

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

LOUIS REYNOLDS, JASON
KENNEDY, RONALD
MCCRANEY, JR., all on behalf of
themselves and all others similarly
situated; and JEFFERY MILLER;

Plaintiffs,

vs.

CASE NO.: 3:10-CV-355 MCR/EMT

WENDELL HALL, in his official
capacity as Sheriff for Santa Rosa
County, Florida.

Defendant.

**MOTION TO DISMISS OF DEFENDANT WITH INCORPORATED MEMORANDUM
OF LAW AND CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1 (B)**

Defendant, WENDELL HALL, in his official capacity as Sheriff of Santa Rosa County, Florida, moves to dismiss the First Amended Complaint of the Plaintiffs for the following reasons:

1. Plaintiffs fail to state a cause of action under the First Amendment to the Constitution in that the action of Defendant that is complained of by Plaintiffs related to limiting non-legal outgoing mail to postcards only does not censor or suppress Plaintiffs' speech in any manner. Plaintiffs are free to communicate and correspond utilizing multiple mediums of communication, including the U.S. Mail.

2. Defendants' limitation on the particular medium of mail communication complained of by the Plaintiffs does not suppress or censor Plaintiffs' communication and said limitation is a reasonable means of avoiding the possibility of prohibited messages, such as escape plans, threats, or coded messages being communicated to persons outside of the prison setting and to reduce the labor

intensive and time consuming task of having Jail personnel open and review enveloped letters for such prohibited messages, thereby freeing Jail personnel to attend to other more pressing aspects of their primary responsibility of the care and custody of inmates at the Jail and to provide security at the Jail.

3. Concerns related to prison security, deterrence of crime and the proper allocation of limited staff resources are all legitimate penological interests which authorize whatever limited restriction the postcard only regulation imposes on the communications of the Plaintiffs.

4. The decisions of Jail personnel in defining the legitimate goals of the corrections system and the most appropriate way to accomplish those goals are entitled to substantial deference.

5. Pursuant to Rule 7.1(B), N.D. Fla. Loc. R., the undersigned certifies that he has contacted opposing counsel in a good faith effort to resolve the issues raised herein. Opposing counsel opposes the relief requested herein.

MEMORANDUM OF LAW

Plaintiffs in this case have submitted a two count complaint challenging on First Amendment grounds a regulation and practice of the Santa Rosa County Sheriff/ Jail that restricts outgoing non-legal mail sent by inmates from the Jail to postcards. Plaintiffs allege the regulation prevents or hinders their ability to communicate certain information to family members or other persons outside of the Jail setting by limiting their ability to discuss sensitive issues or include drawings.¹ Plaintiffs allege that the utilization of postcards enhances the risk that any sensitive or confidential information written on the cards can be seen or read by others. Plaintiffs allege their circumstances prevent other

¹ Plaintiffs assert in paragraph 25 of the First Amended Complaint (Doc.5) that the regulation in question “prohibits drawings or unnecessary marking on all non-privileged mail.” However, a cursory review of the regulation in question reveals that “drawing or unnecessary marking” is prohibited only on “the postcard front.” (Doc.5-1: Standard Operating Procedure 15.48, VI. b).

means of communication being utilized to achieve the purposes of the types of communication alleged to be hindered. Plaintiffs also allege the regulation increases the cost of sending the same information to those with whom they wish to communicate by limiting the space allowed for communication and requiring more postcards to communicate the same amount of information that could be communicated in a letter sent in an envelope.²

Defendant does not dispute that the walls of the jail do not form a barrier separating prison inmates from the protections of the Constitution, including the First Amendment. Thornburgh v. Abbott, 490 U.S. 401 (1989), at page 407. Inmates have a constitutional right to send and receive mail and the First Amendment provides protection against censorship of prisoners' incoming and outgoing correspondence. Rodriguez v. Ames, 224 F.Supp.2d 555 (W. D. N. Y. 2002); Koutenic v. Brown, 396 F.Supp.2d 978 (W. D. Wis. 2005); Covell v. Arpaio, 662 F.Supp.2d 1146 (D. Ariz. 2009). Defendant also recognizes that the standards applied to outgoing mail are different from the standards applied to incoming mail. Koutenic v. Brown, *supra*, and Avery v. Powell, 806 F.Supp. 7 (D. N. H. 1992), citing to Thornburgh, *supra*.

However, even though certain First Amendment rights survive the incarcerated status of an inmate, the rights are not absolute or provided the same deference that exists outside of the jail or prison setting. Although the kind of censorship that might be allowable inside the prison walls would raise grave First Amendment concerns outside of the prison context, once inside the walls of a jail or prison: "these rights must be exercised with due regard for the 'inordinately difficult

² Plaintiffs also allege in paragraph 24 of the First Amended Complaint that the regulation requires the back of the postcard leave a one inch by two inch space blank in order to leave sufficient space for the stamping of a message on the postcard by the Jail. Again, a review of the regulation in question (Doc.5-1) reveals that no such requirement is set forth in the regulation.

undertaking' that is modern prison administration." Thornburgh, at 407, citing to Turner v. Safley, 482 U.S. 78 (1987), at page 89. The courts have repeatedly stated that the judiciary "is ill-equipped to deal with the difficult and delicate problems of prison management" *Id.*, at 407. As a result, the courts afford "considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world." *Id.* at 407-408. *See also*, Overton v. Bazzetta, 539 U.S. 126, 132 (2003); Ware v. Randolph, *supra* 2008 WL 4390315 (C.D. Ill. 2008).

In challenging such a regulation, the burden is on the inmate to prove the regulation is invalid. Ware v. Randolph, *supra*, citing to Overton v. Bazzetta, *supra* at 132. In order for a facial challenge to such a regulation be successful under the First Amendment, the plaintiff must establish that no set of circumstances exists under which the regulation would be valid. Davidson v. Mann, 129 F.3d 700 (2nd Cir. 1997), citing to U.S. v. Salerno, 481 U.S. 739, 745 (1987). Plaintiffs fail to meet their burden in this regard and fail to show that the regulation in question is not valid and rational when considered in the context of the connection between the regulation and the Jail's interest in avoiding a backlog of mail and in allocating prison personnel efficiently.

Even under the allegations of the Plaintiffs set forth in the complaint, it is apparent that the postcard only regulation in question does not censor Plaintiffs' mail as to content, except for the limited purpose of keeping the front of the postcard free of unnecessary markings. The content of the message found on the back of the card is not restricted by the policy in issue and there is no prohibition that would bar an inmate from drawing on the back of the postcard. An inmate may write and send as many postcards as he or she chooses to send. As a result, this circumstance is much different from those cases where outgoing mail has been censored or interfered with.

Defendants have been unable to identify any case law that has found the imposition of a postcard only regulation for outgoing mail to violate the First Amendment.

However, at least two courts have addressed the issue of postcard only regulations in the context of incoming mail. In Covell v. Arpaio, 662 F.Supp.2d 1146 (D. Ariz. 2009), a prisoner held in the county jail brought an action claiming that the sheriff violated his First Amendment rights by instituting a policy that restricted incoming mail to metered postcards. The court, of course, recognized the rights of inmates under the First Amendment to send and receive mail, but also recognized that these rights are limited by the fact of incarceration and they may be curtailed to achieve legitimate correctional goals. The court applied the test set forth in Turner v. Safley, recognizing that the standard is deferential to the professional judgment of prison administrators. The court then looked at the four factors individually.

As to the first prong, the court concluded that there was a rational connection to a legitimate governmental interest in the regulation, when the focus was on jail security. The court noted that when the inmate does not present enough evidence to refute a common sense connection between the prison regulation and the objective that the government argues the policy is designed to further, then the first prong of the Turner test is satisfied. The court concluded the second prong was satisfied because the alternative means of exercising the right at issue such as metered postcards, telephones and jail visits, although all less than ideal, were sufficient. Alternatives provided by the jail need not be ideal, only available. In terms of the third prong, the adverse impact of accommodation, the court noted that eliminating stamped mail allowed its limited security staff to devote more time to prison security assignments. Here, the court again noted the deference to the informed discretion of correction officials. Finally, the court found that the plaintiff failed to meet the burden of showing

that there were obvious or easy alternatives to the regulation or that it constituted an exaggerated response, particularly that there was a way to accommodate the right at a *de minimis* cost to the valid penological purpose.

More recently, the United States District Court for the Middle District of Florida has dismissed a complaint challenging a postcard only regulation applied to incoming mail in the Manatee County Jail. The court cited to the limitation of privileges and rights that accompanies incarceration and the need to strike a balance between the rights of prisoners and the discretion given prison administrators to govern the order and security of a corrections facility. The court found the postcard only policy to be reasonably related to legitimate penological interests. Gambuzza v. Parmenter, 8:09-cv-1891-T-17TBM (M.D. Fla. 2010).

In the instant case, the legitimate penological interests are obvious. First, even on outgoing mail, the courts have upheld the interests of correction officials in limiting some forms of communication and inspecting outgoing mail for those forms of communication, such as threats, coded messages, escape plans and the like. Second, the amount of jail staff time that is taken up in opening and inspecting mail for such messages is obvious, time that necessarily removes the staff member from engaging in other duties related to the care and custody of inmates and ensuring institutional security.

Although not dealing with regulations that restrict non-legal outgoing mail to postcards, other courts have dealt with other restrictions and censorship of outgoing mail, upholding various restrictions, recognizing the deference to be granted to prison officials in making such decisions. These cases are instructive in analyzing the restriction at issue in this case.

In Ware v. Randolph, 2008 WL 4390315 (C.D. Ill. 2008), the plaintiffs' claim related to a

regulation that placed restrictions on his outgoing mail that prohibited correspondence and letters with drawings and or notes on the envelopes. The regulation was implemented in effort to clean up the outgoing mail and to avoid the possibility of messages being passed on the outside of the envelope. The regulation eliminated the need for jail personnel to make the determination as to whether a particular drawing or message was appropriate, a labor intensive and time-consuming task which required judgment calls on the part of jail staff. The blanket prohibition reduced the burden on the mailroom staff. In upholding the regulation, the court noted that the policy did not prevent the offenders from corresponding with the free community; they simply were required to refrain from altering or defacing the outside of their envelopes. The court held that the actions of prison officials in adopting prison regulations that may restrict an inmate's constitutional rights will be upheld as long as it is reasonably related to legitimate penological interest and the court must afford substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a correction system and for determining the most appropriate way to accomplish those goals, citing to Turner v. Saffley, *supra* and Overton v. Bazzetta, *supra*. The court concluded that prison security, deterrence of crime, and proper allocation of limited staff resources are all legitimate penological interests which justified any limited abridgement of the constitutional rights of the plaintiff, citing to O'Lone v. Shabazz, 482 US 342, 348 (1987).

In Koutenic v. Brown, 396 F.Supp.2d 978 (W. D. Wis. 2005), a prison inmate sued alleging that his First Amendment rights were violated when he was prevented from mailing a letter that contained a drawing believed to contain encoded references to gang activities. The court granted summary judgment. In doing so, the court recognized that the First Amendment provided protection against censorship of prisoner's incoming and outgoing correspondence, but also that legitimate

governmental interest may justify the imposition of certain restraints on inmate correspondence. The court noted the two different standards that have been utilized distinguishing between incoming inmate mail and outgoing inmate mail and that a less deferential standard applies to the censorship of outgoing prisoner mail. The court cited to Thornburgh v. Abbott, *supra*, and Procunier v. Martinez, 416 US 396 (1974), for the proposition that corrections officials must show that the regulation or practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression and that the limitation of the First Amendment freedoms is no greater than necessary or essential to protect a particular governmental interest involved. The less deferential analysis was applied because the implications for prison security with outgoing correspondence are of a lesser magnitude than the implications for the incoming materials. Even applying this standard, the court held that it should not unduly limit the discretion of prison officials in rejecting outgoing mail and should ask only whether the restrictions are generally necessary to protect the interest at stake.

In Davidson v. Mann, 129 F.3d 700 (2nd Cir. 1997), an inmate challenged prison regulations limiting access to stamps for non-legal mail, asserting a First Amendment violation. The court dismissed the claim, noting that although the plaintiff claimed that the regulation deprived him of his First Amendment right to send outgoing non-legal mail, he did not allege that the regulation ever actually prevented him purchasing stamps, much less from sending mail, just as is the case herein.

In addressing a similar issue, the Eleventh Circuit in VanPoyck v. Singletary, 106 F.3d 1558 (11th Cir. 1997), addressed inmates' challenge of the constitutionality of a DOC rule limiting free writing materials and postage to quantities sufficient for one letter per month and limiting the number of stamps an inmate could possess at twenty. The court noted that although the rule reduced

the number of opportunities for an indigent inmate to express free speech through the mail, the rules nevertheless allowed for some opportunities and were sufficient under the First Amendment. *See also, Avery v. Powell*, 806 F.Supp. 7 (D. N. H. 1992) (in upholding a prison regulation that prohibits inmates from sealing outgoing correspondence addressed to a recognized attorney the court noted that inmate's rights were not violated when their outgoing correspondence is read because of their reasonable concern for prison security and the inmate's diminished expectation of privacy; since the regulation in issue excepted legal mail, the court found it sufficiently tailored to avoid unnecessary infringement on inmate's First Amendment rights); *Witherow v. Crawford*, 468 F.Supp.2d 1253 (D. Nev. 2006) (censorship of a prisoner's incoming and outgoing mail pursuant to a criminal investigation did not violate his First Amendment rights).

Applying the above referenced case law to the facts of this case as alleged by the Plaintiffs, it is apparent that even if the regulation in question places some limits on the opportunities to express free speech, those opportunities still exist and are sufficient. None of the Plaintiffs allege they have ever been denied the opportunity to send mail to anyone outside the jail. The regulation in issue does not restrict the content of the message to be contained in the postcard correspondence and none of the Plaintiffs complain that their mail has been censored or tampered with. Instead, the regulation in issue falls within the realm of those types of regulations where the courts have deferred to the discretion of corrections officials in determining how to best meet the security and operational needs of the institution. At the same time, the regulation reduces the burden on jail staff to inspect mail and frees jail staff to perform other functions related to the care and custody of the inmates and jail security, allowing for a better allocation of jail resources. The regulation in question is within the discretion of the Sheriff as he operates the Santa Rosa County Jail and meets the needs of the facility,

inmates, staff and public with the limited resources allocated to him to operate the Jail. As such, the regulation at issue does not serve to violate the First Amendment rights of the Plaintiffs, and should be held to not constitute a violation of those rights, with the resulting dismissal of the complaint of the Plaintiffs.

Respectfully submitted this 12th day of October 2010.

s/ Keith C. Tischler
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of October 2010, I electronically filed the foregoing, in the United States District Court, Northern District of Florida, Pensacola Division, by using the CM/ECF system which will send notification of such filing to all persons registered for this case, including Plaintiffs' attorneys.

s/ Keith C. Tischler