United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2036

To be argued by
TIMOTHY F. O'BRIEN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARTIN SOSTRE,

Plaintiff-Appellant,

-against-

DOCKET NO. 75-2036

PETER PREISER, Commissioner of New York State Department of Correctional Services; RUSSELL G. OSWALD, Former Commissioner of New York State Department of Correctional Services; ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility, Auburn, New York; J. E. LA VALLEE, Superintendent of Clinton Correctional Facility, Dannemora, New York,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellees

JACK W. HOFFMAN
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of Counsel

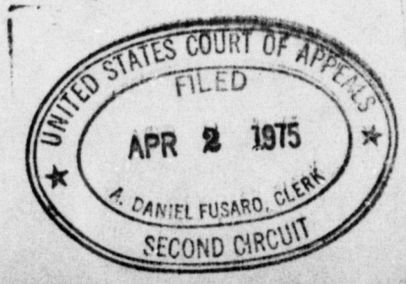

TABLE OF CONTENTS

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BRIEF FOR DEFENDANTS-APPELLEES

Statement

This is an appeal from an order, dated March 6, 1975, of the United States District Court for the Northern District of New York (PORT, J.) denying the Plaintiff's Motion for a Preliminary Injunction restraining the Defendants from (1) enforcing a rule or regulation prohibiting inmates at Clinton Correctional Facility, Dannemora, New York from wearing a beard; (2) continuing to punish the Plaintiff for violating said rule or regulation; and (3) requiring the Plaintiff to submit to a rectal search upon entering and leaving a Special Housing Unit at Clinton Correctional Facility known and designated as Unit No. 14.

Judge Port's order of March 6, 1975, denying the Plaintiff's Motion for a Preliminary Injunction, was made after a hearing held on March 4 and 5, 1975. Such hearing was scheduled by the Court after a pre-trial conference was held in Judge Port's Chambers on February 7, 1975, at which time it was stipulated between the parties that the scope of such hearing would be limited to the following questions:

1. Was the rule banning beards at Clinton Correctional Facility an unconstitutional invasion of the rights of the plaintiff?

2. Was the periodic, but successive confinement of plaintiff in Special Housing Unit No. 14 for continually violating the rule against beards an unconstitutional invasion of plaintiff's rights?

3. Was the rule requiring plaintiff to submit to a rectal search upon his leaving and entering Unit No. 14 an unconstitutional invasion of plaintiff's rights?

The Ban Against Beards

In denying the plaintiff's motion for a preliminary injunction, the District Court found that the rule prohibiting beards for inmates does not "present a Federal Constitutional question justifying Federal interference in the operation of State prisons." (See p. 14 of Judge Port's decision.)

Judge Port pointed out that such a rule "has to be judged by the circumstance and the environment in which it's being applied. The testimony of the Defendant is that the rule is necessary as an

aid to identification and the officer in charge of security in Dannemora testifies that the chin structure and cheek bone are critical points in identifying individuals. He also cites hygienic reasons". (See p. 12 of Judge Port's decision, wherein he makes reference to the testimony of Assistant Deputy Superintendent Michael Tersigni of Clinton Correctional Facility who was called as a witness by the plaintiff. Such testimony of witness Tersigni may be found on pp. 263, 286, and 287 of the Transcript.)

On page 13 of his decision in this case, Judge Port referred to his decision in OJI Kwese Sekou a/k/a Chris Reed v. Robert J. Henderson, Superintendent of Auburn Correctional Facility (U.S.D.C., N.D.N.Y., 73-CV-543, decided Dec. 4, 1973).

Plaintiff Sekou, an inmate at Auburn Correctional Facility sought an injunction against enforcement of institutional rules prohibiting beards and goatees, a declaration that the rules are unconstitutional, and exemplary damages.

In dismissing the complaint, Judge Port wrote:

> "The claim presented does not, in my opinion present a federal or constitutional question justifying federal interference in the operation of the State prison. See Blake v. Pryse, 444 F. 2d 218 (8th Cir., 1971), and Williams v. Batton 342 F. Supp. 1110 (E.D.N.C. 1972). Further, Chief Judge James T. Foley of this District Court has recently reached the same decision in a case questioning a prison regulation requiring an inmate to shave and cut his hair. Barnes v. Preiser, et al., 73-CV-[536] (N.D.N.Y. Nov. 29, 1973)".

An appeal to this Court was taken by Sekou and the decision of the District Court was affirmed without opinion — Sekou v. Henderson 495 F. 2d 1367 (5-3-74).

Plaintiff contends that Judge Port's reliance on this Court's affirmance of Sekou v. Henderson, supra, was misplaced. In denying plaintiff's motion for a preliminary injunction, the District Court quite properly relied upon the affirmance of its decision by this Court. In Doe v. Hodgson, 478 F. 2d 537 (2d Cir.) at page 539, Judge Feinberg wrote:

> "* * * Plaintiffs thus contend that summary affirmance is entitled to no more--or little more--precedential weight than is the denial of a petition for a writ of certiorari. However, we have ruled to the contrary. See United States ex rel. Epton v. Nenna, 446 F. 2d 363, 366, cert. denied, 404 U.S. 948, 92 S.Ct. 282, 30 L. Ed.2d 265 (1971); Heaney v. Allen, 425 F.2d 869, 870-871 (1970); Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F.2d 259, 262-263 n. 3 (1967). * * *"

In Blake v. Pryse, 444 F. 2d 219 (8th Cir., 1971) cited by Judge Port in his decision in this case, a prison regulation of the Federal Correctional Institution at Sandstone Minnesota requiring a prisoner to shave and cut his hair was upheld. The Court said:

> "We think it evident that the regulation in question, however annoying it may be to petitioner personally, does not deprive him of any federal civil or constitutional right. Absent a deprivation of a constitutional right, the federal courts will not interfere with the administration of the prison system. The courts are not superwardens nor are the courts designed to function as administrative overseers of functions entrusted to the executive branch of government. The petitioner, a sentenced inmate, is under the general supervision and control of the Attorney General of the United States.
>
> "An individual upon incarceration loses certain personal freedoms and rights and is under a temporary duty to conform to reasonable institutional regulations. The courts will not interfere with prison regulations and discipline except in exceptional circumstances and those involving cruel and unusual punishment. We find neither here. The trial court's published opinion adequately deals with the issue in this case."

In the "trial court's published opinion" reported in 315 F. Supp. 627 (U.S.D.C., D. Minnesota, 1970) that court quite thoroughly set forth the reasons for its denial of a petition alleging that prison officials were interfering with the prisoner's "civil and constitutional rights in regards to the length or style of petitioner's hair, beard and/or moustache." In that case, the prisoner alleged that his refusal to shave was met with solitary confinement and other pains and penalties, occasionally including forcible shaving, a type of corporal punishment. On pages 625 and 626, the District Court states:

> "The government in rebuttal called as a witness the Chief Correctional Supervisor of the Institution. He testified that the prison has regulations relative to hair, length and style thereof and facial hair; that hair cuts must be tapered to the collar; hair must not extend over the ears; no sideburns are allowed below a line from the bottom of the ear lobe to the tip of the nose; that otherwise the face must be clean shaven. He stated that one of the principal reasons for the regulation is identification. Pictures are taken as inmates enter the institution. If they are permitted to grow long hair and then are missing, identification becomes difficult. Further, as a matter of hygiene long hair is restricted. Where many men live together in close proximity, unusual hairstyle is offensive to some of the inmate population and conceivably, if long enough, hair on the head could conceal a small weapon or instrument. The Supervisor testified that there is no federal correctional institution where beards or long hair are allowed.
>
> * * *
>
> "Hair cases previously have been before courts involving prison regulations. Brown v. Wainwright, 419 F. 2d 1376 (5th Cir. 1970). The Court of Appeals there in denying a petition to invalidate a prison regulation requiring prisoners to be clean shaven, stated:
>
> "'Lawful incarceration brings with it the necessary withdrawal or limitations of

many privileges and rights. Price v. Johnston, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948); Jackson v. Godwin, 5 Cir., 1968, 400 F.2d 529; Walker v. Blackwell, 5 Cir., 1969, 411 F.2d 23.

"'The rule in question is applied to all inmates alike. For personal cleanliness and for personal identification under prison conditions, the rule appears to be neither unreasonable nor arbitrary. There is thus no Constitutional basis for our interference with this vital state function.' 419 F.2d at 1377"

On March 18, 1975, this Court affirmed the denial of a preliminary injunction and the dismissal of the complaint by the United States District Court for the Eastern District of New York (COSTANTINO, J.) in a suit brought by New York City firemen seeking to overturn a fire department regulation which prohibited beards on New York City firefighters.

This Court concluded that the regulation in question was reasonably related to the health and safety of its firefighters, as well as that of the citizens they serve and that the findings of fact below were not erroneous. (See Kamerling, et al. v. O'Hagan _____F. 2d _____, Docket No. 74-2155, decided March 18, 1975.)

Applying the rationale in Kamerling v. O'Hagan, supra, to the instant case, the District Court found on the evidence presented to it that the rule was reasonably related to the proper operation of Clinton Correctional Facility as a necessary aid to identification. In so finding, the District Court relied upon the testimony of

Assistant Deputy Superintendent Michael Tersigni, who stated that the chin structure and cheek bone are critical points used in identifying individuals. (See Transcript, p. 263, lines 2-15; pp. 286, 287.) Captain Tersigni also testified that another reason for the prohibition against beards is for hygiene. (See Transcript, p. 263, lines 16-25.)

On Disparity of Punishment

On the question of disparity between the punishment and the offense, the District Court rejected the argument that plaintiff's lengthy confinement in Unit 14 was a blanket punishment for a single offense. Instead, he found that plaintiff's continued refusal to shave his beard was "more like the case of the persistent traffic violator, that is, he exceeds the speed limit today and he exceeds the speed limit next week, and it's a week each time for exceeding the speed limit." (See p. 16 of Judge Port's decision.)

This latter finding by Judge Port was based upon an "examination of the Plaintiff's record within the institutions indicates that a great majority of his confinements in Special Housing results from actions of the Adjustment Committee directing that he be confined in those units for periods of seven days at a time." (See p. 5 of Judge Port's decision. "Plaintiff's record" to which Judge Port refers is Plaintiff's Exhibit 9.)

It is noteworthy to examine the testimony of one of the plaintiff's own experts, Marion D. Strickland, Superintendent of

Utility Services for the District of Columbia Department of Corrections, Washington, D. C. In response to questions from the Court regarding the manner in which an inmate's continued refusal to comply with a rule would be handled, the following colloquy took place, beginning on page 157 of the Transcript at line 9:

> "THE COURT: Assuming a continued refusal, would charges be brought relating to the subject's noncompliance or refusal, or would you just drop the whole thing?
>
> THE WITNESS: No, he would be cited again for a violation of that rule.
>
> THE COURT: Well, that's what I would like to know. How long would that go on?
>
> THE WITNESS: Your Honor, as I indicated, I simply do not recall where there was --
>
> THE COURT: No. I am asking you as an expert now as a man that runs a penal institution from the standpoint that it is a matter of policy, how long would that go on?
>
> THE WITNESS: If we have a rule governing -- well, providing or prohibiting the wearing of a beard, if the individual did not respond to, let's say the imposition of some disciplinary action, recommended action, I just don't find that there would be any other alternatives available other than to, if he was -- if it did have some ramification in terms of our population, it would be to remove from direct contact with your population and put him in restrictive housing if he was causing some disorder within your institution.
>
> THE COURT: No. The only violation is his refusal to abide by this regulation. No disorder.

> THE WITNESS: If I may, Your Honor, this is beyond my comprehension that a person would be placed in solitary confinement for an excessive period of time for wearing a beard. I just simply do not find that that action would be recommended or condoned, and during the period in which I was deployed from the D. C. jail, I just don't recall a similar circumstance or instance where this type of circumstance existed, and one reason being mainly, if I might add, was that most of those individuals were unsentenced offenders and, of course --
>
> THE COURT: Would that be what your policy would be in a mixiмum [sic] security facility?
>
> THE WITNESS: We did not have a policy in the maximum security facility. The beard was not in vogue at that time when I was --
>
> THE COURT: Well, that's exactly what I am getting at. When it was out of vogue, beards or anything, any violation, maximum of seven days in the segregated unit, and the violation persists, what do you do?
>
> THE WITNESS: We would be limited within any prevailing maximum and minimum penalties. If it persisted, we would have to cite him again. You just have to -- hypothetically, it could go on and on. We could not go beyond the bounds of any prevailing or governing policy."

A pertinent, although somewhat lengthy excerpt from a District Court decision in the Central District of California, gives a fair summary of the situation the plaintiff has presented to the Court in this case. In Winsby v. Walsh, 321 F. Supp. 523 (U.S.D.C., C.D. California 1971), the Court said:

> "[1] I have come to the conclusion that petitioner is not entitled to the relief he seeks. His efforts to ground his opposition to shaving upon religious beliefs are smothered by evidence that, while he may be possessed of a strong code of morals, he is governed by a resolute spirit which gives him endurance as he plays his stubborn game with prison officials. He has

been given countless opportunities to gain his freedom by complying with reasonable rules, but he has chosen to bring about day by day defiance of those who have his custody. To allow one man to defy regulations forbidding the wearing of long hair and beard is to invite the balance of the male population of the prison to do the same thing. * * *

* * *

"[8] This Court feels that it is an extremely serious situation when a prisoner is placed in segregation for a period of 10 months and I have therefore given close attention to the evidence so that I may determine whether the action amounts to cruel and inhuman punishment on the part of prison authorities. The facts of this case do not show that the petitioner was 'sentenced' to any period of time in segregation by prison authorities and this case is not be be compared with the instance of an inmate being administratively confined in isolation for an act he did, such as an assault upon another. Winsby can actually be said to be commiting a new infraction each day and since I must conclude that the prison regulations governing grooming are reasonable and have a definite purpose directly connected with the duty of the warden to see that inmates do not escape, I conclude that petitioner's conduct is the wilful continuous violation of a reasonable rule for which he could release himself at any time if he chose to do so."

The Rectal Search

The District Court, on page 19 of its decision, concluded that the plaintiff has failed to show probable success on the merits and irreparable injury, with respect to the plaintiff's claim that the rectal search constitutes a deprivation or violation of Federal Constitutional rights.

In denying preliminary injunctive relief to the plaintiff on this claim, the District Court cited a federal court decision which specifically dealt with the authority of correctional authorities to conduct rectal searches on prison inmates.

In Daugherty v. Harris, 476 F. 2d 292, 294 (10th Cir., 1973) Cert. den. 414 U.S. 872, the Court, in considering appellants' contentions that strip searches which included rectal examination violated constitutional guarantees of privacy and prohibitions against unreasonable searches and seizures, stated:

> "[1-3] Appellants' assertions must be examined in light of the basic rule that control and management of federal penal institutions lies within the sound discretion of the responsible administrative agency. Judicial relief will only be granted upon a showing that prison officials have exercised their discretionary powers in such a manner as to constitute clear abuse or caprice. Perez v. Turner, 10 Cir., 462 F.2d 1056, 1057; Evans v. Moseley, 10 Cir., 455 F.2d 1084, 1086. The district court, based upon the pleadings and after taking judicial notice of facts contained in other files and records of the court and facts subject to judicial knowledge, summarily denied relief. We affirm, rejecting appellants' contentions that the searches are a basic violation of their right to privacy unless special cause is shown in justification and that, in any event, the searches must be conducted by medical doctors and in complete privacy.
>
> "Leavenworth is a maximum security institution containing many dangerous inmates and any consideration of the penitentiary's security regulations must be realistic. There are many known incidents of concealed contraband being carried by prison inmates in the rectal cavity. Several serious episodes, including the wounding of a court officer, were attributable to the ability of inmates to smuggle weapons out of prison. Given these circumstances coupled with an increasing need to assure the safety

> of our law enforcement and court officials, this policy of allowing rectal searches must be considered reasonable unless contradicted by a showing of wanton conduct. Graham v. Willingham, 10 Cir., 384 F.2d 367, 368. To hold that known cause comparable to that required for a search warrant in private life must precede such a search would be completely unrealistic. It is usually the totally unexpected that disrupts prison security."

Plaintiff, in his testimony, states he does not object to any part of the strip search, except that portion which requires him to bend over, in a forward position and, with his own hands, to spread his buttocks. He does not object to the removal of all his clothing, to the raising of his arms, to the opening of his mouth, to the lifting of his feet or to the raising of his genitals. None of these acts, according to plaintiff, are dehumanizing.

Captain Tersigni testified that the reason for inspection of the rectal cavity is to ascertain that the inmate does not have concealed, either within the folds of his buttocks or within his rectum, some object which can be determined by a visual examination of that area. There is no physical contact required. The inspection is purely a visual one. (Transcript, pp. 267-270.)

In explaining the rationale for the rectal examination, Captain Tersigni testified that the necessity for such an examination exists to a greater degree with respect to those inmates in Special Housing Unit 14, because such inmates are not prone to abiding by the rules of the facility and, therefore, a greater degree of security is required as to these inmates. (Transcript, p. 269, 270.)

In this case we are dealing with two simple propositions which relate to prison security. A ban against beards, to aid the prison officials in the area of identification of inmates. A strip search, which includes a visual inspection of the buttocks, for those inmates moving in and out of Unit No. 14.

Are either of these instances "extreme cases" that this Court made reference to when it laid down the following precept in Sostre v. McGinnis, 334 F. 2d 907, at p. 908:

> "The principal problem of prison administration is the maintenance of discipline. Attica Prison is a maximum security prison designed for the detention of only the most desperate criminals. No romantic or sentimental view of constitutional rights or of religion should induce a court to interfere with the necessary disciplinary regime established by the prison officials. '[E]xcept in extreme cases, the courts will not interfere with the conduct of a prison, with the enforcement of its rules and regulations, or its discipline,' Childs v. Pegelow, 321 F.2d 487, 489 (4th Cir. 1963), cert. denied, 376 U.S. 932, 84 S. Ct. 702, 11 L.Ed.2d 652 (1964) (citing many supporting cases). A prisoner has only such rights as can be exercised without impairing the requirements of prison discipline. 'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948)." (Footnote omitted.)

There can be no question that there are instances of injustice to those who are incarcerated in State prisons. Are the rules the plaintiff is challenging in this case unjust? Do they bear a reasonable relationship to the security of the facility? Are they unreasonable when viewed in the atmosphere of a maximum security prison?

Should the "conscience" of this individual plaintiff determine what is right or wrong, what is constitutional or unconstitutional? His resistance, he argues "is based on his conscience." Should we reward him for his plain, downright stubbornness to authority? Should his "stature" and his "determination" to flaunt these rules be sufficient grounds for this Court to interfere in the necessary disciplinary regime established by prison officials?

CONCLUSION

THE ORDER OF THE DISTRICT COURT DENYING THE PLAINTIFF A PRELIMINARY INJUNCTION SHOULD BE AFFIRMED.

Dated: March 31, 1975

Respectfully submitted

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellees

JACK W. HOFFMAN
TIMOTHY F. O'BRIEN
Assistant Attorneys General

of Counsel

ADDENDUM #1

In their moving papers, requesting this Court to grant plaintiff a stay, pending appeal of Judge Port's order denying plaintiff a preliminary injunction, the plaintiff's attorney attached to such moving papers a statement of one Kurt Allen Prairie, signed by him before one Elizabeth M. Fink on March 8, 1975.

In such statement Mr. Prairie alleged that a correction officer employed at Clinton Correctional Facility, one Ronald Du Pre [sic] had made statements to Prairie regarding the plaintiff Sostre.

Attached hereto is an affidavit of Ronald E. Duprey, sworn to before a Notary Public, wherein Mr. Duprey denies making the statements ascribed to him by Mr. Prairie.

This addendum is included herein, not for the purpose of raising an issue, which forms no part of the record in the trial court, but rather as a matter of fairness to Correction Officer Duprey, the allegation of Prairie should not go unanswered in the records of this Court.

STATE OF NEW YORK)
COUNTY OF CLINTON) ss:
VILLAGE OF DANNEMORA)

RONALD E. DUPREY, being duly sworn, deposes and says:

I am a resident of Clinton County and I am employed by the New York State Department of Correctional Services as a Correction Officer at Clinton Correctional Facility, Dannemora, New York. I have been so employed for a period of 14 years.

I am personally acquainted with one Kurt Allen Prairie and have known him for a period of approximately three years.

I have read an Affadavit dated March 8, 1975 signed by the said Kurt Allen Prairie and sworn to before one Elizabeth M. Fink, Attorney at Law.

The said Affadavit of Kurt Allen Prairie states that I had a conversation with him on February 19, 1975, and in the course of such conversation, I, according to Kurt Allen Prairie, made the following statement with reference to one Martin Sostre:

> "It doesn't matter either way. When the nigger gets back, he's going to get this,"

and at the same time I made a pushing motion to my nose with my hand. Said Affadavit of Kurt Allen Prairie further states that upon asking me what I meant by such a jesture with my hand, I replied,

> "he's going to get the shirt kicked out of him."

I hereby state under oath that I never made such statements to said Kurt Allen Prairie or to anyone on February 19, 1975 or at any time, and I hereby state affirmatively that those portions of Kurt Allen Prairie's Affadavit which states that I made such statements to him are false.

Ronald E. Duprey
RONALD E. DUPREY

Sworn to before me this
25th day of March 1975.

Henry G. Enquea
Notary Public

HENRY G. ENIQUEA
Notary Public
Clinton Co. - State of N. Y.
Commission Expires March 30, 19 75

STATE OF NEW YORK:
COUNTY OF ALBANY : ss.:
CITY OF ALBANY :

SENDER BORLAWSKY, being duly sworn, says:

I am over eighteen years of age and a Senior Mail and Supply Clerk in the office of the Attorney General of the State of New York, attorney for the Defendants-Appellees herein.

On the 1st day of April, 1975, I served two copies of the annexed Brief for Defendants-Appellees upon the attorney named below, by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said attorney at the address within the State respectively theretofore designated by him for that purpose as follows:

Michael E. Deutsch, Esq.
110 Pearl Street
Buffalo, New York 14202

Sender Borlawsky

Sworn to before me this
1st day of April, 1975.

Assistant Attorney General