

## Garvey v. Allen

United States District Court for the Southern District of Georgia, Savannah Division

January 14, 1987, Decided and Filed

No. CV486-230

**Reporter:** 1987 U.S. Dist. LEXIS 1148

MICHAEL J. GARVEY, Plaintiff v. KENNETH ALLEN, ET AL., Defendants

**Counsel:** [\*1] PRO SE, for Plaintiff.

NEAL B. CHILDERS, for Defendant.

**Opinion by:** EDENFIELD

### Opinion

#### ORDER

Before the Court in this action brought by a prisoner under 28 U.S.C. § 1983 is the defendant's motion for summary judgment.

#### BACKGROUND

On June 16, 1986, this Court allowed plaintiff Michael J. Garvey to proceed *in forma pauperis* with a civil rights action. Having separated the wheat from the chaff in plaintiff's form complaint, however, the Court determined that only one of the claims advanced had colorable merit. This claim concerned the alleged confiscation by the defendant prison guard, Officer Kenneth Allen, of plaintiff's chessboard. The facts surrounding this claim are, briefly, as follows.

On December 3, 1985, the prison warden and several other officials conducted a tour of the Coastal Correctional Institution [CCI]. During this tour, it was noted that the plaintiff kept a chessboard on top of the locker in his cell. (Plaintiff was not present in the cell at the time of the inspection). Prison policy with respect to potential fire hazards requires that personal property be kept in an inmate's locker when not in use. One of the inspecting officials directed the defendant to inform the plaintiff [\*2] that the chessboard should either be kept in his locker or sent home. Later in the day, the defendant relayed these directions to the plaintiff. Plaintiff apparently informed the

defendant that the chessboard would not fit in the locker. One of defendant's superiors, a Lieutenant Meyers, upon learning of this fact, instructed the defendant to see that plaintiff mailed his chessboard home.

Plaintiff, as he was directed to do, took his chessboard to the "ID room" on December 4, 1986, on which date the officer in charge of this area, Officer Brigman, took possession of the chessboard and directed the plaintiff to return on the following day to prepare the proper forms for mailing the chessboard out of the institution. Plaintiff did not appear; therefore, Officer Brigman paged him over the prison public address system at approximately 2:00 P.M. on December 5, 1986 to come to the ID room. Plaintiff did not respond. Plaintiff was again paged to come to the ID room on December 10, 1985, and again he did not respond. On January 2, 1986, Officer Brigman sent a written notice to the plaintiff concerning the chessboard, but still the plaintiff did not respond. On January 17, 1986, plaintiff [\*3] was transferred to another correctional institution. The chessboard was returned to the plaintiff upon his departure from CCI. <sup>1</sup>

#### ANALYSIS

Plaintiff claims that his constitutional rights were violated by virtue of the defendant's noncompliance with the terms of a consent order entered by this Court in October, 1985. The consent order provides that, where property is determined [\*4] to be "nuisance contraband" (such contraband including material that constitutes a fire hazard), an inmate shall be allowed within seven days to present to the Deputy Warden or his designee evidence concerning the ownership of the confiscated object, or evidence as to whether the object is or is not "contraband" as defined in the consent order. If the inmate can establish both that the object belongs to him and that it is not contraband, the object must be returned to the inmate. *Consent Order, Lewis v. Evans*, CV484-251 (S.D.Ga. October 22, 1985) § II (VII.B.).

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<sup>1</sup> Plaintiff's complaint did not reveal the fact that the chessboard had been returned to the plaintiff. In fact, the complaint is worded in a manner strongly implying that the chessboard was still in the possession of CCI personnel at the time suit was filed, some seven months after the initial confiscation. The complaint suggests, in fact, that the plaintiff had no knowledge of the whereabouts of the chessboard after December 4, 1986. It seems that the plaintiff intentionally sought to mislead. Though the Court finds plaintiff's lack of candor reprehensible - especially so inasmuch as Mr. Garvey fancies himself a jailhouse lawyer of sorts -- the fact that plaintiff's chessboard was returned to him within a month after it was deposited with Officer Brigman is irrelevant to the disposition of this case.

It is clear that the policy of the institution with respect to the confiscation of property, as outlined in the consent order, is not deficient. In fact, plaintiff alleges that there was a constitutional deprivation by virtue of the alleged failure of an officer to follow the established guidelines. With this and the above-outlined facts in mind, it is apparent that defendant's motion for summary judgment must be granted.

First of all, the Supreme Court has held, in Hudson v. Palmer, 82 L.Ed.2d 393 (1984), that neither negligent nor intentional deprivations of property interests rise to the level of Fourteenth Amendment [\*5] procedural due process violations where there exist adequate post-deprivation remedies. This Court, in approving the Lewis v. Evans consent order, found the post-confiscation procedures proposed for use at CCI to provide adequate *ex post facto* process to inmates. The plaintiff in the case at bar simply chose not to avail himself of the available remedies.

Plaintiff was directed, on three occasions, to proceed to the ID room to arrange for the proper disposition of his chessboard. He failed to appear on all three occasions. The consent order mentioned, *supra*, while allowing an inmate to present evidence that his property is not contraband, does not guarantee the inmate any specific forum for this purpose. And apparently prison personnel are under no affirmative duty to schedule a hearing, *per se*, with respect to a confiscation. (Plaintiff has not alleged that he requested a hearing or took any other action to retrieve his chessboard; he states merely that he waited for notification of an opportunity to present evidence). It appears that plaintiff was free to bring evidence to the attention of the ID room officer or to the deputy warden as to whether his chessboard was [\*6] or was not contraband, and it must be assumed that any evidence offered by the plaintiff to either officer within the seven day period provided for in the

consent order would have been accepted and given due consideration. Plaintiff refused to respond to the messages of the ID room officer, and does not allege that he was denied access to the deputy warden. Thus, plaintiff deliberately refused to avail himself of the adequate post-deprivation procedures available to him. <sup>2</sup>

As the defendant has pointed out, there is an yet another legal proposition worth noting in this Order. "[R]emedial decrees are the means by which unconstitutional conditions are corrected but they . . . do not create or enlarge constitutional rights." Green v. McKaskle, 788 F.2d 1116 (5th Cir. 1986). Violations of consent decrees may be redressed through contempt proceedings, but such violations do not bring § 1983 into play. There are many reasons militating against finding violations [\*7] of consent decrees to be violations of constitutional rights. See generally Green, supra, 788 F.2d at 1122-24. Among these is the obvious fact that often the terms of a consent order may call for the implementation of procedures that provide "more process" than the Constitution guarantees, or may mandate improvement in conditions of confinement where the previously existing conditions could not have been considered "cruel and inhuman" in the constitutional meaning. Thus, even if there had been violation of the Lewis v. Evans consent decree by the defendant in this case, or by some other prison official, there would not necessarily have been a constitutional violation. In any event, the Court need not base its holding on this last-mentioned ground, because it has already been determined that there was no violation of the consent order.

For the reasons stated, the defendant's motion for summary judgment is GRANTED, and the case is DISMISSED.

SO ORDERED, this 14th day of January, 1987.

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<sup>2</sup> It seems patently clear, of course, that the chessboard was property that the plaintiff was not permitted to possess, and that its initial confiscation was appropriate. Plaintiff has not seriously disputed this point.