UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-5694
Summary Calendar

LUCIEN JULES GUIDROZ,

Plaintiff-Appellant,

VERSUS

JIM MATTOX, Attorney General
for the State of Texas, Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-90-CA-403)

(February 24, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

This suit stems from Guidroz's murder prosecution and subsequent commitment to a state mental hospital pursuant to Tex. Code Crim. Proc. Ann. art. 46.03. Guidroz killed his wife on July 4, 1976 by stabbing her 23 times with a knife and then slashed his own wrists. See Guidroz v. Lynaugh, 852 F.2d 832, 833 (5th Cir. 1988). Guidroz was initially determined incompetent to stand trial, and after the second competency hearing, his attorney and the prosecutor signed a stipulation to the effect that he was insane at the time of the offense. Id. However, he was subsequently

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

determined competent to stand trial, was tried on the murder charge, and was found guilty by a jury. Guidroz was sentenced to 99 years in prison. His conviction was affirmed by the Texas Court of Appeals, and two state habeas petitions were denied. Id. See Guidroz v. State, 679 S.W.2d 586 (Tex. App. - San Antonio 1984, pet. ref'd). Guidroz filed a petition for writ of habeas corpus in federal court, which was granted by this Court. Guidroz, 852 F.2d at 840. This Court found that the prosecutor improperly argued that the jury should ignore the stipulation that Guidroz was insane at the time of the offense, and that the prosecutor's improper arguments prejudiced Guidroz's defense and deprived Guidroz of fundamental fairness at his trial. Id. at 836-37. This Court remanded for issuance of the writ, but stated that this holding did not preclude a retrial conducted in a manner consistent with due process. Id. at 840. Guidroz was retried and found not guilty by reason of insanity and was committed to Vernon State Hospital by Order of Extended Commitment after Acquittal by Reason of Insanity.

Subsequently, Guidroz filed this action under 42 U.S.C. § 1983 against Bill Blagg and Beth Taylor, assistant district attorneys (ADAs) in Bexar County, Texas; Judge Pat Priest and Judge Peter M. Curry, district judges in the 187th district of Bexar County; Dennis R. Jones, commissioner of Texas Department of Mental Health and Mental Retardation; Dr. Don Gilbert, interim superintendent of Vernon State Hospital; and the State of Texas, through Attorney General Jim Mattox, alleging malicious prosecution and false imprisonment. The defendants were served and all filed motions to dismiss on various grounds, including absolute, qualified, and Eleventh Amendment immunity. The district court dismissed all defendants for the following reasons: State of Texas - Eleventh Amendment immunity; Judges Priest and Curry - absolute judicial immunity; ADA Blagg - absolute prosecutorial immunity; ADA Taylor - both absolute prosecutorial and qualified immunity; and Jones and Gilbert - immunity.

Malicious Prosecution Claim

Guidroz's malicious prosecution claim cannot survive the claims of absolute immunity afforded to judges and prosecutors under our law. Consequently, we affirm, forthwith, the trial

court's order of dismissal as to Judge Pat Priest, Judge Peter M. Curry, and the prosecutors Bill Blagg and Beth Taylor. Similarly, the claim of Eleventh Amendment immunity in favor of the State of Texas, who was sued through its then attorney general, Jim Mattox, is a clear and sufficient bar to the claims of malicious prosecution and false imprisonment asserted by Guidroz herein; and we summarily affirm the trial judge's dismissal of the State of Texas on those grounds.

The remaining defendants, Doctor Don Gilbert, interim superintendent of Vernon State Hospital, and Dennis R. Jones, commissioner of Texas Department of Mental Health and Mental Retardation, would of course have no factual connection whatsoever with the claim of malicious prosecution; and, if they have any liability whatsoever, it would be under the claim of false imprisonment. However, we are not persuaded that Guidroz has stated a claim for false imprisonment. Guidroz complains of the fact that although the review board has determined that he is not manifestly dangerous, the Commissioner, at the urging of ADA Taylor, disagrees with the board's determination and continues to confine him at the maximum security hospital instead of transferring him to a minimum security facility. Guidroz is committed to Vernon State Hospital under the authority of Texas Code of Criminal Procedure Article 46.03, which provides for involuntary commitment of persons found not guilty of criminal charges by reason of insanity. Section 4(b) of art. 46.03 provides for transfers from maximum security to nonsecurity facilities.

> (b) Commitment to Maximum Security Unit; Transfer to Nonsecurity Unit. A person committed to a mental health or mental retardation facility as a result of the proceedings initiated pursuant to Subsection (d) of this section shall be committed to the maximum security unit of any facility designated by the Texas Department of Mental Health and Mental Retardation. Within 60 days following arrival at the maximum security unit, the person shall be transferred to a nonsecurity unit of a mental health or mental retardation facility designated by the Texas Department of Mental Health and Mental Retardation unless the person is determined to be manifestly dangerous by a review board within the Texas Department of Mental Health and Mental Retardation. The Commissioner of Mental Health and Mental Retardation shall appoint a review board of five members ... to determine whether the person is manifestly dangerous. If the superintendent of the facility at which the maximum security unit is located disagrees with the determination, then the matter will be referred to the Commissioner of Mental Health and Mental Retardation who will resolve the disagreement by deciding whether

the person is manifestly dangerous.

Tex. Code Crim. Proc. Ann. art. 46.03, Sec. 4(b)(West 1992).

We are not persuaded that this provision creates a constitutionally protected liberty interest in being transferred from a maximum security to a nonsecurity facility. The cases dealing with whether the Texas parole statute creates a liberty interest provide an analogy. In those cases, this Court had held that the Texas parole statute does not create a constitutionally protected expectancy of release because of the discretionary nature of the authority to decide if a prisoner will be released on parole. See Williams v. Briscoe, 641 F.2d 274, 277 (5th Cir.), cert. denied, 454 U.S. 854 (1981); Creel v. Keene, 928 F.2d 707, 712 (5th Cir.), cert. denied, 111 S. Ct. 2809 (1991). Further, convicted prisoners have no right to challenge classifications to maximum security units. Tubwell v. Grffith, 742 F.2d 250, 251 (5th Cir. 1984). A prison inmate does not have a protectable liberty or property interest in his custodial classification. Moody v. Baker, 847 F.2d 256, 257 (5th Cir.), cert. denied, 488 U.S. 985 , 109 S. Ct. 540, 102 L. Ed. 2d 570 (1988); and prisoner's disagreement with his medical classification is insufficient to establish a constitutional violation. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Finally, the State is not required to permit a prisoner who is categorized as a mental patient to attend classes and religious services with the general prison population. Green v. McKaskle, 788 F.2d 1116, 1125 (5th Cir. 1986); and Wilson v. Budney, 976 F.2d 957 (5th Cir. 1992). While Section 4(b) of Article 46.03 quoted above does use some mandatory language such as "shall be transferred unless determined to be manifestly dangerous," the statute clearly gives discretion to the Commissioner to resolve any disagreement between the review board and the superintendent of the facility regarding the particular type of facility to which a person committed to a mental-health facility will be assigned. We hold therefore that the false imprisonment claim asserted by Guidroz herein, i.e. he was incorrectly required to remain at a high security facility when he was entitled to be moved to a low security facility, does not state a claim of constitutional magnitude reachable under 42 U.S.C. § 1983.

On appeal Guidroz has filed a motion for appointment of counsel and for oral argument. He

previously requested appointment of counsel in the district court, which was denied. There is no general right to counsel in civil rights actions. Branch v. Cole, 686 F.2d 264, 266 (5th Cir. 1982). To determine whether appointment of counsel is proper in a suit brought under § 1983, the Court should consider the type and complexity of the case; whether the indigent is capable of adequately presenting the case; whether the indigent is in a position to investigate the case adequately; and whether the evidence will consist in large part of conflicting testimony requiring skill in the presentation of evidence and in cross-examination. Ulmer v. Chancellor, 691 F.2d 209 (5th Cir. 1982). In is apparent from Guidroz's pleadings in the district court and the motions and briefs filed with this Court that he is able to represent himself adequately. Guidroz has demonstrated that he is familiar with the facts and can express his allegations in an understandable manner. We conclude, therefore, that there are no exceptional circumstances to warrant the appointment of counsel in this case, and, accordingly, deny Guidroz's motion for appointment of counsel and oral argument.

On appeal Guidroz has also filed a motion to subpoena his medical records at Vernon State Hospital. A court of appeals will not ordinarily enlarge the record on appeal to include material not before the district court. Kemlon Products and Development Co. v. United States of America, 646 F.2d 223 (5th Cir.), cert. denied, 454 U.S. 863 (1981). The medical records which he asks this Court to subpoena and consider in deciding his appeal were not before the district court and we decline, therefore, to grant his motion in that regard.

The judgment of the trial court is AFFIRMED.