

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

CARL M. SMITH : CIVIL ACTION  
 : NO. 97-6027  
Plaintiff, :  
 :  
v. :  
 :  
ANTHONY J. URBAN, ET AL., :  
 :  
Defendants. :

ORDER-MEMORANDUM

AND NOW, this 5th day of March, 1998, upon consideration of plaintiff's complaint (doc. no. 1), plaintiff's request for entry of default judgment (doc. no. 3), and defendants' response thereto (doc. no. 5), it is **ORDERED** that:

1. Plaintiff's request for entry of default judgment (doc. no. 3) is **DENIED**; and

2. Plaintiff's complaint is **DISMISSED** pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim upon which relief may be granted.

The Court's Order is based upon the following reasoning:

Plaintiff has filed a pro se civil rights complaint pursuant to 42 U.S.C. § 1983.<sup>1</sup> Specifically, he alleges that his Constitutional rights were violated during the course of a prosecution for assault of a corrections officer when the public defender assigned to defend him: (1) provided ineffective

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<sup>1</sup> Plaintiff has paid his \$150 filing fee without requesting leave to proceed in forma pauperis.

assistance of counsel; and (2) coerced him into pleading guilty to the charge. Presently before the Court is plaintiff's request that a default judgement be entered in his favor. Defendants respond by asserting that entry of default is not appropriate because the plaintiff failed to properly serve a summons and complaint upon them.

In support of his request for entry of default judgment, plaintiff submits an affidavit which states that on October 1, 1997 the plaintiff mailed a copy of the summons by certified mail to the defendants' place of business, the Office of the Public Defender of Schuylkill County. The affidavit also states that he mailed a copy of the complaint to each of the defendants on October 10, 1998. Plaintiff did not request that the Court order service to be effected by an appointee of the Court. See Fed. R. Civ. P. 4(c)(2)(authorizing the Court to order service by a United States marshal or other appointee under certain circumstances); see also 4A Charles Alan Wright. et al., Federal Practice and Procedure, §1090 (1987). Finally, the docket does not indicate any type of personal service.

In the federal courts, original process may be served under either the law of the state in which the district court sits or under the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 4(e)(1). Except where a waiver has been obtained, the Federal Rules of Civil Procedure do not provide for service of original process by mail. See Fed. R. Civ. P. 4(e). Similarly, the Pennsylvania Rules of Civil Procedure do not authorize

service of original process within Pennsylvania by mail, including certified mail. See Staudte v. Abrahams, 172 F.R.D. 155 (E.D.Pa. 1997)(citing Cahill v. Schultz, 434 Pa.Super. 332, 643 A.2d 121, 125 (1994)). Because the plaintiff served the defendants by mail, without obtaining a waiver of service, service was improper under the Pennsylvania Rules of Civil Procedure and the Federal Rules of Civil Procedure. In the absence of proper service, the defendants have no obligation to file a response to the complaint. Therefore, plaintiff's request for entry of a default judgment must be denied.

Rule 4(m) vests upon the Court discretion to extend the time for service. Spencer v. Steinman, 968 F.Supp. 1011, 1014-15 (E.D.Pa. 1997). However, such an extension would be futile in this case because the complaint should be dismissed under 28 U.S.C. § 1915A (West Supp. 1997).

Section 1915A,<sup>2</sup> which was enacted by Congress on April

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<sup>2</sup> 28 U.S.C. § 1915A provides:

**(a) Screening.**-- The Court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

**(b) Grounds for dismissal.**-- On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

**(c) Definition.** -- As used in this section, the

26, 1997, directs federal courts to screen out meritless cases by reviewing, before docketing or as soon after docketing as practicable, civil complaints in which prisoners seek redress from a government entity or officer or employee of a government entity. 28 U.S.C. § 1915A(a). Under this screening process, the court is required to dismiss, at the earliest appropriate time, any claim which is frivolous or malicious, or which fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915A(b). Applying the provisions of § 1915A(b), the Court finds that the plaintiff's complaint should be dismissed for failing to state a cause of action upon which relief can be granted.

The Court will apply the standard for Rule 12(b)(6) of the Federal Rules of Civil Procedure in determining whether the plaintiff's complaint fails to state a cause of action upon which relief can be granted under §1915A(b). See Neal v. Pennsylvania Board of Probation and Parole, 1997 WL 338838 (E.D.Pa. June 19, 1997)(applying Rule 12(b)(6) standard as appropriate standard for dismissing claim under § 1915A). Accordingly, the Court must "accept as true the facts alleged in the complaint and reasonable inferences drawn from them. Dismissal . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v.

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term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or divisionary program.

Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990).

The plaintiff's claims are not cognizable under § 1983 for two reasons. First, plaintiff's attempt to collaterally attack his criminal conviction for assaulting a corrections officer is not permitted under § 1983. See Heck v. Humphrey, 512 U.S. 477, 483 (1994). The plaintiff's claim is such that an award of damages to the plaintiff would necessarily imply the invalidity of his conviction or sentence for assaulting a corrections officer. A § 1983 claim of that kind cannot proceed unless the plaintiff proves that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determinations, or called into question by a federal court's issuance of a writ of habeas corpus." Id. at 486-87. The plaintiff has not made such a claim in this case. Second, a claim against a public defender is not cognizable under § 1983. Section 1983 requires the plaintiff to show that the person who deprived him of a constitutional right "acted under color of [state] law."<sup>3</sup> Spencer, 968 F.Supp. at 1017 (citing Flagg Bros.

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<sup>3</sup> 42 U.S.C. § 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, 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 proceeding for redress.

Inc. v. Brooks, 436 U.S. 149, 156 (1978)). Public defenders representing state criminal defendants are not deemed to be persons acting under "color of state law" for purposes of § 1983. Borsello v. Leach, 737 F.Supp. 25, 26 (E.D.Pa. 1990); Rooks v. Driadon, 1993 WL 166757 (E.D.Pa. May 18, 1993)(citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)). Given these two rules of law and accepting as true all the facts alleged in the complaint and reasonable inferences drawn from them, it is certain that the plaintiff can prove no set of facts which would entitle him to relief. Therefore, the plaintiff's complaint is dismissed.

**AND IT IS SO ORDERED**

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EDUARDO C. ROBRENO, J.