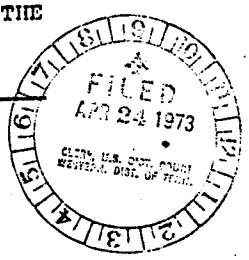
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION



JAMES EARL RAY,

Plaintiff,

vs.

GEROLD FRANK, et al.,

Defendants.

CIVIL ACTION NO. C-73-126

MEMORANDUM OF POINTS AND AUTHORITIES

TO THE HONORABLE HARRY W. WELLFORD, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION:

Comes now your defendant Phil M. Canale, Jr., District Attorney General for the Fifteenth Judicial Circuit, County of Shelby, State of Tennessee, and respectfully submits this, his Memorandum of Points and Authorities in support of his Motion to Dismiss, heretofore filed in this cause.

I.

Under the provisions of Title 28, U.S.C., Section 1915 (d), the Court may dismiss the case if it is satisfied that the action is frivolous or malicious. The District Court has wide discretion in acting upon motions to proceed in forma pauperis as a plaintiff in civil litigation, especially in civil rights actions brought by prisoners. Torres v. Garcia, 9th Cir. 1971, 444 F. 2d 537. The District Court may dismiss a civil rights complaint as frivolous under 28 U.S.C., Section 1915 (d), even on its own motion, after allowing the complaint to be filed in forma pauperis. Conway v. Fugge, 9th Circ. 1971, 439 F. 2d 1397.

This rule has been followed in action for libel brought in Federal Courts by state prisoners as the result of publication of articles about the prisoner.

Urbano v. Sondren, D. C. Conn. 1966, 41 F.R.D. 355, and cases cited therein. The Court in Urbano, supra, made a comment at page 358 of 41 F.R.D., which is pertinent here.

> "If the suit is frivolous, and if the chances of success are highly dubious at best, the Court has an interest in protecting its forum from being abused by persons who are unable to pay costs or give security therefor. . ."

See all Mattheis v. Hoyt, D.C. Mich. 1955, 136 F. Supp. 119.

I.

Your defendant, Phil M. Canale, Jr., is the District Attorney General for the State of Tennessee, Fifteenth Judicial Circuit, County of Shelby.

A prosecuting attorney is a judicial or quasi-judicial officer, and when performing his official duties he enjoys the same immunity from liability for suit under the Federal Civil Rights Act that protects a judge who acts within his jurisdiction over the parties and the litigation.

Kenney v. Fox, 6th Circ. 1956, 232 F. 2d 288, cert. den. 352 U.S. 855, 77 S. Ct. 84, 1 L. Ed. 2d 66;

Gabbard v. Rose, 6th Circ. 1966, 359 F. 2d 182;
Hurlburt v. Graham, 6th Circ. 1963, 323 F. 2d 713;
Peek v. Mitchell, 6th Circ. 1970, 419 F. 2d 575;
Thompson v. Heither, 6th Circ. 1956, 234 F. 2d 660;
Puett v. City of Detroit, 6th Circ. 1963, 323 F. 2d 591.

This immunity applies even though the prosecutor conscientiously acts in excess of his jurisdiction.

Bauers v. Hersel, 3rd Circ. 1966, 361 F. 2d 581, cert. den. 386 U.S. 1021, 87 S. Ct. 1367, 18 L. ed. 2d 457 (1967) (a scholarly opinion collecting the cases).

This immunity applies even though the allegation is that the prosecutor conspired to incarcerate the complainant in a mental hospital.

Scolnick v. Lefkowitz, 2d Cir. 1964, 329 F. 2d 716, cert. den. 379 U.S. 825, 85 S. Ct. 49, 13 L. Ed. 2d, 35.

See also the decision in this Court in Danfro T. Hays vs. Phil M. Canale, Jr., in Cause Number C-70-482, granting defendant's Motion for Summary Judgment, on October 22, 1971.

Therefore, to the extent that the complaint herein complains of your defendant's actions of suppressing exculpatory evidence (which your defendant emphatically denies), of colluding to deny plaintiff due process in this criminal cause (which again your defendant emphatically denies), and of any action taken by your defendant to secure complainant's conviction, your defendant relies upon the defense of prosecutorial community for the purpose of this Motion to Dismiss.

III.

It is well settled that the civil rights statutes are not a substitute for habeas corpus relief, and cannot be used to circumvent the requirement under the habeas corpus statutes of exhaustion of state remedies.

Smartt vs. Avery, 6th Circ. 1969, 411 F. 2d 408;
Johnson v. Walker, 5th Circ. 1963, 317 F. 2d 418;
Gaito v. Ellenbogen, 3rd Circ. 1970, 425 F. 2d 845.

An action for damages under the Civil Rights Act cannot be prosecuted as a guise or method of obtaining release from custody but must await the complainant's release through other channels.

Still v. Nichols, 1st Circ. 1969, 412 F. 2d 778.

A Federal Court should not be required to pass upon the validity of complainant's guilty plea in a civil rights action prior to his seeking and establishing that fact by way of a petition for a writ of habeas corpus.

U.S. ex rel. Konvstecki v. Lamb, D.C. Penn. 1970, 321 F. Supp. 492.

In this case, as can be seen by Exhibit A to Defendant's Motion to Dismiss, complainant has litigated the very question of the legality, from a constitutional point of view, of his confinement and that ruling was adverse. It is submitted that he has therefore not been wronged, even by his own allegations in his complaint, and certainly has not been damaged.

IV.

An allegation of negligent conduct by a state public official is not sufficient, of itself, to state a Civil Rights claim. The wrongdoing complained of must amount to a deprivation of a federally guaranteed right. A tort action, alone, does not in itself give rise to a Federal Civil Rights action.

Santiago v. Jowers, D.C. La. 1972, 347 F. Supp. 1055.

For example, a simple malpractice case, even against a jail physician by an inmate, does not give rise to a Federal Civil Rights action.

Shields v. Kunkel, 9th Circ. 1971, 442 F. 2d 409.

An action will not lie under the Federal Civil Rights Act for damages for libel or slander, even though the allegations might give rise to a State tort action, such an action giving rise to no federal claim, nor falling within the aegis of the Civil Rights Act.

Heller v. Roberts, 2nd Circ. 1967, 386 F. 2d 832.

An action for false imprisonment is not cognizable under the Civil Rights Act.

Bradford v. Lefkowitz, D.C. N.Y. 1965, 240 F. Supp. 969 969 (here the Court also held that a plea of guilty bars an action for false imprisonment or malicious prosecution. This is exactly the situation in the instant case).

An action for invasion of privacy, though authorized under State law, is not supported by the United States Constitution or any federal law, and is not cognizable in a Federal Civil Rights Action.

Felber v. Foote, D.C. Conn. 1970, 321 F. Supp. 85;
Travers v. Paton, D.C. Conn. 1966, 261 F. Supp. 110.

This is especially true of convicted prisoners.

Travers v. Paton, supra, citing numerous cases.

A prisoner becomes a public figure by virtue of his crime and subsequent trial.

Restatement, Torts, Section 867, comment.c.

In the instances where prisoners have sued in Federal Court alleging invasion of privacy in the publication or broadcasting of a version of their crime, the Courts have denied relief on the grounds that prisoners are public figures in whose misadventures the community has a consuming interest.

Travers v. Paton, supra, citing numerous cases.

V.

Complainant sues for damages under 42 U.S.C., Section 1983 and 1985. Section 1983 reads as follows:

> "Civil action for deprivation of rights.
> Every person who, under color of any statute, ordinance, regulation, customs, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1985 is also referred to, dealing with a conspiracy to deprive of certain civil rights, but Section 1983 is the Key provision for the purposes of this complaint.

It has been held that highly specific facts must be alleged to show a violation of either Section 1983 or 1985. If such highly specific facts are not so alleged, the complaint should be dismissed both under 28 U.S.C. 1915 (d), and, it is submitted, under Rule 12 (b) (6) of the Federal Rules of Civil Procedure.

Mattheis v. Hoyt, D.C. Mich. 1955, 136 F. Supp. 119.

This complaint does not meet this standard, it is submitted. There is no specific allegation that your defendant was acting under color of any statute, ordinance, regulation, custom, or usage, of the State, in the alleged wrongdoing. Misuse of power, possessed only because the wrongdoer is clothed with the authority of state law, is required.

Monroe v. Pape, 365 U.S. 167, 5 L. ed. 2d 492, 81 S. Ct. 473 (1961).

There is further no specific allegation of the deprivation by defendant of any of complainant's rights, privileges, or immunities secured by the Constitution and laws.

VI.

Your defendant respectfully avers that the complained-of conduct allegedly committed by your defendant, according to the

complaint occurred more than one year prior to the filing of the within Complaint.

Tennessee Code Annotated, Section 28-304, reads, where pertinent, as follows:

> "28-304 -- Personal tort actions -- Malpractice of attorneys -- Civil Rights Actions -- Statutory Penalties.
>
> Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, action and suits against attorneys . . . . . civil actions for compensatory or punitive damages, or both brought under the federal civil rights statutes, and statutory penalties shall be commenced within one (1) year after cause of action accrued . . . " (Emphasis added).

It has been held that Tennessee has no statute tolling the statute of limitations while a prospective complainant is in jail. Williams v. Hollins, 6th Cir. 1970, 428 F.2d 1221

It is therefore submitted that this complaint against your defendant is barred by the statute of limitations.

CONCLUSION

For each and every reason heretofore stated, your defendant respectfully submits that the complaint filed in this cause should be dismissed as to your defendant.

Respectfully submitted,

PHIL M. CANALE, JR.
DISTRICT ATTORNEY GENERAL
FIFTEENTH JUDICIAL CIRCUIT
STATE OF TENNESSEE

BY: James H. Allen
JAMES H. ALLEN
ASSISTANT DISTRICT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

This is to certify that on the 24th day of April, 1973, I served a copy of the within Memorandum of Points and Authorities upon complainant James Earl Ray, #65477, Tennessee State Penitentiary, Station A, Nashville, Tennessee 37203, by postage paid mail, and upon David M. Pack, Attorney General of Tennessee, Supreme Court Building, Nashville, Tennessee 37219, Attorney for Defendant Robert K. Dwyer, and upon Robert M. Callegy, Attorney for defendants Gerold Frank and Doubleday Publishing Company, 277 Park Avenue, New York, New York 10017,

by mailing a copy hereof to their offices, postage prepaid.

James H. Allen

JAMES H. ALLEN