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KTC

DPS-34

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-1020

FILED
SCRANTON

MAR 06 2002

REGINALD BOYER,

PER KTC
DEPUTY CLERK

Appellant

v.

JOSEPH LEHMAN; JEFFREY BEARD; ANTHONY PETRUCCIO;
KENNETH KYLER; ROBERT M. FREEMAN; TERRY W. HENRY;
ROBERT SMITH; LAMAR LIBHART; A. E. KERSTETTER;
MICHAEL EAKIN; MARK A. SINDLER; JONATHAN R. BIRBECK;
GEORGE E. HOFFER; LAMAR F. POWELL; EDWARD POTTMEYER;
WILLIAM J. MCCLURE; ROBERT CIMBALISTA; FRANK PAWLOWSKI;
ROBERT J. MULDERIG; MICHAEL A. SCHERER; DAMON A. PACE;
DARRELL C. DETHLEFS, Attorney at SCI Camp Hill;
DONALD KELCHNER, Director of Treatment at SCI Camp Hill;
GEORGE SHERACK, Correctional Officer at S.C.I. Camp Hill;

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 00-cv-1895)
District Judge: Honorable Richard P. Conaboy

Submitted For Possible Dismissal Under 28 U.S.C. § 1915(e)(2)(B)
November 8, 2001

BEFORE: NYGAARD, ROTH and BARRY, CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted for possible dismissal under 28 U.S.C. §1915(e)(2)(B). On consideration whereof, it is now here ORDERED AND ADJUDGED by this court that the appeal is dismissed under 28 U.S.C. §1915(e)(2)(B). All of the above in accordance with the opinion of this Court.

ATTEST:

Marcia M. Waldron

Clerk

DATED: February 8, 2002

Certified as a true copy and issued in lieu of a formal mandate on March 4, 2002.

Teste: *Marcia M. Waldron*

Clerk, United States Court of Appeals
for the Third Circuit

DPS-34

UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-1020

REGINALD BOYER,

Appellant

v.

JOSEPH LEHMAN; JEFFREY BEARD; ANTHONY PETRUCCIO;
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November 8, 2001

BEFORE: NYGAARD, ROTH and BARRY, CIRCUIT JUDGES

(Filed: February 8, 2002)

OPINION

PER CURIAM

Appellant Reginald Boyer, proceeding in forma pauperis, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). Appellant has also filed a motion for appointment of counsel and a motion to stay proceedings in this Court. We will dismiss the appeal as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and deny the motions.

Appellant, a former inmate at the State Correctional Institution at Camp Hill, was tried and convicted in 1991 of one count of rioting for his participation in the riots that occurred at the prison on October 25-26, 1989. Institutional misconduct charges were also brought against him based on his alleged participation in the riots. In his complaint, appellant claims that appellees deprived him of various constitutional rights in the course of the institutional misconduct proceedings and the investigation and prosecution that resulted in his rioting conviction. He seeks declaratory, injunctive and monetary relief. Appellant was released from prison in November 1996 after serving his original sentence and the sentence he received for the rioting conviction.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Title 28

U.S.C. § 1915(e)(2)(B)(i) requires us to dismiss a case “at any time” if the appeal “is frivolous or malicious.” An appeal is frivolous if it “lacks an arguable basis either in law or fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989).

We agree with the district court that appellant’s claims for damages based on his allegedly unconstitutional conviction and imprisonment are premature, as neither his conviction nor sentence has been invalidated. See Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). Appellant’s remaining claims are time-barred. As the district court correctly noted, claims brought pursuant to § 1983 are subject to the state statute of limitations for personal injury actions. See Owen v. Okure, 488 U.S. 235, 250 (1989). The statute of limitations for personal injury actions in Pennsylvania is two years. 42 Pa. C.S.A. § 5524(2), (7). The conduct of which appellant complains occurred approximately ten years ago. The complaint was filed on October 26, 2000.

We find no basis for invoking the doctrine of equitable tolling. See Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir. 1998) (equitable tolling is generally proper only where a plaintiff has “in some extraordinary way been prevented from asserting his or her rights”). Contrary to what appellant appears to contend, he is not entitled to equitable tolling on the basis of the district court’s prior dismissal without prejudice of a similar complaint he had filed in 1992 as legally frivolous. He is also not entitled to equitable tolling on the basis of his mistaken belief that he had to exhaust state court remedies before filing a § 1983 complaint. See School Dist. of City of Allentown v.

Marshall, 657 F.2d 16, 21 (3d Cir. 1981) (ignorance of the law does not justify equitable tolling).

For the foregoing reasons, we will dismiss Boyer's appeal as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).¹ The motion for appointment of counsel and motion to stay the proceedings in this Court are denied.

¹To the extent that appellant seeks an order directing that his conviction for rioting be vacated, we agree with the district court that such a request may not be entertained in a § 1983 action. The proper vehicle for such a request is a petition for writ of habeas corpus or, in appellant's case, as he is no longer in custody, a petition for writ of coram nobis.

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OFFICE OF THE CLERK - LEGAL DIVISION
UNITED STATES COURT OF APPEALS

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PHILADELPHIA, PA 19106-1790

August 1, 2001

COPY

MARCIA M. WALDRON
CLERK

TELEPHONE
(215) 597-2378

Mr. Reginald Boyer
247 W. Hansberry Street
Philadelphia, PA 19144
SCRANTON

AUG - 9 2001

Re: Boyer v. Lehman, et al.
C.A. No. 01-1020
(M.D. Pa. Civ. No. 00-cv-01895)

~~FRM~~
~~DEPUTY CLERK~~

Dear Mr. Boyer:

This will acknowledge receipt on July 9, 2001, of an original and three copies of your motion to stay the above-captioned appeal, and receipt on July 16, 2001, of an original and three copies of your supplement to that motion. We note that you state you have served the appropriate opposing party(ies) and/or counsel with copies of these documents.

Your motion to stay will be submitted to the same panel of this Court that will consider your previously submitted motion for appointment of counsel and determine whether the appeal should be dismissed pursuant to 28 U.S.C. § 1915(e)(2). Please be assured that the Court will consider your argument that the merits of the appeal cannot be decided without review of the extensive exhibits which appear to be missing from the District Court record.

Insofar as you are seeking an order to compel the District Court's Clerk's Office to produce these exhibits and forward them to this Court, it appears you are seeking relief in the nature of a writ of mandamus. If you seek to file a petition for a writ of mandamus directed to the District Court, you should be advised that such an action is an original proceeding and, therefore, imposes a separate filing fee on the litigant. Accordingly, if you wish to file a petition for writ of mandamus pursuant to 28 U.S.C. §1651 and Federal Rule of Appellate Procedure 21, you must submit to the Clerk of this Court: (1) an original and three copies of a petition for writ of mandamus or prohibition; and (2) the docketing fee of \$100 or an original and three copies of a motion for leave to proceed in forma pauperis, with affidavit in support thereof. You also must serve the District Court Clerk, trial-court judge and counsel who represents the party to the District Court action with copies of your petition and any motion to proceed in forma pauperis, and submit a certificate of service to this Court. See Fed.R.App.P. 21 and 25.

CJG/jam

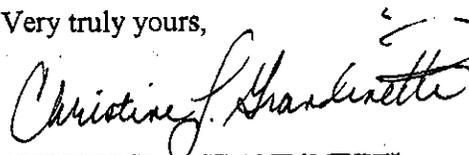
(Continued)

August 1, 2001

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Re: Boyer v. Lehman, et al.
C.A. No. 01-1020
(M.D. Pa. Civ. No. 00-cv-01895)

Very truly yours,



CHRISTINE J. GRANDINETTI
Staff Attorney

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