

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

DWAINE WRIGHT,

Plaintiff,

:

Case No. 3:10-cv-067

-vs-

District Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

MIAMI COUNTY INCARCERATION
FACILITY, et al.,

Defendants,

:

DECISION AND ORDER DENYING MOTION FOR SANCTIONS

This action is before the Court on Plaintiff's Motion for Sanctions for Spoliation of Evidence (Doc. No. 9).

The sole claim made in the Complaint in this case is for unspecified monetary damages against the Miami County Sheriff's Office, the Miami County Incarceration Facility, and Captain S. E. Cooper upon the following asserted facts:

Miami County Jail was given a court order to preserve my tapes of telephone conversations at that Jail on 5/1/2006. Counsel Gray [sic] Crim discussed this matter with Capt. Cooper who works for Miami County Sheriff's Office who is in charge of Miami County Incarceration Facility.

On or about 1/30/09 Capt. Cooper contact me stating that all of my phone calls from 2005 they don't have because they were lost. Do [sic] to the lost tapes I was unable to file ineffective assistance of counsel or prove my claim of it.

(Complaint, Doc. No. 1, at 5.) The Magistrate Judge recommended dismissal of this claim upon initial review under 28 U.S.C. § 1915A (Report and Recommendations, Doc. No. 4) because:

1. Plaintiff never filed a Motion to Vacate under 28 U.S.C. § 2255 in Case No. 3:04-cr-003.
2. Plaintiff has not suggested what claim of ineffective assistance of trial counsel he would have made in that case or how these recorded telephone calls would have supported that claim.
3. The Defendants in this case were not a party to Judge Rose's order in the prior case which directed **the Government** to preserve any tapes of telephone conversations. The motion for that order was made by counsel in the prior case and thus presumably was intentional in its reference to the Government, meaning the United States Attorney's office prosecuting the case.
4. Ohio law does not recognize a property right in a jail inmate in recordings of his telephone conversations.

Id. This Report has been objected to by Plaintiff (Doc. No. 6) and the Objections have not yet been ruled on by District Judge Rice.

It appears that the Motion for Sanctions is a re-casting of Plaintiff's Complaint. However, it is no more entitled to succeed in its present form. Spoliation is the destruction of evidence that is presumed to be unfavorable to the party responsible for the destruction. *United States v. Copeland*, 321 F.3d 582, 597 (6th Cir. 2003). The Defendants here were not parties to the prior litigation. They have only become "parties" by being named as defendants in this case. Furthermore, the evidence is not even argued to be unfavorable to them, but rather as showing ineffective assistance of trial counsel by Mr. Wright's trial attorney.

Since any destruction of the tapes in question does not come within the legal definition of spoliation in federal law, the Motion for Sanctions is denied.

March 27, 2010.

s/ **Michael R. Merz**
United States Magistrate Judge