

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

BERNARD JERRY, :
Plaintiff :
v. : Case No. 3:08-cv-125-KRG-KAP
JEFFREY BEARD, et al., :
Defendants :

Report and Recommendation

Recommendation

Plaintiff, an inmate at S.C.I. Cresson, filed a complaint alleging violation of his civil rights by defendant employees of the Pennsylvania Department of Corrections who have confiscated or upheld the confiscation of a children's book he was writing. Before the Court is defendants' motion to dismiss the complaint under the Prison Litigation Reform Act's "three strikes" rule, 28 U.S.C. § 1915(g). docket no. 23. I recommend that the motion be granted and the complaint dismissed.

Report

Plaintiff, while serving a life sentence in the last twenty years, has filed three or more complaints in federal court dismissed as frivolous or for failure to state a claim. See Jerry v. Smith, Civil Action No. 06-1498 (E.D.Pa. April 24, 2006) (order by Honorable Harvey Bartle denying in forma pauperis under 28 U.S.C. § 1915(g) by citing dismissals at Eastern District Jerry v. Donnelly, C.A. No. 95-0702 (E.D.Pa. February 9, 2005), appeal dismissed as frivolous, No. 95-1170 (3d Cir. April 19, 1995); and an unnamed action at C.A. 90-6093 (E.D.Pa. December 17, 1990)). See also Jerry v. Price, Case No. 02-cv-96-122-DWA-IJS (W.D.Pa.

November 4, 1996), affirmed w/o opinion, No. 96-3691 (3d Cir. August 12, 1997)¹.

The three strikes rule does not prevent an inmate from proceeding if he is in "imminent danger of serious physical injury," but plaintiff's complaint does not state a colorable claim that he is in imminent danger of serious physical injury. See Abdul-Akbar v. McKelvie, 239 F.3d 307 (3d Cir.) (en banc), cert. denied, 533 U.S. 953 (2001). Plaintiff cannot avoid the impact of the three strikes rule, and indeed does not try: his response to the motion to dismiss ignores Section 1915(g) and addresses only the merits of his claim.

On the merits, if plaintiff were to pay the filing fee, Hudson v. Palmer, 468 U.S. 517, 533 (1984), implies that plaintiff's claim for the confiscation of his property would still be dismissed:

Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy. (footnote omitted)

The Court of Appeals for the Third Circuit has recently held that Pennsylvania's administrative grievance system is an adequate

1. Defendants cite another Western District of Pennsylvania civil case but the dismissal in that case was by motion of the plaintiff to withdraw and so does not count as a strike.

postdeprivation remedy for confiscations regardless of whether an inmate prevails in any particular grievance proceeding. Monroe v. Beard, 536 F.3d 198, 210 (3d Cir.2008).

Pursuant to 28 U.S.C. § 636(b)(1), the parties are given notice that they have ten days to serve and file written objections to this Report and Recommendation, and in plaintiff's case also to pay the full filing fee of \$350.00.

DATE: December 1, 2008

Keith A. Pesto
Keith A. Pesto,
United States Magistrate Judge

Notice by ECF to counsel of record and by U.S. Mail to:

Bernard Jerry AP-3307
S.C.I. Cresson
P.O. Box A
Cresson, PA 16699-0001