



AND NOW, this 23<sup>rd</sup> day of August, 1995;

IT IS HEREBY ORDERED that plaintiff's objections to the Report and Recommendation dated March 6, 1995, are treated as an amendment to his complaint and 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 May 19, 1995, is adopted as the opinion of the court.



Gustave Diamond, Senior Judge  
United States District Court

cc: Ila Jeanne Sensenich  
U.S. Magistrate Judge

George Jones, AM-2329  
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In his objections, plaintiff states that he is seeking prospective injunctive relief because the alleged void judgment and warrant of commitment underlying his criminal conviction which formed the basis of this § 1983 action can deprive him of credit towards his commutation application and could increase possible minimum sentences to be served in the future. He states that he is seeking prospective injunctive relief against the Court of Common Pleas to enjoin it "from using this void judgement and warrant of commitment to continue keeping him in prison." (Obj. p. 2.) He contends that the county is liable because it has failed properly to oversee the Court of Common Pleas to ensure that Post Conviction petitions are heard in a timely manner, and he claims that the county allowed its employees to twice issue void judgments of warrants of commitment.

Plaintiff recognizes that he erred in seeking money damages from the Court of Common Pleas and the Board of Probation and Parole. Because he has substituted a demand for injunctive relief for his demand for damages, his objections should be treated as an amendment to his complaint.

Plaintiff has sought two different types of injunctive relief. First, he seeks release from prison based upon his convictions on the void warrants of commitment. Release from confinement is not an available remedy under § 1983. Preiser v. Rodriguez, 411 U.S. 475 (1973). Such relief is available only by means of a petition for writ of habeas corpus under 28 U.S.C.

§ 2254(b), after he has exhausted his state court remedies. He has alleged in his complaint that he has filed state post-conviction actions and federal habeas corpus claims, but that he has not been successful. However, he cannot now obtain release from confinement under § 1983 because he has been denied habeas corpus relief. Release from confinement is available only through a writ of habeas corpus.

Second plaintiff seeks to enjoin the Board of Probation and Parole and the Court of Common Pleas from using the record of his criminal convictions based on the allegedly void warrants of commitment to enhance any sentences which he might receive in the future, as well as denying him credit towards a commutation application. Plaintiff does not specify the type of injunctive relief which he seeks against Judge Ridge, but it would appear to be the same relief he seeks from the Court of Common Pleas.

In Dorman v. Higgins, 821 F.2d 133 (2d Cir. 1987), an inmate sought to enjoin the use of an allegedly false presentence report which could be used by a court in sentencing and by probation officials after his release from prison. The court held that the inmate was not entitled to injunctive relief because he had failed to demonstrate that he was in immediate danger of harm. Id. at 139.

Here, plaintiff has not made a showing that there is a real or immediate threat that he will be subject to future convictions. He seeks to enjoin defendants from using the report, in part, to prevent a possible, future sentencing judge

from using the information of his convictions which is similar to the information which was contained in the presentence report challenged in Dorman, supra. However, he has failed to allege any basis for believing that he will be convicted of criminal offenses in the future and that the information will therefore be used at a future date.

Plaintiff also seeks to enjoin the use of this information because he believes it may affect his application for commutation. However, at the present time he does not have a cause of action. In Heck v. Humphrey, \_\_\_ U.S. \_\_\_, 114 S. Ct. 2364, 2373 (1994), the Court stated "even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless or until the conviction has been reversed, expunged, invalidated or impugned by the grant of a writ of habeas corpus." Plaintiff's allegations clearly demonstrate that his underlying criminal conviction has not been invalidated. If, at some time in the future, an allegedly void judgment results in his incarceration, a petition for writ of habeas corpus would be available to him under either 28 U.S.C. § 2254 or 2241. Thus, his § 1983 claim lacks legal merit for the reasons stated in the first report and recommendation and for the additional reasons contained in this report.

Plaintiff has also objected to the absolute immunity afforded to Judge Ridge, and is seeking unspecified injunctive relief against the judge. However he does not allege that Judge Ridge acted in the absence of jurisdiction, and he is absolutely

immune from money damages. Stump v. Sparkman, 435 U.S. 349, 357 n. 7. Although the judge is not immune to equitable relief, Pulliam v. Allen, 466 U.S. 522, 541-44 (1984), plaintiff has failed to allege facts which, if true would entitle him to such relief.

Finally, plaintiff objects to dismissal of his claim against the county because of its alleged policy of failing to properly monitor the Court of Common Pleas in the issuance of the warrants and the delay in deciding post-conviction petitions. However, plaintiff has failed to correct the deficiencies noted in the Report and Recommendation dated March 6, 1995. Further, the Court of Common Pleas is not an entity subject to oversight by the county government. Therefore it is recommended that plaintiff's complaint be dismissed as frivolous.

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.

  
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ILA JEANNE SENSENICH  
U.S. Magistrate Judge

Dated: May 19, 1995

cc: The Honorable Gustave Diamond, Senior Judge  
United States District Court

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