

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 90-1883
Summary Calendar
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ROOSEVELT MOORE,

Plaintiff-Appellant,

versus

PAT PATTERSON, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the
Northern District of Mississippi
(EC85-442-D-D)

S)))))))))Q
(January 26, 1993)

Before GARWOOD, HIGGINBOTHAM and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant Roosevelt Moore (Moore) filed this conditions of confinement suit under 42 U.S.C. § 1983 against defendants Pat Patterson (Patterson) and Don Easter (Easter). The district court dismissed the action, and Moore now appeals. We affirm.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

Moore was an inmate in the Monroe County Jail at various times between 1983 and 1985 on charges of burglary and forgery. The record shows that during this period he was incarcerated as both a pretrial detainee and as a convicted inmate. Moore filed the present action under 42 U.S.C. § 1983 alleging that Monroe County Sheriff Patterson and former Monroe County jail administrator Easter violated his constitutional rights by denying him medication and medical treatment while he was housed in the Monroe County Jail.¹

After permitting Moore to conduct extensive discovery and holding an evidentiary hearing, the magistrate recommended entering judgment for the defendants.² Moore filed objections to the report and recommendation. The district court adopted the report and

¹ Moore also sued Don A. Cabana, Superintendent of the Mississippi Department of Corrections; Morris Thigpen, Commissioner of the Mississippi Department of Corrections; and L.G. Faulkner, John Allen Cockerman, C.E. Henley, and Delma Francis, members of the Monroe County Board of Supervisors. The district court dismissed the complaint against these defendants for failure to state a claim upon which relief can be granted because Moore made no specific allegations against any of these defendants.

² It is somewhat unclear under what authority the magistrate held the hearing. His order of December 16, 1988 simply states that the action "is set herein for Evidentiary Hearing on February 22, 1989." The magistrate followed the procedure detailed in 28 U.S.C. § 636(b)(1)(B) & (C), and we presume that he acted pursuant to that authority. The magistrate held the hearing, submitted proposed findings and recommendations to the district court, mailed his findings and recommendations to the parties, and instructed the parties that they had ten days to object. The district court subsequently accepted the findings and made additional findings. Because a complete evidentiary hearing was held, we do not treat the dismissal as one under 28 U.S.C. § 1915(d), authorizing the dismissal of actions *in forma pauperis* that the court deems to be frivolous.

recommendation of the magistrate, overruled Moore's objections to the report, and entered judgment for the defendants. Moore timely filed a notice of appeal.

Discussion

I. Denial of Jury Trial

Moore's first point of error is that the magistrate abused his discretion in denying Moore's motion for jury trial. Moore, however, never formally requested a jury trial. In his Petition for Writ of Habeas Corpus Ad Testificandum, Moore requested that the court "issue a writ of habeas corpus and testificandum . . . to bring the witness before the Court for the Voir Dire and Jury Trial." The magistrate construed this language as a motion for a jury trial and denied it as untimely since it was made only seven days before the evidentiary hearing.

Generally, a party demanding a jury trial of right must make his request timely, otherwise, the request is committed to the sound discretion of the court. See FED. R. CIV. P. 38(b). The Uniform Local Rules of the United States District Court for the Northern District of Mississippi provide that the request for a jury trial must be made within ten days after service of the answer. Answer on behalf of Patterson and Easter was served in November 1985. Further, the magistrate entered a scheduling order on December 16, 1988, that required all pretrial motions to be made by January 31, 1989. Moore's Petition for Writ of Habeas Corpus Ad Testificandum, which the magistrate deemed a request for a jury trial, was not filed until February 8, 1989. We have previously

held that "[d]isruption of the court's docket is a strong and compelling reason to deny an untimely request for a jury trial." *Richardson v. Henry*, 902 F.2d 414, 416 (5th Cir.), cert. denied, 111 S.Ct. 260 (1990). Given that Moore's "request" was filed a mere seven days before the hearing, we find that the district court did not abuse its discretion in denying the motion for jury trial.

II. Appointment of Counsel

Moore's second point of error is that the magistrate abused his discretion in denying his motions for appointment of counsel. "The trial court is not required to appoint counsel for an indigent plaintiff asserting a claim under 42 U.S.C. § 1983 . . . unless the case presents exceptional circumstances." *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982). A federal district court, however, has the discretion to appoint counsel if doing so would advance the proper administration of justice. *Id.* at 213. We have previously noted that while there is no comprehensive definition of exceptional circumstances, the following four factors should be considered in ruling on requests for appointed counsel:

"(1) the type and complexity of the case; (2) whether the indigent is capable of adequately presenting his case; (3) whether the indigent is in a position to investigate adequately the case; (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross examination." *Id.* (citations omitted).

Moore contends that because he is illiterate, he has demonstrated exceptional circumstances justifying the appointment of counsel. We are not convinced that illiteracy alone will always constitute exceptional circumstances requiring appointment of counsel. Moore, apparently with the assistance of an inmate writ

writer, filed a wide array of motions, including a motion for summary judgment, and conducted extensive discovery. At the evidentiary hearing, Moore presented several witnesses, in addition to testifying himself, and cross examined the defendants' witnesses. The magistrate allowed Moore's daughter to assist him during the evidentiary hearing, and while she was not familiar with his case, she was able to read materials for him during the hearing and helped locate documents. Further, the magistrate himself questioned witnesses for both sides in order to get a more complete picture of the facts. In sum, we are not convinced that the case was so complex or of such a nature that Moore was prevented from adequately investigating or presenting the case. The district court did not abuse its discretion in denying the motion for appointment of counsel.³

III. Evidentiary Matters

Moore's next set of complaints centers on evidentiary rulings that the magistrate made during the hearing. Moore contends that the magistrate erred in allowing the defendants to place unauthenticated evidence in the record, in not permitting him to develop fully his evidence, and in not obtaining copies of some of his medical records that were on microfilm.

A. Unauthenticated Evidence

³ Moore has also filed a Motion to Appoint Counsel for this appeal, giving as reasons his inability to read or write. Finding that Moore has not demonstrated exceptional circumstances justifying the appointment of counsel, we deny his motion. In so doing, we note that Moore has been able to effectively present his claims to this Court: he has filed a Motion to Reinstate the Appeal, which was granted, an Appellant's Brief, and a Motion to Appoint Counsel.

During his testimony, Patterson referred to a document that had been specially prepared for the hearing. Patterson reviewed this document while testifying about one of the dates on which Moore was transferred from the penitentiary to the Monroe County Jail. Moore objected that the information in the document was inconsistent with the information he received during discovery and that he was supposed to have the same records as those to which Patterson was referring. The magistrate explained that Patterson was reviewing a document he had compiled for trial from other documents in order to help him remember some details. The magistrate specifically afforded Moore an opportunity to review the document, but Moore declined. Additionally, both Patterson and his counsel conceded that there was a possibility of error in the transfer date, that they would be happy to discuss any different date that Moore had, and Patterson's counsel even offered to stipulate to the release date that Moore had. The magistrate, however, directed the parties to move on, indicating that the date was not relevant.

This is the sort of evidentiary ruling that we review for an abuse of discretion. See *Herrington v. Hiller*, 883 F.2d 411, 414 (5th Cir. 1989). Given that Moore has not demonstrated that any discrepancy in transfer date was material or that he has been prejudiced by such discrepancy, we hold that the magistrate did not abuse his discretion in allowing Patterson to refer to the document during his testimony.

B. Medical Records

Moore next contends that the magistrate should have obtained

copies of his medical records that might have been on microfilm. In 1986, the hospital sent a document to Moore indicating that additional medical records might be on microfilm. Moore never requested assistance in obtaining the records on microfilm. The only reference Moore made to these records during the trial was to inform the magistrate, shortly before he rested, that "I've got a thing here from the Monroe County Hospital, where the hospital say the rest of the records is on microfilm and it can be produced." Moore never specified what he believed was or likely was contained in the records or even indicated that he needed to rely on the records. Additionally, Moore does not allege that the microfilm contains any relevant evidence. Given the extent of discovery Moore conducted and the lack of any apparent materiality of the records, the magistrate did not abuse his discretion in not, *sua sponte*, obtaining the records for Moore.

C. Evidence of Other Deaths

Moore's last evidentiary argument is that the magistrate failed to permit him to develop evidence regarding the deaths of two prisoners at the jail. This claim is belied by the record. Moore conducted extensive discovery, yet never requested information regarding these two deaths. Further, despite the questionable relevance of this evidence, the magistrate allowed Moore to question Patterson about the deaths. Patterson acknowledged that a prisoner, Earl Guthrie, had died in 1983 of a heart attack suffered while on work detail. Patterson also acknowledged that between seven and ten years ago a second prisoner in his care died. Thus, not only was Moore allowed to question

Patterson, but testimony regarding other deaths at the jail was introduced at the hearing.

After this colloquy, Moore addressed the magistrate: "Your Honor, I can prove that another man died there at the county jail for lack of attention. . . . I can prove that, Your Honor, if I had a little time, but I ain't got the time." The magistrate responded: "You've got all the time you are going to need, Mr. Moore." Moore reasserted "I've lost that information, Your Honor." We find no abuse of discretion in this exchange. Moore was allowed to present the information he had and to develop it through cross-examination of Patterson. Given the amount of discovery and the relative lack of materiality of the evidence regarding other deaths at the jail, the magistrate did not abuse his discretion in not allowing Moore an unspecified amount of additional time in which to procure or locate additional evidence regarding another death at the jail.

IV. Medical Care

Moore's last arguments center on his alleged lack of adequate medical treatment. Specifically, Moore contends that he was denied adequate medical treatment because he was required to pay a portion of his medical bills, there were insufficient personnel to provide adequate treatment, and because he was not allowed to keep nitroglycerin in his cell.

The Supreme Court has stated that in order to state a cognizable section 1983 claim for lack of medical treatment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."

Estelle v. Gamble, 97 S.Ct. 285, 292 (1976). In contrast, the rights of a pretrial detainee to medical care following his arrest are governed by the due process clause of the Fourteenth Amendment rather than the Eighth Amendment's prohibition against cruel and unusual punishment. *City of Revere v. Massachusetts Gen. Hosp.*, 103 S.Ct. 2979, 2989 (1983). The due process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to the convicted prisoner; while the convicted prisoner is entitled to protection only against punishment that is cruel and unusual, the pretrial detainee, who has yet to be adjudicated guilty of any crime, may not be subjected to any form of punishment. *Id.* at 2983. But not every inconvenience encountered during pretrial detention amounts to punishment in the constitutional sense. To establish that a particular condition or restriction of confinement is constitutionally impermissible punishment, the pretrial detainee must show either that it was (1) imposed with an expressed intent to punish or (2) not reasonably related to any legitimate nonpunitive governmental objective, in which case an intent to punish may be inferred. *Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987) (citing *Bell v. Wolfish*, 99 S.Ct. 1861, 1871-74 (1979)). However, we have also recognized that no due process violation is established if the case involves only negligence of the officials. *Ortega v. Rowe*, 796 F.2d 765 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1887 (1987). See also *Davidson v. Cannon*, 106 S.Ct. 668, 671 (1986); *Feagley v. Waddill*, 868 F.2d 1437, 1440 (5th Cir. 1989); *Partridge v. Two Unknown Police Officers of the City of Houston*, 791 F.2d 1182, 1187 (5th Cir.

1986).

The record indicates that Moore was both a convicted prisoner and a pretrial detainee between 1983 and 1985, but is not clear as to his status on specific dates. For present purposes, the distinction between pretrial detainees and convicted prisoners is without a difference because the evidence shows that Moore received adequate medical treatment regardless of his status.

A. Payment of Bills

Moore contends that he was denied adequate medical care because he was required to absorb part of the cost of some of his medical treatment. Although the record is less than wholly clear, it appears that this claim is grounded in the fact that Moore's wife's employer's insurance was billed for and paid a portion of the cost of two of Moore's hospital stays in July 1983. Patterson testified that if a prisoner is indigent, the county absorbs all costs of medical treatment; however, if the prisoner has insurance, is on a supplement, or has his own funds, the county seeks payment from the prisoner. The district court reviewed the documents provided by Moore and found that either Moore or his family or an insurance company did pay for part of Moore's hospital stay of July 4-8, 1983. The court concluded, however, that Moore had not established a constitutional violation. The district court found that Moore had neither shown that the policy was punitive or that he was deprived of treatment.

We agree. Under Supreme Court jurisprudence, questions about the specific allocation of the cost of care between a government entity and a provider are a matter of state law. *City of Revere*,

103 S.Ct. at 2983. In *Revere*, the Supreme Court specifically stated that nothing in the opinion "affects any right a hospital or a governmental entity may have to recover from a detainee the cost of the medical services provided to him." *Id.* at 2984 n.7. Mississippi law provides that the sheriff shall provide medical care to prisoners, and "[i]f the prisoner [is] unable to pay the cost, the account of the physician or surgeon . . . shall be paid . . . out of the treasury of the county." MISS. CODE ANN. § 47-1-57. In requiring Moore to pay a portion of his hospital stay, Patterson was complying with Mississippi law. We find that nothing in the Mississippi statute violates either the Eighth or Fourteenth Amendment because such a policy neither deprived Moore of medical care nor was enforced with the intent to punish Moore. See *Fant v. Fisher*, 414 F.Supp. 807 (W.D. Okl. 1976). We agree with the district court's conclusion in *Fant* that a state's obligation to provide a prisoner with medical care "does not include a duty that the medical care be furnished without cost to a non-indigent prisoner whose ability to pay is not questioned." *Id.* at 809. We reject Moore's claim that his constitutional rights were violated because he was required to pay a portion of his hospitalization.

Moore also argues that requiring him to pay part of his medical care violates the Equal Protection Clause because indigent patients do not have to pay. Mississippi state law provides that if a prisoner is unable to pay the costs of medical treatment or hospitalization, the county will pay for the necessary services. MISS. CODE ANN. §§ 47-1-57, 47-1-59(2). The statutes thus distinguish between indigent and nonindigent prisoners. The

Supreme Court has noted that:

"The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude" *City of Cleburne, Tex. v. Cleburne Living Center*, 105 S.Ct. 3249, 3254 (1985) (citations omitted).

The classification established by the Mississippi statutes does not distinguish on the basis of race, alienage, national origin, or gender, and is not suspect or quasi-suspect. See *id.* at 3254-55. Accordingly, because the classification requiring nonindigent prisoners to contribute to the cost of their medical treatment is rationally related to Mississippi's legitimate interest in mitigating the costs of confining prisoners, we hold that the statute does not violate the Equal Protection Clause.

B. Insufficient Personnel

Moore alleges generally that there were insufficient prison personnel to provide adequate medical treatment. However, Moore does not allege, and the record reflects no evidence of, any injury he has suffered from this purported lack of personnel. Indeed, the extent of Moore's medical treatment contradicts his contention. The record reflects that Moore was taken to a doctor or the hospital on July 2, July 21, and August 4, 1983, September 13 and December 12, 1984, and October 31, 1985; was provided with prescription medication on July 2, 13, 21, 26, August 1, 4, 1983; and was hospitalized for three days in June 1983 and four days in July 1983.

Moore also complains about two specific delays in receiving

treatment assertedly caused by the lack of personnel. In October 1984, Moore complained of chest pains and a cellmate called a jailer. Moore was apparently not taken to the doctor until two or three days later. The evidence shows that such a delay does not rise to the level of deliberate indifference or reflect an intent to punish. Moore was sitting up in his bunk talking at the time he complained of chest pains, and when he was taken to the doctor, he stayed only thirty minutes, indicating that his complaint was not serious. The second incident Moore complains of occurred in July 1983. Moore alleges that he was denied medical attention for an hour while he lay on the floor "jerking" before he was finally taken to the hospital. While such delay may have been negligent, there is no evidence that it was deliberate or intentional or systematic. See *Partridge*, 791 F.2d at 1187. Furthermore, while Moore was not treated as promptly as might be desired, he still received reasonably prompt medical attention.

C. Medication

Moore's last argument is that he was denied adequate medical treatment because he was not permitted to keep his nitroglycerin, which he used for his heart, in his cell. In a related claim, he complains that on one instance a guard found nitroglycerin in Moore's cell and poured it down the drain. The record evidences that the Monroe County Jail had a regulation preventing prisoners from keeping medication in their cells. Instead, prisoners were supposed to request medicine from the infirmary and it would then be administered to them.

We are not convinced that this regulation violates either the

Eighth Amendment or the Fourteenth Amendment. In *Simons v. Clemons*, 752 F.2d 1053, 1055 (5th Cir. 1985), we held that a jail did not violate a pretrial detainee's rights by depriving her of personal possession of pain medication during the period she was incarcerated. We identified the "need to prevent drugs, not yet identified as medically necessary, from reaching incarcerated individuals" as a rational basis for the imposition on the detainee. *Id.* Two federal district courts have also refused to find that medication policies similar to the one in place at Monroe County Jail violated the Eighth Amendment. See *Johnson v. Richards*, 617 F.Supp. 113 (W.D. Okl. 1984); *Hearn v. Hudson*, 549 F.Supp. 949 (W.D. Va. 1982). In *Johnson*, the plaintiff filed a *pro se* section 1983 suit challenging the refusal of the defendants to dispense medication other than through a "pill line." The district court found that the plaintiff had not established a constitutional violation because he had not alleged any injury by reason of the defendants' refusal to dispense medication other than through the pill line. *Johnson*, 617 F.Supp. at 114. In *Hearn*, the district court held that a procedure by which a prisoner's medication was removed from his possession did not constitute deliberate indifference to the plaintiff's medical needs. *Hearn*, 549 F.Supp. at 962.

In the instant case, the magistrate afforded Moore a complete evidentiary hearing. Moore did not put on any evidence regarding the frequency with which he required the nitroglycerin or any instances in which he requested the nitroglycerin and it was not provided to him by the infirmary. Given the legitimate interest

behind such a policy and absent any allegation of injury resulting from the Monroe County Jail's medication policy, we refuse to find that such a policy violated Moore's constitutional rights.

Conclusion

For the foregoing reasons, we affirm the district court's dismissal of Moore's suit.

AFFIRMED