

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

AUGUSTUS HEBREW EVANS, JR., :
 :
 Plaintiff, : C.A. No. S13C-05-020 JTV
 :
 v. :
 :
 T. HENLEY GRAVES, BRENDON :
 O'NEIL, RICHARD MORSE, SEAN :
 O'SULLIVAN, JOHN/JANE DOE, :
 :
 Defendants. :

**ORDER DENYING MOTION TO
PROCEED *IN FORMA PAUPERIS*
AND DISMISSING COMPLAINT UPON REVIEW**

This 30th day of September, 2013, it appears:

Plaintiff August Hebrew Evans, Jr. (“Evans” or “plaintiff”) has filed a complaint naming as defendants the Honorable T. Henley Graves, Superior Court Judge; Brendon O’Neil,¹ Public Defender; Richard Morse, legal director of the American Civil Liberties Union (“ACLU”) of Delaware; Sean O’Sullivan, reporter for the **News Journal**; and John/Jane Doe, regional director of the News Journal Company. Plaintiff also has filed a motion to proceed *in forma pauperis*.

This Court reviews the motion to proceed *in forma pauperis*, and in connection

¹ The correct spelling of his name is “Brendan O’Neill”.

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with that review, it examines the viability of plaintiff's complaint.²

Pertinent to the Court's decision on the motion to proceed *in forma pauperis* are the following questions and answers in the affidavit plaintiff filed on July 2, 2013:

10. If a prisoner, provide the following requested information.

(a) At any time while incarcerated or detained at any facility, have you previously brought an action or an appeal in a federal court or in any court of this State? Yes.

(b) If the answer to (a) was yes, identify the court(s) and provide the civil action(s) or appeal number(s) for each case. #11-195 LPS

(c) If the answer to (a) above was yes, state the outcome of each action or appeal. Dismissed - Motion Pending!

The purpose of these questions and their answers is to allow the Court to determine whether plaintiff is barred from proceeding *in forma pauperis* because he previously has filed at least three complaints which were dismissed on the grounds the complaints were either frivolous, malicious and/or failed to state a claim upon which relief may be granted.³ Plaintiff did not provide complete answers to these

² 10 *Del. C.* § 8803.

³ In 10 *Del. C.* § 8804(f), it is provided:

In no event shall a prisoner file a complaint or appeal of a judgment arising from

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questions. He has filed numerous cases with the Delaware state courts and the United States District Court for the District of Delaware (“District Court”). The courts have allowed some of these actions to proceed. However, the District Court has dismissed three other actions because they were frivolous and/or they failed to state a claim upon which relief may be granted: *Evans v. McMillian*, 2007 WL 4348067 (D. Del. Dec. 5, 2007); *Evans v. Wright*, 2008 WL 511904 (D. Del. Feb. 21, 2008); *Evans v. Seaford Police Department*, 2012 WL 1191649 (D. Del. April 3, 2012).⁴ In a fourth case, *Evans v. Cook*, 2007 WL 4348068 (D. Del. Dec. 5, 2007), the Court dismissed one claim as frivolous while it allowed another to proceed.

The Court **denies** the motion to proceed *in forma pauperis* because plaintiff has had three previous complaints dismissed as frivolous and/or due to a failure to state

a complaint brought in forma pauperis if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or an appeal in a federal court or constitutional or statutory court of the State that was dismissed on the grounds that it was frivolous, malicious or failed to state a claim upon which relief may be granted unless the prisoner is under imminent danger of serious physical injury at the time that the complaint is filed. Complaints or appeals therefrom dismissed prior to the enactment of this section shall be counted for purposes of determining the number of previously dismissed proceedings. No petition for writ of habeas corpus or any appeal from the denial of any such petition shall be dismissed under this subsection.

⁴ The case of *Evans v. Seaford Police Department, supra*, is the only case plaintiff reported in his affidavit.

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a claim.⁵ Thus, he is statutorily prohibited from proceeding *in forma pauperis*.⁶

As noted earlier, in reviewing the motion to proceed *in forma pauperis*, the Court has reviewed the complaint. That review establishes that the complaint is frivolous and fails to state any claim upon which relief may be granted.

Before reviewing the complaint, it is necessary to outline the criminal matter of *State v. Evans*, Def. ID# 0609011528A, which gives rise to plaintiff's complaint. In 2007, Evans went to trial before a jury on numerous charges. He insisted on representing himself. Superior Court allowed him to do so and it ordered a member of the Public Defender's Office to act as standby counsel. Her job was limited to answering Evans' legal questions. The jury found Evans guilty of two counts of possession of a firearm during the commission of a felony, assault in the second degree, aggravated menacing, and resisting arrest with force or violence. Evans was sentenced as an habitual offender on the two counts of possession of a firearm during the commission of a felony and on the assault second count. He was sentenced to a total of 72 years of incarceration on those three counts. His level 5 time on the aggravated menacing and resisting arrest counts was suspended for probation.

Evans requested, and was granted leave, to represent himself on appeal.⁷

⁵ If the motion was not denied for this reason, it is likely the Court would deny it as a sanction for plaintiff's clearly calculated omissions in answering the questions.

⁶ The facts of the pending complaint do not give rise to an assertion he is "under imminent danger of serious physical injury."

⁷ *State v. Evans*, 2008 WL 3312502 (Del. Super. Apr. 10, 2008).

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The Supreme Court affirmed Evans' convictions.⁸ Thereafter, Evans filed numerous petitions with Superior Court seeking writs of habeas corpus, all of which were denied. He also filed two motions for postconviction relief, both of which were denied.⁹ The Supreme Court affirmed the first motion for postconviction relief. The Superior Court's decision on the second motion currently is pending before the Supreme Court. Evans also filed a petition seeking a writ of habeas corpus with the District Court; that court denied Evans' request.¹⁰ The various courts ruled the issues Evans raised were either procedurally barred or meritless.

The Superior Court,¹¹ the Supreme Court¹² and the District Court¹³ all ruled that Evans had no constitutional right to standby counsel and consequently, he cannot establish an ineffective assistance of counsel claim.

I now turn to plaintiff's complaint in this matter.

He has sued Graves, O'Neill, and Morse in their official and individual capacities. He asserts they have violated his Fourteenth Amendment rights under the

⁸ *Evans v. State*, 968 A.2d 491, 2009 WL 367728 (Del. Mar. 16, 2009).

⁹ *State v. Evans*, 2009 WL 2219275 (Del. Super. Jul. 6, 2009), *aff'd*, 985 A.2d 390, 2009 WL 3656085 (Del. Dec. 16, 2009) (first motion for postconviction relief); *State v. Evans*, 2013 WL 1090979 (Del. Super. Feb. 25, 2013), *rearg. den.*, Del. Super., Def. ID# 0609011528A (Mar. 15, 2013) (second motion for postconviction relief).

¹⁰ *Evans v. Phelps*, 2012 WL 1134482 (D. Del. Apr. 2, 2012).

¹¹ *State v. Evans*, 2009 WL 2219275, at *3.

¹² *Evans v. State*, 2009 WL 3656085, at *1.

¹³ *Evans v. Phelps*, 2012 WL 1134482, at * 3.

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color of a state statute. He asserts there is jurisdiction under the Municipal Tort Claims Act of 10 *Del. C.* § 4001- 4013 and the Fourteenth Amendment Civil Rights Act of color of state statute. He also “preserves further claims after the court has appointed counsel to review plaintiffs intentional conspiracy of the collective defendants and state agencies to advance a continued abuse and violation of civil rights of a selective class of people!”¹⁴

The assertions made to support these sweeping claims are as follows. He maintains his second motion for postconviction relief established a colorable, substantial claim that undermined the legality of the judgment of conviction and overcame the procedural bars of Superior Court Criminal Rule 61. The Court’s February 14, 2013 decision denying his motion denied him equal access to the laws of the court and Judge Graves imposed “intentional infliction of mental anguish....” Furthermore, he asserts:

[That February 14, 2013 Decision] begins the conspiracy with defendants O’Neil and Morse to deny plaintiff the rules of due process of law, where:

FIRST: Having served defendant O’Neil and Morse in official capacity and in exercise of available state agencies in which and whom are charged to advocate the cause of the otherwise poor and/or similarly peoples in a duty owed under the due process and ...

¹⁴ He asserts he filed a motion for appointment of counsel. He did not. However, he is not entitled to the appointment of counsel in a civil action.

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SECOND: The failure of defendants Morse and O'Neil to perform their duties owed to plaintiff in assuring that the laws are applied equally [illegible] upon the due process rights plaintiff has to be protected against arbitrary and capricious, oppressive denial of equal access to law and to be represented by the public institutions in place to assist him.

He clarifies regarding his claims against Judge Graves, O'Neil and Morse:

The factual assertions ... is that they continue to conspire, for the purpose of directly depriving Negroes and similarly situated person as plaintiff equal protections of the law and exercise of substantial constitutional rights, for the purpose of oppression racism and furtherance of the organized Klu Klux Klan in their passion to turn a blind eye to the wrongs done under the cloak of law... Prejudice toward Negroes and other non-white poor peoples, intentional neglect in a duty owed to the people and intolerance of any negative exposure in which would subject the so far off applications of law in a Negroes' case.

It is clear in case/motion and appendice that the Judge refuses to review the case on merits due to his unwillingness to address the severely incompetent handling of the case and under his cloak, he is able to manipulate the case and control the outcome while...

The conspiracy is furthered through the intentional neglect of defendants O'Neil and Morses' failure to perform their duties in furthance [sic] of the conspiracy!

Although it is not articulately phrased, it appears he maintains the state

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employees are personally liable.¹⁵

He asserts Sullivan and Jane/John Doe are controlling members of the media. They favor high profile cases of Caucasians while refusing to publicize the “severely unconstitutional and intentionally oppressive conviction” of plaintiff, a black man. According to his complaint, this “denies Evans equal protection against the media favoring Caucasian inmates in gaining publicized opinions of law professors and the legal community of the United States as well as public opinion of the courts [sic] racist and oppressive conspiracy to hide its flaws. Violates Evans’ equal protection clauses.”

He further alleges as to these two defendants:

[Defendants] patently advocate invidious application/usage of the media in selectively excluding poor Negroes and similarly situated persons to promote the compelling interest standard of:

FIRST: Extending media coverage in “death in prison sentences/case” in which are clearly conspiratory and unconstitutionally implemented trials and judgements of guilt, that would draw public outcry...

SECOND: Denying less economically situated Negroes and alike persons media review and opinions of America’s legal society as to the correctness of the states application of federal law... Denying plaintiff equal protection, that all

¹⁵ The statement he makes is: “As a state tort claim defendants satisfy the standards of 10 Del. C. § 4011(c) in which to cause action!”

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persons shall be treated alike under like circumstances,
both in privileges and liabilities....

He explains that he requested assistance from the media with regards to his case and the defendants refused to print information on his case. According to him, that refusal constitutes “the denial of equal protection and utilization of the media to gain public outcry and the opinions of America’ [sic] legal society to cause the courts to apply the proper standards of law and grant me due process!”

He alleges that the defendants’ wrongs have constituted cruel and unusual punishment. He further maintains he has suffered unjustified restraints on his liberties causing:

- 1 - Grave mental anguish
- 2 - Continual thoughts of suicide
- 3 - Loss of family relationships
- 4 - Loss of financial gain over the past 6 ½ years

He requests the appointment of counsel and references a motion seeking such, which was not filed with this Court. He further requests the monetary sum of 6.5 million dollars. He also “seeks a full disciplinary review of the courts [sic] failure to advance law equally in the case at bar.” Finally, he asks for punitive damages.

I address plaintiff’s claims against Sean O’Sullivan and John/Jane Doe. Plaintiff has no claim against them for a number of reasons.

The Fourteenth Amendment of the United States Constitution prohibits a state from denying a person “the equal protection of the laws.” Sean O’Sullivan and John/Jane Doe are private individuals; they are not acting as state agents.

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Furthermore, plaintiff has absolutely no right, pursuant to the United States or Delaware's constitutions, any federal or state statute, or the common law, to have his story published by a privately owned newspaper. Finally, Delaware does not permit fictitious name practice; in other words, filing a claim against a John Doe or Jane Doe has no legal effect.¹⁶

In conclusion, plaintiff's claims against Sean O'Sullivan and John/Jane Doe are legally frivolous and fail to state a claim and thus, are dismissed with prejudice.

Plaintiff's claims against Morse also are frivolous. He appears to be under the impression that the ACLU of Delaware is a governmental entity. It is not. It is a non-profit, non-partisan entity. Plaintiff has no legal right to representation by the ACLU of Delaware. The claims against Morse are dismissed with prejudice because they are legally frivolous and fail to state a claim.

Plaintiff's claims against Judge Graves are based upon his decisions issued while performing his official duty as a judge. Judge Graves has complete immunity from liability,¹⁷ and thus, the complaint fails to state a claim against him.

¹⁶ *Haskins v. Kay*, 2007 WL 4662114 (Del. Super. Sept. 27, 2007); *Mohl v. Doe*, 1995 WL 339099 (Del. Super. May 11, 1995).

¹⁷ 10 *Del. C.* § 4001; *Vick v. Haller*, 514 A.2d 782, 1986 WL 17348 (Del. Aug. 22, 1986). In 10 *Del. C.* § 4001, it is provided:

§ 4001. Limitation on civil liability.

Except as otherwise provided by the Constitutions or laws of the United States or of the State of Delaware, as the same may expressly require or be interpreted as requiring by a court of competent jurisdiction, no claim or cause of action shall arise, and no judgment, damages, penalties, costs or other money entitlement shall

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Plaintiff's claims against Brendan O'Neill are a bit confusing. It appears he is arguing that Mr. O'Neill, as the Public Defender, has refused to help plaintiff in his postconviction matters. However, plaintiff's postconviction claims are based upon his contention that the Public Defender's Office was ineffective in its representation of him during the criminal proceedings. Thus, that office is conflicted from representing plaintiff in any postconviction matters. Furthermore, the Public Defender's Office has

be awarded or assessed against the State or any public officer or employee, including the members of any board, commission, conservation district or agency of the State, whether elected or appointed, and whether now or previously serving as such, in any civil suit or proceeding at law or in equity, or before any administrative tribunal, where the following elements are present:

(1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over whom the public officer, employee or member shall have supervisory authority;

(2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and

(3) The act or omission complained of was done without gross or wanton negligence;

provided that the immunity of judges, the Attorney General and Deputy Attorneys General, and members of the General Assembly shall, as to all civil claims or causes of action founded upon an act or omission arising out of the performance of an official duty, be absolute; provided further that in any civil action or proceeding against the State or a public officer, employee or member of the State, the plaintiff shall have the burden of proving the absence of 1 or more of the elements of immunity as set forth in this section.

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no legal duty to represent any person in postconviction proceedings absent an order of a court. Plaintiff fails to state a claim against Mr. O’Neill and that claim is dismissed with prejudice.¹⁸

In conclusion, the motion to proceed *in forma pauperis* is denied. Furthermore, the complaint is dismissed in its entirety because each assertion is frivolous and/or fails to state a claim upon which relief may be granted.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Prothonotary’s Office
Augustus Hebrew Evans, Jr.
Hon. T. Henley Graves
J. Brendan O’Neill, Public Defender
Richard Morse, Esquire
Sean O’Sullivan

¹⁸ In light of this conclusion, no need exists to examine the immunity provided Mr. O’Neill.