

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

FILED
USDC, WESTERN DISTRICT OF LA
ROBERT H. SHEM WELL, CLERK
DATE 4, 18, 00
BY TLW

MICHAEL LLOYD COMBS, et al CIVIL ACTION NO. 95-2029-A
VERSUS U.S. DISTRICT JUDGE F.A. LITTLE, JR.
CORRECTIONS CORP. OF
AMERICA, et al U.S. MAGISTRATE JUDGE JAMES D. KIRK

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Before the court, upon referral from the district judge, is plaintiffs' motion to enforce and execute [Doc. #74]. Plaintiffs allege violations of this court's order of August 22, 1997 [Doc. #69]. All plaintiffs in the lawsuit, with the exception of Michael L. Combs ("Combs"), have either been dismissed from the proceeding by this court, or are no longer present at Winn Correctional Center ("WCC"), have no standing now to enforce the judgment at WCC, and the motion is moot as to them. The only plaintiff in interest in this suit is Combs.

A hearing was held on plaintiff's motion at WCC on Tuesday, April 4, 2000. The purpose of the hearing was to determine whether there was compliance by WCC with the district court's order [Doc. #69] and whether additional orders from this court were necessary.

At the hearing, plaintiff Combs appeared pro se. In addition to his own testimony, he presented the testimony of inmates Danny Bridges, Perry Smith, Cliff Cook, Perry Taylor, Raoul Regino, and Emile Severs.

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Defendants presented the testimony of Captain Michael Trent, Chaplin Randy Oliff, and Warden Mickey Hubert.

The allegations contained in plaintiff's motion allege acts beginning even before the court's order of August 22, 1997. Therefore, the hearing was limited to those matters occurring after the court's order. The motion lists numerous violations of the order. However, at the hearing, plaintiff produced evidence with respect to four complaints:

1. The Native Americans were prevented from using the ceremonial drum in their ceremonies;
2. Call-outs to their religious services were sometimes late;
3. On occasion, the inmates are not allowed out fifteen minutes before call-out to obtain the sacred items from the chaplain's office.
4. On occasion, the religious services are interrupted for a "count."

THE LAW

The Supreme Court stated, in O'Lone v. Estate of Shabazz, 482 U.S. 342, 348-49, 107 S.Ct. 2400, 2404-5, 96 L.Ed.2d 282 (1987), that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. Inmates clearly retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion. However, lawful incarceration brings about the necessary withdrawal of limitation of many privileges and rights, a retraction justified by the considerations underlying our

penal system. The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives-including deterrence of crime, rehabilitation of prisoners, and institutional security. The evaluation of penological objectives is committed to the considered judgment of prison administrators who are charged with and trained in the running of the particular institution under examination. Prison regulations alleged to infringe constitutional rights are judged under a reasonableness test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights. When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. See also, Stewart v. Thigpen, 730 F.2d 1002, 1005 (5th Cir. 1984).

To determine whether a challenged regulation is valid, the court must consider four factors: (1) whether the regulation has a logical connection to the legitimate government interests invoked to justify it; (2) whether there are alternative means of exercising the rights that remain open to the inmates; (3) the impact that accommodation of the asserted constitutional rights will have on other inmates, guards, and prison resources; and (4) the presence or absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. O'Lone, 482 U.S. 342, 350-52, 107 S.Ct. at

2405-6, citing Turner v. Safley, 482 U.S. 78, 79-90, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Also, Chriceol v. Phillips, 169 F.3d 313, 316 (5th Cir. 1999); Scott v. Mississippi Dept. of Corrections, 961 F.2d 77 (1992).

THE DRUM

Plaintiff claims that since an incident on November 28, 1998 the drum has not been used. On that occasion, the drum was being used during a religious ceremony when, plaintiff claims, Corrections Officer Michael Trent came up and told the designated drummer, Perry Smith, to stop playing the drum because it was too loud. This claim was supported by the testimony of Combs, Bridges and Smith. On the other hand, Captain Trent testified that he recalls the incident in question and that he simply motioned with his hands for them to quiet down the loudness of the drum. He explained the reason for doing so was that at that particular time there was mass movement of inmates along one of the sidewalks "for chow." Because of the loud drum playing, the inmates were stopping and watching the ceremony. Trent testified that the drum playing was excessively loud and was louder than he had ever heard before. In addition, he said the inmates were not in their sacred circle, but rather some were walking around and some were in the shed. He testified that when he motioned to quiet the drums, plaintiff Combs motioned "no." Trent then told Combs that his "drums needed to be

quieted down." Trent denies that he ever told the inmates to stop playing the drums.

Although Trent admits that he was curious as to why the drums were never played again after that, he never asked. More importantly, none of the then twelve plaintiffs ever asked Trent if they could play the drum, none ever attempted to discuss the matter with Trent, none ever filed an ARP (administrative remedy procedure), none ever filed an inmate request form to speak with a case manager concerning the problem, and none ever discussed it with the chaplain, the warden, or anyone else in authority. This, even though for each ceremony, which is held daily, the drum was retrieved from the chaplain's office and taken to the grounds.

It is clear from the evidence that the drum is an integral, indeed central, part of the Native American religious ceremony. The testimony reflects that the beat of the drum reflects the "heartbeat of Mother Earth." The testimony further reflected that without the drumbeat it is improper to smoke the peace pipe, also central to the religion. The district judge has previously determined [Doc. #69] that the drum, along with the other sacred items set forth in the judgment, may be used in the Native American religious ceremonies. Defendants' testimony indicated they understand that and have made every effort to comply with that judgment, but no complaint was ever lodged by the Native Americans that they could not use the drum. In the order, the district judge

further noted that prison policies may impact the free exercise of religion when reasonably related to a legitimate penological interest.

Therefore, it is the finding of the court that the ceremonial drum is a central part of the Native American religious ceremony, its use may not be prohibited by WCC unless it is shown that there is a legitimate penological interest in doing so. However, the loudness with which the drum is played may be regulated provided that regulation is reasonably related to a legitimate penological interest. The defendants demonstrated a legitimate penological interest in the orderly and unobstructed movement of inmates walking on the nearby sidewalks to and from meals, and that loud drum playing distracts the inmates on the sidewalks, causing them to stop and block the sidewalks, which provides an opportunity for fights between inmates. The impact that regulating the loudness with which the ceremonial drum is played on the free exercise of the Native American religion appears to be minimal; although plaintiffs indicated a preference for playing it loud enough to assist the participants in entering a meditative state, the loudness does not appear to be essential. The fact that they are permitted to use it with moderation is adequate to permit the Native Americans to conduct their religious ceremonies.

Therefore, it is recommended that the court's ruling as to permitting plaintiffs to use their ceremonial drum be enforced, to

whatever extent defendants may have been denying plaintiffs that right, but it is also recommended that defendants be permitted to reasonably regulate the loudness with which the drum is played.

LATE CALL-OUTS

Plaintiff also produced evidence that, on occasion, call-outs are late. When it is time for the Native Americans or any other group to participate in an activity, the prison announces a "call-out." Plaintiff claims, however, that sometimes the call-outs are late. The evidence reflects that the Native Americans receive two hours per day every day of the week plus an additional three hours on Saturday, for a total of seventeen hours a week during which they may practice their religion. Nevertheless, they claim if the call-out is late, they may not be able to complete their ceremony in the remaining part of the two hours, depending on how many inmates want to take part in the ceremony.

The defendants produced evidence that every attempt is made to make the call-out on time, but that conditions may prevent that, depending on what is going on in the prison at the time. For example, there could be a problem elsewhere in the prison that would prevent the call-out from being called on time, or there could be another group of people on the sidewalk at the time, necessitating a delay in calling out the Native Americans.

The evidence reflects that, although there have been a few instances of call-outs being late, it does not appear to be a

pervasive problem; it does not appear to occur often or regularly. There was no evidence indicating the late call-outs were done intentionally to harass or interfere with plaintiff's practice of the Native American religion. For example, Danny Bridges could recall only one incident of not getting out of the dorm on time. Likewise, Perry Smith recalled only one such incident in two and a half years at the prison; however, Smith claimed he had seen others "turned away." Cliff Cook alleged he has problems getting out of his unit "all the time," meaning, he said, "a couple of times" per week. However, Cook finally admitted that "more often than not" he is released not only on time, but fifteen minutes before time in order to assist with retrieving the sacred items (see discussion below). Perry Taylor testified that he has had a problem getting out on time on only one occasion.

As with the drum, adequate time set aside for practice of the Native American religion may be interfered with only for a related and legitimate penological reason. Security of the facility, such as not allowing Native Americans to enter the sidewalk area when another group is present, or when an altercation or other problem is occurring in the facility at the time, is, I find, an appropriate and legitimate penological interest in security. Therefore, it is recommended that plaintiffs' motion be denied on this issue. If there appeared to the court to be a pervasive or intentional interference with call-outs for the Native American

religious services, an additional recommendation to the district judge would be appropriate. However, that it not the case.

It should be noted, also, as mentioned above, the Native Americans receive a total of seventeen hours per week to practice their religious ceremony. Of all of the organized religions practiced within the facility, of which there are fourteen, the Native Americans receive almost a third of all hours set aside for religious ceremonies. The groups with the second highest hours set aside for them receive only seven hours per week each and some as few as one two hours per week. I find that even if call-outs are sometimes late, the Native Americans are receiving adequate time daily and weekly for the performance and completion of their religious ceremonies.

RELEASE FIFTEEN MINUTES EARLY TO
RETRIEVE SACRED ITEMS

Combs also complained that, on occasion, he and Cliff Cook, who were designated to retrieve the sacred items from the chaplain's office for each religious ceremony, are not allowed to do so fifteen minutes before everyone else is called out. Combs claims they need that time to retrieve the items and set them up in preparation for the ceremony. The evidence reflects, however, that on most occasions they are released fifteen minutes early to obtain the items. Further, and more important, is the fact that, as noted above, the Native Americans receive seventeen hours per week to perform their religious ceremony. There is no requirement that

they be provided an additional fifteen minutes. The additional fifteen minutes, the evidence showed, has been provided to them by WCC as an accommodation, and in an effort to "bend over backwards" to comply with this court's previous order. Even if the inmates are not provided the additional fifteen minutes, the court finds, as noted above, that seventeen hours per week is more than adequate time to conduct the Native American religious ceremonies at WCC. Therefore, it is recommended that plaintiffs' motion be denied on this issue, also.

INTERRUPTION OF CEREMONY FOR COUNTS

Plaintiff alleges, and some evidence reflects, occasional interruptions in the Native Americans' religious ceremonies for an inmate count. It was explained that during certain times of the day, which are intended to be random, but which, in fact, occur at approximately the same time each day, a head count is taken of inmates. This head count is done simply by the officers counting the inmates without requiring them to stand or line up. However, if the count does not add up to the correct number of inmates, a re-count is required. In the event of a re-count, the inmates are required to stand to be counted so that no mistake will be made. The evidence showed that a re-count has occurred on more than one occasion during the Native Americans' ceremonies. The evidence also reflects, however, that a re-count sometimes occurs during other religious ceremonies and other activities in the prison.

As with the call-outs discussed above, these counts during the Native Americans' religious ceremony do not appear to occur often or regularly and do not appear to be occurring intentionally to harass or interfere with the Native Americans' practice of their religion. Obviously, the counts are related to a legitimate penological interest in security -- indeed, it is difficult to imagine any activity at the prison which is more related to a legitimate penological interest than making sure the prisoners remain at the facility. It is also noted that because the Native Americans receive so many more hours for their religious ceremonies than do members of the other religions at the facility, counts are, naturally, more likely to occur during their ceremonies. Therefore, it is recommended that plaintiffs' motion be denied on this issue.

OTHER CONCERNS

Evidence was also presented at the hearing that, during some of the Native Americans' religious ceremonies, the prisoners can be seen sitting around, talking, walking around, picking up rocks and being present at places other than the sacred circle¹. Giving plaintiff the benefit of the doubt, it is possible that because the drum has not been used and, therefore, the peace pipe cannot be smoked, and, in turn, the religious ceremony not performed, the

¹ The sacred circle is a circle within which the Native American religious ceremony is practiced. In this case, it is a circle marked in the earth and grass in the yard of the prison.

prisoners are not obviously practicing their religion when they are supposed to be. Having made clear that the Native Americans can use their drum in their religious ceremony, one would expect that there would be no further picking up of rocks, standing around, conversing, or walking around during the time set aside by the prison for religious ceremony.

The evidence showed that plaintiff, on behalf of the Native Americans, has requested that the facility prohibit persons from attending the religious ceremony who do not also attend the educational sessions to learn about the religion. That demand has properly been rejected by the prison. As made clear by the district judge's ruling [Doc. #69], the prison cannot prohibit any person from practicing the religion of his choice absent a legitimate penological interest in doing so. However, there does seem to be some misunderstanding on the prison's part -- perhaps in an effort to comply precisely with the district judge's ruling -- as to when the prison may prohibit persons from attending call-out for the Native American religious service. As the district judge explained in the ruling, prison inmates retain their First Amendment right to exercise their religious beliefs. Prison officials may not restrict practice of the Native American religion unless they have a legitimate penological interest in doing so. The fact that a prisoner under the constitution has the freedom to believe or not to believe in and practice a religious faith does

not, however, mean that a prisoner has a right to be released from his dormitory, ostensibly to attend a Native American religious ceremony or religious studies, and then choose instead to do something else such as converse, walk around, pick up rocks, or otherwise engage in activity not related to the Native American religion. Although the prison may not restrict the practice of the Native American religion, the prison may restrict persons from using the Native American religious ceremony or studies as an excuse to be called out of their tier (dormitory) and then do something else.

Finally, the court is compelled to observe that the issues presented at the hearing on plaintiff's motion could most likely have easily been corrected had the plaintiffs simply filed an inmate request form asking to speak with their case manager or filed an administrative remedy procedure (ARP) grievance. Combs is encouraged to utilize those procedures in the future with respect to the judgment of this court. Although this court will not hesitate to enforce its judgment regardless of grievance procedures in place,² the court will not micro-manage religious ceremonies at the prison.

²Combs and some of his witnesses alleged that prison officials have not always responded to their ARPs; however, that does not excuse inmates from attempting to settle their grievances through the prison's grievance procedures.

CONCLUSION

For the foregoing reasons, IT IS RECOMMENDED to the district judge that:

1. Plaintiff and the Native Americans be allowed to play their ceremonial drum during Native American religious ceremonies so long as its use and its volume does not impinge on a legitimate penological interest.
2. Defendants be instructed that every effort must be made to allow the Native Americans to practice their religion at the times specified and set aside for them to practice it and interference with those times by late call outs or counts must be reasonably related to a legitimate penological interest.
3. The prison be instructed that those persons not actually attending and participating in the Native America religious ceremonies or studies may be prohibited from being called out for them.
4. Plaintiff be encouraged to utilize the inmate request forms, the prison grievance procedure, or discussion with the chaplain in an effort to solve problems or perceived problems which may from time to time come up concerning the exercise by Native Americans of their religion in accordance with this court's judgment of August 22, 1997.

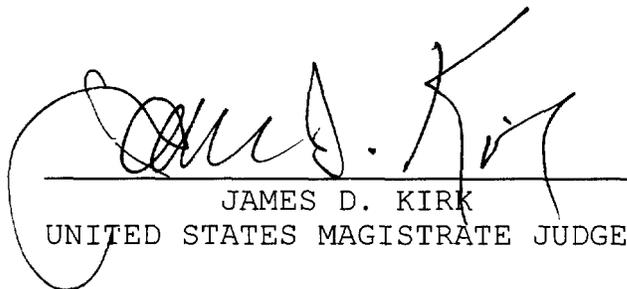
OBJECTIONS

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed.R.Civ.P. 72(b), the parties have ten (10) business days from service of this Report and Recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the district judge at the time of filing. Timely objections will be considered by the district judge before he makes his final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT UPON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED in chambers, in Alexandria, Louisiana, on this the 17th day of April 2000.

COPY SENT:
DATE: 4-18-00
BY: TLW
TO: Combs
Thompson
Keller
Lancaster
Voshell
Simpson
Corkern
Beenal
Waldrup
Regino



JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE