

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

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| NATHANIEL PARKER, SR. | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| MICHAEL R. STILES, United | : | |
| States Attorney, MIKE | : | |
| FISHER, Pennsylvania | : | |
| Attorney General, and | : | |
| ANTHONY SARCIONE, | : | |
| District Attorney of | : | |
| Chester County | : | No. 00-5334 |

MEMORANDUM ORDER

Plaintiff is a federal inmate. He has asserted claims pursuant to 42 U.S.C. § 1983 arising out of his arrest on state charges and his subsequent conviction on related federal charges which he asserts deprived him of due process and violated the proscription against double jeopardy. Plaintiff is asking for damages, a declaration that defendants have violated his constitutional rights and an order directing his immediate release and barring any further prosecution of him.

The pertinent facts as alleged in the complaint are as follow. On November 24, 1998, plaintiff was arrested by police in Chester County on charges of possession of a controlled substance with intent to deliver. After being detained, plaintiff was released on bail from Chester County Prison in October 1999. He was again arrested by police in Chester County police on February 1, 2000 while on bail on new drug charges and was detained. Three of these charges were dismissed at a

preliminary hearing by defendant Anthony Sarcione's office and plaintiff was held for trial on two charges by the Chester County Common Pleas Court. The case against plaintiff was adopted by the United States Attorney and the two pending state charges against him were dismissed nolle prosequi on May 4, 2000 at which time he was released by to federal custody.¹

It appears from court records that plaintiff was subsequently found guilty in a federal jury trial on twelve counts of drug offenses in violation of 21 U.S.C. §§ 841(a)(1) and 860(a).

Defendant Stiles has filed a motion to dismiss. A motion to dismiss tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A complaint may be dismissed when the facts alleged and the reasonable inference s therefrom are legally insufficient to support the relief sought. See Pennsylvania ex. rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

¹"Nolle prosequi is the voluntary withdrawal by a prosecuting attorney on a particular criminal bill or information, which at anytime in the future can be lifted upon appropriate motion in order to permit a revival of the original criminal bill or information." See Commonwealth v. Ahearn, 670 A.2d 133, 135-36 (Pa. 1996).

Although plaintiff titles his pleading as a "§ 1983 Civil Complaint," he cannot maintain a § 1983 claim against a federal official. The court will construe plaintiff's claims against Mr. Stiles as a Bivens action. See Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971); Brown v. Phillip Morris Inc., 2001 WL 533654, **7-8 (3d Cir. May 17, 2001) (Bivens action, not § 1983 action, is proper when federal officer has allegedly violated plaintiff's rights under color of federal law); Zolicoffer v. F.B.I., 884 F. Supp. 173, 175 (E.D. Pa. 1995) (proper action against federal officer is Bivens action and not § 1983 action).

Plaintiff alleges that the filing of federal charges after the state charges were dismissed nolle prosequi violated his protection against double jeopardy. Plaintiff further alleges that the federal prosecution has deprived him of liberty without due process because the federal government is "without authority and jurisdiction to detain and prosecute" him because the indictment did not set forth facts to show that he interfered with interstate commerce and he was charged under Title 21 which "is a civil statute and not a criminal statute." Plaintiff also alleges that "defendants are in violation under Title 18 U.S.C. § 245(a)(1)," apparently because his federal prosecution was not authorized in writing by the Attorney General or other specified Department of Justice official.

Unless and until plaintiff's conviction is reversed, expunged or held invalid, he cannot maintain a Bivens claim. See Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) (§ 1983 claim); Whitmore v. Harrington, 204 F.3d 784, 784-85 (8th Cir. 2000) (Bivens action); Zolicoffer v. F.B.I., 884 F. Supp. 173, 175-76 (E.D. Pa. 1995) (Bivens action). Otherwise, the civil action would simply be a collateral review of the conviction. Zolicoffer, 884 F. Supp. at 175-76.²

Plaintiff also cannot obtain an injunctive order requiring his release. Any challenge to the fact or duration of confinement must be lodged in a habeas corpus action. See Preiser v. Rodriguez, 411 U.S. 475, 484-85 (1973); Urrutia v. Harrisburg Police Dept., 91 F.3d 451, 462 (3d Cir. 1996); Death Row Prisoners of Pa. v. Ridge, 948 F. Supp. 1258, 1272-73 (E.D. Pa. 1996).

Even if plaintiff could obtain the damages and injunctive relief he seeks in this action, his claims are meritless and subject to dismissal on their face.

Double jeopardy does not bar federal prosecution on the same facts as state charges which were dismissed. See United States v. Sparks, 87 F.3d 276, 279 (9th Cir. 1996) (no double jeopardy violation when federal prosecution followed state dismissal of charges on same offense). Indeed, jeopardy attaches

²Mr. Stiles also has absolute immunity from liability for any decision to prosecute plaintiff. See Imbler v. Pachtman, 424 U.S. 409, 431 (1976); Kulwicki v. Dawson, 969 F.2d 1454, 1463-64 (3d Cir. 1992).

in criminal proceedings only when a jury is empaneled and sworn, or in a bench trial when the court begins to hear evidence. See Serfass v. United States, 420 U.S. 377, 388-92 (1975) (dismissal of indictment did not trigger double jeopardy protection); United States v. Marchese, 46 F.3d 1020, 1022-23 (10th Cir. 1995) (jeopardy did not attach when case dismissed before trial). See also Commonwealth v. Ahearn, 670 A.2d 133, 135-36 (Pa. 1996). Moreover, consistent with the dual sovereignty doctrine, even a prior prosecution by the Commonwealth would not bar a subsequent prosecution by the federal government for federal offenses arising out of the same facts. See United States v. Pungitore, 910 F.2d 1084, 1105-06 (3d Cir. 1990); United States v. Benson, 1998 WL 23168, *4 (E.D. Pa. Jan. 6, 1998).

An indictment need not set forth facts to show that a defendant's conduct affected interstate commerce to sustain charges under 21 U.S.C. § 841 or 21 U.S.C. § 860. See United States v. Weinrich, 586 F.2d 481, 498 (5th Cir. 1978). Plaintiff relies on United States v. Lopez, 514 U.S. 549 (1995) for the proposition that a federal charge must be predicated on a specific nexus with interstate commerce. Congress made specific findings that the distribution of controlled substances has a substantial effect upon interstate commerce when enacting the Controlled Substances Act. Section 841 has survived commerce clause challenges since the Lopez decision. See United States v. Peck, 161 F.3d 1171, 1174 (8th Cir. 1998); United States v. Westbrook, 125 F.3d 996, 1008-10 (7th Cir. 1997); United States

v. Edwards, 98 F.3d 1364, 1369 (D.C. Cir. 1996); United States v. Leshuk, 65 F.3d 1105, 1111-12 (4th Cir. 1995). Section 860 has similarly survived post-Lopez commerce clause challenges. Cf. United States v. Jackson, 111 F.3d 101, 101-102 (11th Cir. 1997) (per curiam); United States v. Hawkins, 104 F.3d 437, 439-440 (D.C. Cir. 1997); United States v. Orozco, 98 F.3d 105, 106-07 (3d Cir. 1996).

Also, contrary to defendant's assertion, 21 U.S.C. §§ 841 and 860 are indeed criminal and not civil statutes. Title 18 U.S.C. § 245(a)(1) clearly has no application to a prosecution for a violation of federal narcotics laws.

ACCORDINGLY, this day of June, 2001, upon consideration of the Motion of defendant Stiles to Dismiss (Doc. #12) and plaintiff's response, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and, as all claims against the other named defendants have also been dismissed, the above action is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.