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12/19/01

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

FILED
WILLIAMSPORT, PA
DEC 14 2001
MARY E. D'ANDREA, CLERK
Per _____ Deputy Clerk

JOHN ROBERT McCOOL,	:	
Plaintiff,	:	No. 4:01-CV-0731
vs.	:	Complaint Filed 04/26/01
SNYDER COUNTY, et al.,	:	(Judge Muir)
Defendants	:	(Magistrate Judge Blewitt)

ORDER

December 14, 2001

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On April 26, 2001, Plaintiff John Robert McCool, an inmate at the State Correctional Institution at Pittsburgh, Pennsylvania ("SCI-Pittsburgh"), filed this civil rights action pursuant to 42 U.S.C. § 1983. The 12 named Defendants are Snyder County, Northumberland County, the Hon. Harold F. Woelfel of the Court of Common Pleas of Snyder County, the Hon. Samuel C. Ranck of an unidentified court, John T. Robinson, Vincent R. Mazeski, James J. Rosini, Thomas E. Boop, Robert Savage, Harry Wilcox, Jeffrey Apfelbaum, and Harry Klein. McCool is proceeding pro se. The Clerk of Court assigned this case to us but referred it to United States Magistrate Judge Thomas M. Blewitt for preliminary consideration.

On August 1, 2001, six of the named defendants filed a motion to dismiss McCool's complaint. On August 10, 2001, two other Defendants filed such a motion. On August 13, 2001, a

ninth Defendant filed a motion for the same relief. Each of those three dispositive motions was accompanied by a supporting brief.

The only Defendants who have not filed a motion to dismiss are Apfelbaum, Klein, and Savage. McCool's claims against Apfelbaum and Klein relate to their representation of McCool in the course of state criminal proceedings against McCool. Apfelbaum and Klein had been appointed by the court to represent McCool. McCool's claims against Savage are based on actions taken by Savage in his role as a prosecutor.

As of October 30, 2001, McCool had not filed any document in response to the three pending motions to dismiss. A copy of this court's standard practice order had been issued to the parties on April 27, 2001. That order informed the parties of, *inter alia*, this court's rules governing the parties responsibilities relating to motions. On October 30, 2001, Magistrate Judge Blewitt issued an order directing McCool to respond by November 7, 2001, to the pending motions to dismiss. Paragraph 3 of the dispositive portion of that order specifically advised McCool that

> [f]ailure to file a brief in opposition to Defendants' motions will result in the motion[s] being deemed unopposed and will result in a recommendation that Defendants' Motions to Dismiss be granted without a merits analysis.

(Document 22, p. 3) McCool did not file any document in response to that order.

On November 16, 2001, the Magistrate Judge issued a report recommending that 1) the three motions to dismiss be granted because McCool violated an explicit order directing McCool to respond to those motions, 2) the entire case be dismissed pursuant to Federal Rule of Civil Procedure 41(b) for McCool's failure to comply with the Magistrate Judge's order of October 30, 2001, and 3) the claims against defendants Apfelbaum, Klein, and Savage be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)[1] because McCool failed to state a claim against any of them upon which relief may be granted.

Objections to the report and recommendation were due to have been filed by December 6, 2001. To this date no objection has been filed. When no objections are filed to the report of a Magistrate Judge, we need only review that report as we in our discretion deem appropriate. Thomas v. Arn, 474 U.S. 145, 151-52 (1985).

The merits of the Magistrate Judge's first two recommendations are evident from the procedural history referenced above. In the Magistrate Judge's order of October 30, 2001, McCool was directed to respond to the motions to dismiss by a certain date and he was advised of the consequences if he

[1]That statute provides in relevant part that "the court shall dismiss the case at any time if the court determines that ... the action ... fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

failed to comply with that directive. McCool has filed no document in this case since August 27, 2001. The totality of the circumstances in this case, including McCool's failure to comply with the October 30, 2001, order, constitutes a failure to prosecute this case. Such a failure warrants the dismissal of this action.

The Magistrate Judge's third recommendation deals with the sufficiency of McCool's allegations against Apfelbaum, Klein, and Savage. We agree with the Magistrate Judge's conclusions that those defendants are not liable to McCool based on the claims asserted against them in this case. See Polk County vs. Dobson, 454 U.S. 312, 325, 102 S.Ct. 445, 453 (1981)(public defender not a state actor "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding"); Jordan vs. Fox, Rothschild, O'Brien and Frankel, 787 F.Supp. 471, 475 (E.D. Pa. 1992)(attorneys are not state actors by virtue of status as officers of the court); Borsello vs. Leach, 737 F.Supp. 25, 26 (E.D. Pa. 1990)(state appointed defense counsel not a state actor and, thus, no viable civil rights action existed); Imbler vs. Pachtman, 424 U.S. 409 (1976)(prosecutor entitled to absolute immunity from claims arising from prosecution of plaintiff).

We agree with all of the Magistrate Judge's recommendations. Because none of those recommendations are erroneous, and no objections have been filed to them, we will adopt them as our

own.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The report and recommendation of Magistrate Judge Blewitt filed on November 16, 2001, (Document 23) is adopted in toto.
2. The motion to dismiss filed by Defendants Northumberland County, Ranck, Robinson, Mazeski, Rosini, and Boop (Doc. 9) is granted.
3. The motion to dismiss filed by Defendants Snyder County, Robinson, Mazeski, and Wilcox (Doc. 12) is granted.
4. The motion to dismiss filed by Defendant Woelfel (Doc. 15) is granted.
5. McCool's complaint is dismissed pursuant to Federal Rule of Civil Procedure 41(b) for his failure to prosecute this case.
6. McCool's complaint is dismissed as it relates to Defendants Apfelbaum, Klein, and Savage because McCool has failed to state a claim against those defendants upon which relief may be granted.
7. The Clerk of Court shall close this case.
8. The Clerk shall send a copy of this order to Magistrate Judge Blewitt.
9. Any appeal from this order will be deemed frivolous,

without probable cause and not taken in good faith.

MUIR, U.S. District Judge

MM:ga

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

* * MAILING CERTIFICATE OF CLERK * *

December 18, 2001

Re: 4:01-cv-00731 McCool v. Snyder County

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

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SCI at Pittsburgh
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cc:

Judge	( )		( ) Pro Se Law Clerk
Magistrate Judge	( )		( ) INS
U.S. Marshal	( )		( ) Jury Clerk
Probation	( )		
U.S. Attorney	( )		
Atty. for Deft.	( )		
Defendant	( )		
Warden	( )		
Bureau of Prisons	( )		
Ct Reporter	( )		
Ctroom Deputy	( )		
Orig-Security	( )		
Federal Public Defender	( )		
Summons Issued	( )	with N/C attached to complt. and served by: U.S. Marshal ( ) Pltf's Attorney ( )	
Standard Order 93-5	( )		
Order to Show Cause	( )	with Petition attached & mailed certified mail to: US Atty Gen ( ) PA Atty Gen ( ) DA of County ( ) Respondents ( )	
Bankruptcy Court	( )		
Other_____	( )		

MARY E. D'ANDREA, Clerk

DATE: 12-18-01

BY: S Hess
Deputy Clerk