a pending motion to approve remaining fire safety issues filed by the Commonwealth on May 25, 1993 in Tillery v. Owens, W.D.Pa., Civ. No. 87-1537.

On August 19, 1993, plaintiffs filed a "motion for disqualification of U.S. Magistrate J. Andrew Smyser and U.S. Judge Kosik to be construed as plaintiffs' objections to false and fictitious written report and recommendation dated August 4, 1993 as fraud in malicious abuse of legal process to conceal and cover-up by willfully [sic] committed judicial legal malpractice." In their motion, plaintiffs object to the fact that the Magistrate Judge exceeded his authority in ruling on plaintiffs' motion for a temporary restraining order and preliminary injunctive relief. After repeating the list of cases outlined in the first seven pages of the complaint, involving those cases which have been filed in this and other circuits and which have been disposed of unfavorably to the plaintiffs named therein, the plaintiffs assert that the disposition of such cases clearly demonstrate the "impartiality" of the U.S. Magistrate and U.S. District Judge and the inference that the court "received or accepted a bribe from the Pennsylvania Attorney General Ernest D. Preate and his associate group core members ACLU Jew Attorneys named in instant complaint matter." Thereafter, plaintiffs filed what they assert are objections to the report and recommendation of the Magistrate Judge dated August 4, 1993.

In a Memorandum and Order dated September 30, 1993, this court remanded the August 4, 1993 Report and Recommendation to the Magistrate Judge for further proceedings. On October 7, 1993, the instant Report and Recommendation was filed by the Magistrate Judge. Once again, plaintiffs filed "Objections to United States

Magistrate J. Andrew Smyser Report and Recommendation dated October 7, 1993 and for criminal contempt proceedings against U.S. Magistrate J. Andrew Smyser and Judge Edwin M. Kosik and for mandatory disqualification thereto in case matter."

In his Report and Recommendation of October 7, 1993, the Magistrate Judge finds that the complaint is frivolous because there is no arguable basis in fact or in law. The Magistrate Judge points out that the plaintiffs' complaint is legally deficient and has no basis in law because it is based upon a faulty conceptualization of a federal cause of action. In addition, the plaintiffs set forth conclusory allegations of corruption and bribery on the part of every judge or other public official, including this court, who has ever considered any of plaintiffs' claims. The Magistrate Judge recommends that the plaintiffs be granted leave to proceed in forma pauperis, that the plaintiffs' motion for disqualification be denied and that the complaint be dismissed pursuant to 28 U.S.C. §1915(d).

In their objections and request for disqualification, plaintiffs reassert the nebulous allegations set forth in the complaint. Once again, plaintiffs allude to an action pending in the Western District of Pennsylvania, Tillery v. Owens, W.D.Pa. Civ. No. 87-1537, to an outstanding motion filed by the Commonwealth of Pennsylvania in that case to approve remaining fire safety issues, which plaintiffs assert would result in a denial of "core legal materials," and to the alleged impropriety of the Magistrate Judge in ruling on plaintiffs' motion for a temporary

restraining order and preliminary injunction. Additionally, plaintiffs again question the impartiality of this court in deciding cases in which plaintiffs have been involved for the past ten [10] years and accuse the magistrate judge and this judge of accepting bribes in the disposition of their cases.

When considering a complaint accompanied by a motion to proceed in forma pauperis, a district court may determine that process not be issued if the complaint is malicious, presents an indisputably meritless legal theory, or is predicated on clearly baseless factual contentions. Neitzke v. Williams, 490 U.S. 319, 327-28 (1989). Indisputably meritless legal theories are those "in which either it is readily apparent that the plaintiff's complaint lacks an arguable basis in law or that the defendants are clearly entitled to immunity from suit." Roman v. Jeffes, 904 F.2d 192, 194 (3d Cir. 1990). A complaint is predicated on clearly baseless factual contentions when the scenario outlined therein is clearly removed from reality. Roman v. Jeffes, supra.

We agree that the plaintiffs' complaint lacks an arguable basis in fact or in law. Accordingly, we will adopt the Report and Recommendation of the Magistrate Judge. First, plaintiffs' complaint, as well as the objections filed to the Magistrate Judge's report, requests that this court interfere in the determination of an outstanding motion filed in an action pending in the United States District Court for the Western District of Pennsylvania, namely, Tillery v. Owens, W.D.Pa., Civ. No. 87-1537. Additionally, the plaintiffs' allegations of the acceptance of

bribes on the part of public officials, as well as this and other courts, lacks an arguable basis in fact. Finally, the plaintiffs' allegations of judicial legal malpractice by this court as a reason for disqualification arising out of their filing of a motion for "temporary restraining order and order to show cause for a preliminary injunction" also lack arguable bases in fact or in law. The motions for preliminary injunction and for mandatory disqualification, which have yet to be addressed by this court, will be denied.

Because we find no merit to the plaintiffs' "objections," we will adopt the Report and Recommendation of the Magistrate Judge dated October 7, 1993.³ An appropriate Order will be entered.

3. We note that two letters [Documents 13 and 14] have been filed with this court by plaintiff Richard Hollihan who was transferred to SCI-Somerset. While not specifically captioned, construing these letters as objections to the report and recommendation, we likewise find no merit to them.

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 Plaintiffs :
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 vs. : CIVIL NO. 93-1079
 : (Judge Kosik)
 ERNEST D. PREATE, JR., et al. :
 :
 Defendants :

ORDER

NOW, THEREFORE, this 19th day of November, 1993, IT IS
HEREBY ORDERED THAT;

[1] the Report and Recommendation of Magistrate Judge
Smyser dated October 7, 1993 [Document 10] is adopted;

[2] plaintiffs are granted leave to proceed in forma
pauperis;

[3] the plaintiffs' motion for disqualification and motion
for temporary restraining order and order to show cause for a
preliminary injunction are denied;

[4] the plaintiffs' complaint is dismissed pursuant to 28
U.S.C. §1915(d);

[5] the Clerk of Court is directed to send a copy of this
Memorandum and Order to Magistrate Judge Smyser and to close this
case; and

[6] any appeal from this Order will be deemed frivolous,
without probable cause and not taken in good faith.



Edwin M. Kosik
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:93-cv-01079 Gay v. Preate

True and correct copies of the attached were mailed by the clerk
to the following:

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