

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 91-5120 &  
92-4438  
Summary Calendar

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ELLIS D. BURRELL,  
  
Plaintiff-Appellant,  
  
v.  
  
TOMMY CROW, ET AL.,  
  
Defendants-Appellees.

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Appeals from the United States District Court  
for the Eastern District of Texas  
(TY 88 384 Ca & 6:88 CV 384)

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March 29, 1993

Before GARWOOD, JONES, and EMILIO GARZA, Circuit Judges.\*

EDITH H. JONES, Circuit Judge:

From a dismissal of his complaint against TDCJ prison guards and a prison doctor, Ellis Burrell appeals. We find no error and affirm.

Burrell filed this action pro se and in forma pauperis alleging that several guards had used excessive force against him. Specifically, he asserted that on October 30, 1987, several guards

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\*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

restrained him after he asked to speak to an officer and that two of the defendants had held him down, scraped his face back and forth against the concrete floor, kicked him, and twisted his arms behind his back after severely tightening his handcuffs. Burrell alleged that he received inadequate medical attention following the incident. He further alleged that some of the defendants filed false disciplinary reports on him concerning the incident. As defendants, Burrell named Dr. Allison and guards Crow, Flowers, Mitchell, Green, Chavers (also Chavis in the pleadings), Lankford (also Langford), and McCrary. Following a Spears hearing, the district court entered a partial order of dismissal as to all claims except the excessive force claim.

To assist Burrell, the district court appointed counsel, who filed an amended complaint naming Crow, Flowers, Mitchell, Green, Chavers, and Allison as defendants. Defendants Langford and McCrary were not included. The district court dismissed the action for failure to state a claim and as frivolous, finding that the only potential claim that was stated was against Langford and McCrary. Langford and McCrary had not been served, and the district court afforded Burrell an additional opportunity to provide their addresses in its order dismissing the action as to the other defendants. Id. at 14. The district court denied Burrell's motion to reconsider. Burrell appealed from the dismissal and the denial of reconsideration.

As his first issue on appeal, Burrell states that all defendants should have been ordered served by the district court.

Burrell asserts that the district court delayed too long in ordering service because by the time summons issued, Langford had died and McCrary could no longer be located because of a job change.

The plaintiff is responsible for effecting service of process. The district court is not to be held responsible for changes in the status of Langford and McCrary that prevented their addresses or whereabouts from being easily ascertainable. Burrell has asserted no good cause for his failure to effect service or for his failure to attempt to comply with the court's order directing him to provide the addresses. See Fed. R. Civ. P. 4(j); Traina v. U.S., 911 F.2d 1155, 1156 (5th Cir. 1990).

Burrell next asserts that the district court abused its discretion in denying his request for a temporary restraining order/preliminary injunction.

A preliminary injunction is granted only in extraordinary circumstances, and the decision to deny a preliminary injunction lies within the sound discretion of the district court. Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985). To be entitled to a preliminary injunction, the movant must demonstrate (1) a substantial likelihood of success on the merits; (2) a substantial threat that the failure to grant the injunction will result in irreparable injury; (3) that the threatened injury outweighs any damage that the injunction will cause to the adverse party; and (4) that the injunction will not disserve the public interest. Id. The

movant's failure to carry clearly the burden of persuasion on all four elements will result in the denial of the motion. Id.

It does not appear that Burrell was entitled to a preliminary injunction. He offered conclusional allegations that the prison officials were conspiring to do many things against him after he filed this complaint, including deprive him of a scheduled haircut. His allegations did not indicate a substantial threat of irreparable injury.

Burrell also contends that the district court should not have dismissed his action for failure to state a claim and that his amended complaint should have been consolidated with his original complaint so as to include the causes of action against Langford and McCrary, which appeared to state a claim.

Major Crow was sued only in his supervisory capacity. There were no allegations that he personally participated in the use of force against Burrell. He was thus properly dismissed, as § 1983 does not provide a vehicle to impose liability against supervisory officials based on respondeat superior. Williams v. Luna, 909 F.2d 121, 123 (5th Cir. 1990).

At the Spears hearing, Burrell specifically admitted that defendants Flowers and Green were not involved in administering the beating, but that it was only two officers, namely, Langford and McCrary. Flowers and Green were thus properly dismissed, along with the remaining defendants who were not alleged to have taken part in the beating.

Dr. Allison was also properly dismissed, as Burrell's allegations did not state a claim of deliberate indifference. Burrell alleged that Dr. Allison rendered inadequate medical attention following the use of force incident because Dr. Allison failed to diagnose the ulnar nerve damage later diagnosed at John Sealey hospital. Burrell was promptly taken to Dr. Allison following the incident, and Dr. Allison took X-rays before determining that Burrell did not have any particularly serious injury. Unsuccessful treatment and disagreement with the quality of treatment do not give rise to a cause of action under § 1983. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). The later different diagnosis does not indicate that Dr. Allison was deliberately indifferent to Burrell's medical needs, but rather at most would indicate only a negligent misdiagnosis. Claims of negligence or malpractice are not actionable under § 1983. Fielder v. Bosshard, 590 F.2d 105, 107 (5th Cir. 1979).

Finally, even if Langford and McCrary were still defendants in the action by virtue of their being named in the original complaint, dismissal as to them would have been appropriate based on Burrell's failure to serve them, as previously discussed.

Burrell states in his appellate brief that the attorney appointed to represent him did so ineffectively. The Sixth Amendment guarantee of effective assistance of counsel does not apply to civil litigation. Sanchez v. U.S. Postal Serv., 785 F.2d 1236, 1237 (5th Cir. 1986).

For these reasons, the judgment of dismissal entered by the district court and its denial of reconsideration are **AFFIRMED**.