

UNITED STATES DISTRICT COURT
Eastern District of Virginia
1000 East Main Street, Room 307
Richmond, Virginia 23219-3525

chambers of
Richard L. Williams
Senior District Judge

Telephone
(804) 649-0322
(804) 771-2542

June 24, 1998

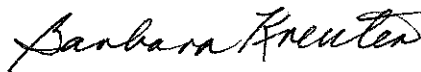
TO THE PUBLISHING COMPANIES

Gentlemen:

Enclosed is a memorandum and order in the case of Marvin Sumner v. E. Montgomery Tucker, et al. Please publish.

The case was in the screening process and had not yet been served on the defendants.

Sincerely,



Barbara W. Kreuter
Secretary to Judge Williams

Enclosures

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U.S. District Court
Eastern District of Virginia (Richmond)

CIVIL DOCKET FOR CASE #: 97-CV-854

Sumner v. Tucker, et al
Assigned to: Judge Richard L. Williams
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Filed: 11/13/97

Nature of Suit: 550
Jurisdiction: Federal Question

Cause: 42:1983 Prisoner Civil Rights

MARVIN SUMNER
plaintiff

Marvin Sumner
[NTC] [PRO SE]
#119869
Haynesville Correctional Center
P. O. Box 129
Haynesville, VA 22472

v.

E. MONTGOMERY TUCKER
defendant

VIRGINIA PAROLE BOARD
defendant

=====

RICHARD CROSSEN, Deputy
Director, Virginia Parole
Board
defendant

JOHN WADE, Virginia Parole
Board
defendant

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Director, Virginia Parole
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defendant

JOHN WADE, Virginia Parole
Board
defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MARVIN SUMNER,
Plaintiff,

v.

Civil Action No. 3:97cv854

E. MONTGOMERY TUCKER, et al.,
Defendants.,

ORDER

In accordance with the accompanying Memorandum, it is hereby
ORDERED that:

1. The Report and Recommendation is accepted and adopted;
2. The complaint and action are dismissed without prejudice;
3. The Clerk is directed to note the disposition of the action for purposes of the Prison Litigation Reform Act of 1995. See 28 U.S.C. § 1915(g).

Sumner may appeal the decision of the Court. Should he wish to do so, written notice of appeal must be filed with the Clerk of the Court within thirty (30) days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

The Clerk is directed to send a copy of the Order and the accompanying Memorandum to Sumner.

It is so ORDERED.


United States District Judge

Richmond, Virginia
Dated: 6/25/98

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MARVIN SUMNER,

Plaintiff,

v.

Civil Action No. 3:97cv854

E. MONTGOMERY TUCKER, et al.,

Defendants.

MEMORANDUM

Plaintiff, Marvin Sumner, a Virginia state inmate proceeding pro se and in forma pauperis, brings this civil rights action pursuant to 42 U.S.C. § 1983. The matter is before the Court for evaluation pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A. Pursuant to 28 U.S.C. § 636(b), the action was referred to the Magistrate Judge for initial review. Jurisdiction is appropriate pursuant to 28 U.S.C. §§ 1343(a)(3).

I. PROCEDURAL HISTORY

On April 26, 1996, the President signed into law the Prison Litigation Reform Act of 1995 ("PLRA"). Among other things, the PLRA requires the courts to dismiss any action filed by a prisoner that is factually frivolous or "which fails to state a claim upon which relief can be granted." 28 U.S.C. §§ 1915(e)(2) and 1915A. Factual frivolousness includes allegations that are "clearly baseless," "fantastic," or "delusional." Turner v. United States Navy, 793 F. Supp. 679, 680 (E.D. Va. 1992) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327-28 (1989)). The second standard is the familiar standard for a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) allows a court to dismiss claims based on

dispositive issues of law. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). A 12(b)(6) motion should be granted "if as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Neitzke v. Williams, 490 U.S. 319, 327 (1989) (quoting Hishon, 467 U.S. at 73). The Court presumes all factual allegations in the complaint to be true and accords all reasonable inferences to the non-moving party. 2A Moore's Federal Practice ¶ 12.07[2.5] (2d ed. 1994). However, the Court is not bound to accept as true "conclusory allegations regarding the legal effect of the facts alleged." Labram v. Havel, 43 F.3d 918, 921 (4th Cir. 1995). Further, the Court will not develop tangential claims when the essence of the complaint concerns another issue. Beaudett v. Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985), cert. denied, 475 U.S. 1088 (1986).

Summary of Allegations and Claims

On March 24, 1998, Sumner's amended complaint was filed and supplanted the original complaint in its entirety. Sumner's amended complaint asserts that the named defendants, all members of the Virginia Parole Board, violated his constitutional rights in connection with the denial of discretionary parole. Sumner seeks monetary damages in the amount of \$175,000 per defendant.

Broadly construing Sumner's complaint, he has raised the following claims as grounds for relief:

1. Sumner was denied a fair parole hearing and due process when erroneous information in his file resulted in the denial of parole based on "prior failure(s) on parole." Sumner has been denied parole several times because the defendants erroneously believe that he has violated his parole three times in the past.
2. Sumner's request for reconsideration of his parole denial based on "prior failure(s) on parole" was denied out of bias, and was denied by an unknown board member, John Wade.
3. John Wade denied Sumner the right to appeal his parole board determination out of prejudice.

Analysis

The Due Process Clause applies when government action deprives an individual of liberty or property. Board of Regents v. Roth, 408 U.S. 564, 570 (1972). "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 7 (1979). The United States Supreme Court has held that where a state holds out only the possibility of parole, an inmate has a mere hope that the benefit will be obtained and that hope is not protected by due process. Id. at 11 (citing Meachum v. Fano, 427 U.S. 215, 225 (1976)).

The Fourth Circuit has found that Virginia's discretionary parole scheme does not grant a plaintiff a liberty interest. Gaston v. Taylor, 946 F.2d 340, 344 (4th Cir. 1991) (citing Greenholtz, 442 U.S. 1 (1979)). "Neither the [Virginia] parole statute nor any parole regulation has created a liberty interest in parole sufficient to invoke the due process clause." James v. Robinson, 863 F. Supp. 275, 277 (E.D. Va.), aff'd mem., 45 F.3d 426 (4th Cir. 1994). Because an inmate does not have a liberty interest in parole if the scheme is discretionary, he cannot raise a claim of constitutional magnitude in the process or decision that denies him parole. See Slezak v. Evatt, 21 F.3d 590 (4th Cir.), cert. denied, 513 U.S. 889 (1994).

Sumner's allegations that he was deprived of the appropriate procedures in the reconsideration and appeal of his parole denials assert errors in the process which denied him parole. As such, the complaints do not state a claim of constitutional magnitude. See Dock v. Latimer, 729 F.2d 1287 (10th Cir.), cert. denied 469 U.S. 885 (1984) (alleged failure of Chairman of Utah State Board of Pardons to follow procedures set forth in Utah statute and regulations in considering inmate's parole eligibility did not violate inmate's rights to due process of law under Federal Constitution); Shirley v. Chestnut, 603 F.2d 805 (10th Cir. 1979) (in the absence of a protected liberty interest, inmates not entitled to published criteria for parole release, access to adverse material in inmate's files, or written reasons for the

denial of parole). Further, Sumner's allegations that he was denied reconsideration and appeal out of bias and prejudice must be dismissed as vague and conclusory. Sumner's complaint is devoid of any evidence to support his allegations of bias and prejudice. Accordingly, it is RECOMMENDED that Claims One and Two be DISMISSED.

Finally, inmates may not invoke section 1983 as a basis to attack the validity of materials considered in determining whether they should be released on parole. James, 863 F. Supp. at 278. If Sumner wishes to challenge material in his file, he may do so through the Inmate Grievance Procedure, DOP 10-2 (1993). See DOP 804 § VII-G.

In those rare instances where admittedly false material is intentionally used to inhibit parole, federal jurisdiction might be asserted to prevent arbitrary and capricious action. James, 863 F. Supp. at 278 (citing Monroe v. Thigpen, 932 F.2d 1437, 1442 (11th Cir. 1991)). However, there is no indication in the present action that the defendants intentionally used admittedly false material to deny Sumner parole. In fact, the letter sent to Sumner from the Parole Board informing him of his parole denial, and submitted with Sumner's amended complaint, does not give "prior failure(s) on parole" as the sole grounds for the parole denial. Rather, the letter from the Parole Board, dated February 6, 1998, states that Sumner was denied parole based on his prior failures under community supervision, his unlikeliness to comply with the conditions of parole, his serious disregard for property rights, and his prior offense history indicates a disregard for the law. Accordingly, even if the information concerning prior failures on parole was erroneous, ample additional grounds existed upon which Sumner's parole was justifiably denied.

Sumner has failed to establish that the Defendants violated his due process rights in denying him parole. Accordingly, it is RECOMMENDED that this action be DISMISSED.

Report and Recommendation entered May 18, 1998. Sumner was advised that he could file objections or an amended complaint within ten

days of the date of entry thereof. Sumner has not filed objections, nor has he moved to amend his complaint. Rather, Sumner has moved to voluntarily dismiss the action without prejudice pursuant to Fed. R. Civ. P. 41(a).

II. VOLUNTARY DISMISSAL

The Federal Rules of Civil Procedure provide "subject to . . . any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) at any time before service by the adverse party of an answer or a motion for summary judgment Unless otherwise stated . . . the dismissal is without prejudice" Fed. R. Civ. P. 41(a)(1)(i). Thus, while Sumner enjoys a right to voluntarily dismiss the present action, that right is subject to the provisions of the Prison Litigation Reform Act ("Act").

In passing the Act Congress "was obviously concerned that the limited resources of the federal judiciary not be expended on cases whose frivolity was manifest, but whose sheer numerosity represented a formidable and time consuming task." Roller v. Gunn, 107 F.3d 227, 230 (4th Cir.), cert. denied, 118 S. Ct. 192 (1997). In light of the purposes of the Act and the procedure afforded him in this case, Sumner's dismissal at this late date does not relieve him of the consequences of filing a frivolous

action under 28 U.S.C. § 1915(g). Under 28 U.S.C. § 1915(g), an inmate who has filed three actions or appeals, which were dismissed as frivolous, malicious or for failure to state a claim, is prohibited from proceeding without the prepayment of fees unless he alleges that he is in imminent danger of serious physical harm. The three strikes provision is directed at inmates who flood the courts with frivolous and vexatious litigation. Section § 1915(g) absolves the courts of the responsibility and expense of reviewing and serving actions on behalf of litigants who consistently file meritless actions.

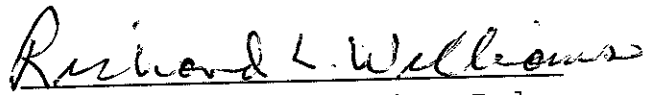
The Court has expended significant time and resources reviewing the merits of Sumner's claims in this particular action. Although the Court could summarily dismiss deficient prisoner complaints under the Act, out of fairness to pro se inmates, this Court has established a procedure by which the Magistrate Judge initially reviews prisoner complaints. Such a procedure allows the inmate to correct any deficiencies in his complaint and to clarify vague claims that might be mischaracterized by the Court. It would frustrate the purpose of Section 1915(g) if an inmate was allowed to exploit this system by filing a meritless action and waiting until after it was reviewed to move for its dismissal. Cf. Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987) (prior to

initiating a lawsuit or filing a paper plaintiff must "stop, think, investigate and research").

III. CONCLUSION

The Court concludes that Sumner is entitled have his action dismissed without prejudice, but he must shoulder the consequences of filing a frivolous action. There being no objections, and upon review of the record and the Magistrate Judge's findings, the Report and Recommendation will be accepted and adopted. The complaint and action will be dismissed without prejudice. The Clerk will be directed to note the disposition of the action for purposes of the Prison Litigation Reform Act of 1995. 28 U.S.C. § 1915(g).

An appropriate Order shall issue.


United States District Judge

Richmond, Virginia

Date: 6/25/98

UNITED STATES DISTRICT COURT

Eastern District of Virginia
1000 East Main Street, Room 307
Richmond, Virginia 23219-3525

chambers of
Richard L. Williams
Senior District Judge

Telephone
(804) 649-0322
(804) 771-2542

May 14, 1998


Re: Jeanette Wade, et al. v. Danek Medical Inc., et al.
Civil Action 3:95CV876

Dear Publishers:

Enclosed is a docket sheet showing the parties and their attorneys in the above mentioned case. Also enclosed is a memorandum opinion entered May 13, 1998, which the Judge requests that you publish.

Thank you.

Sincerely,



Barbara W. Kreuter
Secretary to Judge Williams

Enclosures

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JURY

U.S. District Court
Eastern District of Virginia (Richmond)

CIVIL DOCKET FOR CASE #: 95-CV-876

Wade, et al v. Danek Medical, Inc., et al
Assigned to: Judge Richard L. Williams
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Filed: 10/23/95
Jury demand: Plaintiff
Nature of Suit: 365
Jurisdiction: Federal Question

Cause: 28:1331 Fed. Question: Product Liability

JEANNETTE WADE
plaintiff

Arthur Vincent Shaheen
[COR LD NTC]
Shaheen & Shaheen
9030 Three Chopt Rd
Suite 200
Richmond, VA 23229
(804) 285-6406

John J. Cummings, III
[COR LD NTC]
416 Gravier Street
New Orleans, LA 70130
NA
(504) 586-0000

Easter Peter Moses
[COR LD NTC]
Law Office of Easter P. Moses
120 Church Ave SW
Roanoke, VA 24011
(540) 342-1731

Donna S. Cummings
[COR]
Frank C. Dudenhefer, Jr.
[COR]
Cummings, Cummings & Dudenhefer
416 Gravier Street
New Orleans, LA 70130
NA
(504) 586-0000

Thomas J. Kliebert, Jr.
[COR NTC]
P. O. Drawer 580
Gramercy, LA 70052
NA
(504) 869-5517

Darryl Tschirn
[COR NTC]
416 Gravier Street
New Orleans, LA 70130
NA
(504) 586-0000

EDWIN WADE
plaintiff

Arthur Vincent Shaheen
(See above)
[COR LD NTC]

John J. Cummings, III
(See above)
[COR LD NTC]

Easter Peter Moses
(See above)
[COR LD NTC]

Donna S. Cummings
(See above)
[COR]
Frank C. Dudenhefer, Jr.
(See above)
[COR]

Thomas J. Kliebert, Jr.
(See above)
[COR NTC]

Darryl Tschirn
(See above)
[COR NTC]

v.

DANEK MEDICAL, INC.
defendant

Gary J. Spahn
[COR LD NTC]
Mays & Valentine
1111 East Main St
PO Box 1122
Richmond, VA 23208-1122
(804) 697-1200

Stephen S. Phillips
[COR]
Pepper, Hamilton & Scheetz
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103-2799