UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-5743
Summary Calendar

DAMIAN ESCALANTE, JR.,

Plaintiff-Appellant,

versus

HARLON COPELAND, Sheriff
and DR. JOHN C. SPARKS,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas
SA 90 CA 781

(April 29, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-Appellant, Damian Escalante, Jr. (Escalante), appeals the district court's grant of summary judgment in favor of defendants-appellees, Harold Copeland (Copeland) and John C. Sparks (Sparks), dismissing Escalante's claim that he was denied proper

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

medical treatment by defendants as a pretrial detainee and later as a convicted felon, in violation of 42 U.S.C. § 1983. We affirm.

Facts and Proceedings Below

On October 19, 1989, Escalante was arrested and detained in the Bexar County (Texas) Adult Detention Center (BCADC). On the day of his arrest, Escalante informed prison officials that he was still impaired by a 1977 back injury. The next day he requested a heat pad, a second mattress, and the opportunity to take hot showers. Escalante was examined by a prison physician who prescribed Motrin and Robaxin, but denied Escalante's other requests. Over the next few weeks, Escalante was treated by prison physicians and physicians' assistants on several different occasions. His prescriptions were changed, but he was not given a second mattress.

On November 13, 1989, in response to Escalante's further complaints of pain, a prison doctor referred Escalante to the emergency room at the county hospital. Escalante refused treatment there, asking to be admitted to a Humana hospital instead. This request was denied by prison officials. On November 17, Escalante complained that he could not move. He was taken to the county hospital emergency room and diagnosed with chronic back pain. The treating doctor prescribed Vicodin, Flexeril, heat pad therapy, and bedrest on a soft mattress. Escalante received the new drugs, but was not given a second mattress. It is unclear whether he received a heating pad.

Escalante continued to complain. He filed a jail grievance stating that his medication was lost. The grievance was addressed,

and he was given some, but not all, of his requested medications. Although an orthopedic appointment was scheduled in late December, 1989, Escalante was released from BCADC on December 4, 1989.

Because of his conviction, Escalante returned to BCADC in March of 1990. He again complained of back pain. From March through July of 1990, the prison physicians or their assistants treated Escalante on several different occasions, prescribing a combination of Motrin, Flexeril, Robaxin, and/or Indocin, but still not ordering a second mattress. During this period, Escalante's pain became more acute. In response to a jail grievance filed by Escalante on May 13, 1990, an orthopedist appointment was scheduled for July 11. Prison officials cancelled this appointment due to problems transporting Escalante. No new appointment was scheduled.

In August 1990, Escalante filed another jail grievance complaining about his lack of medical care and twice sought emergency medical reprieves. His prescriptions were continued, but no other treatment was rendered. Escalante was transferred from BCADC to the Texas Department of Criminal Justice (TDC) on September 7, 1990. Escalante does not complain about his treatment at TDC.

Pursuant to a Bench Warrant, Escalante returned to BCADC in March 1991 for a brief period where he again complained about his care, filing a jail grievance and requesting prescriptions and an appointment with an orthopedist or neurologist.

On July 17, 1990, Escalante filed a complaint under 42 U.S.C. § 1983 naming only Sparks and Copeland as defendants. Sparks is the medical director at BCADC. The BCADC doctors who treated

Escalante were not made defendants in this suit. Copeland is the sheriff in charge of the prison. Escalante's suit primarily complains that he had been refused proper medical attention.

Sparks and Copeland moved to dismiss the suit. The magistrate converted the motions to dismiss into motions for summary judgment, giving Escalante a detailed explanation of what a motion for summary judgment is, how to respond to one, and the legal standards involved in this case. Copeland and Sparks filed affidavits with the court, but Escalante did not. The magistrate recommended granting summary judgment.

Escalante responded with a "motion not to dismiss" supplemented by two affidavits. He complained that his medical care was insufficient and that he was only able to use the law library six to eight hours a week and denied sufficient paper and supplies for his case.

After a *de novo* review of the record, the district court granted summary judgment in favor of both defendants on the grounds that both were protected by qualified immunity and that Escalante was not provided constitutionally inadequate medical care. Escalante filed a motion for reconsideration supplemented by affidavits in which he again complained of his medical treatment and raised several other issues. This motion was denied. Escalante appeals.

Discussion

A party moving for summary judgment is entitled to a judgment where no genuine issue of material fact is in dispute and the movant is entitled to a judgment as a matter of law. FED. R. CIV.

P. 56. Under *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986), when the party opposing a motion for summary judgment bears the burden of proof at trial on an essential element of the case and does not make by summary judgment evidence of record a showing of the existence of that element sufficient to sustain a verdict in his favor thereon, summary judgment may be entered against that party. Since Escalante bears the burden of proof as plaintiff, to survive summary judgment, he must establish by summary judgment evidence timely placed of record facts supporting all the elements of his cause of action against each defendant as alleged in his pleadings.[1]

The key elements under section 1983 that Escalante must establish are that a constitutional violation occurred and that the named defendants were responsible for the violation. Escalante alleged that both his Fourteenth and Eighth Amendment rights were infringed. Under the Fourteenth Amendment, "[P]retrial detainees are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective." *Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987); *Fields v. City of South Houston*, 922 F.2d 1183, 1191 (5th Cir. 1991); *Bell v. Wolfish*, 99 S.Ct. 1861, 1871-1874, 1886 (1979). More than mere negligence must be shown to establish the liability of an individual in a section 1983 action based on a due process

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[1] Our review is *de novo* in summary judgment cases. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). Summary judgment evidence includes all types of evidence listed in Federal Rule of Civil Procedure 56(c) except the mere pleadings themselves. *Celotex*, 106 S.Ct. at 2553.

violation.[2] *Feagley v. Waddill*, 868 F.2d 1437, 1440 (5th Cir. 1989). A detainee's medical care is not unreasonable when he receives legitimate and continuous treatment, even when that treatment is unsuccessful. *Mayweather v. Foti*, 958 F.2d 91 (5th Cir. 1992). For example, a detainee's medical care could, under appropriate circumstances, be found unreasonable "if he told jail authorities that he needed his prescribed medication . . . and if they did not have him examined or otherwise adequately respond to his requests." *Thomas v. Kipperman*, 846 F.2d 1009, 1011 (5th Cir. 1988).

Under the Eighth Amendment, prison officials owe a duty of care to imprisoned convicts that is similar to the Fourteenth Amendment's duty to pretrial detainees. *Cupit*, 835 F.2d at 85 (a distinction without a difference). "In order to state a cognizable claim, 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). Deliberate indifference is established by the delay or denial of appropriate medical care or through the unnecessary infliction of pain. *Id.* at 291. The denial of recommended care may, in some situations, reflect deliberate indifference. *Payne v. Lynaugh*, 843 F.2d 177, 178 (5th Cir. 1988). As under the Fourteenth Amendment, the fact that a particular treatment is unsuccessful does not of itself give

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[2] We note that there were no allegations that the prison, as an institution, or Copeland, as sheriff, or Sparks, as BCADC medical director, had any policies, formal or informal, allowing (or requiring) the denial of reasonable medical care to pretrial detainees. *Bell*, 99 S.Ct. at 1871-86.

rise to a section 1983 action. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). That a prisoner disagrees with the course of treatment does not make the treatment improper or negligent. *Id.*

Escalante claims that his medical care was constitutionally insufficient because he did not receive a second mattress, a heat pad, or an expert opinion. While the deprivation of these forms of treatment arguably may have been negligent, as the medical records tend to show that a heat pad and an expert consultation were appropriate, these deprivations do not reflect a deliberate indifference on the part of the prison doctors to Escalante's serious medical needs. Almost every time that Escalante complained of back pain, he was examined by a physician or physician's assistant who prescribed the necessary treatment including medication. The medical records reveal that Escalante was treated by at least four doctors who basically agreed with his course of treatment. *Compare Payne*, 843 F.2d at 178. Escalante offered no evidence that the medical care he did receive was unreasonable or reflected deliberate indifference by his treating physicians. Similarly, the denial of the additional treatments that he requested were also not constitutionally unreasonable or based on deliberate indifference.

Even if Escalante's rights were violated, Escalante still would have to show that the named defendants were responsible for the constitutional violation. The responsibility to provide medical care is primarily with the actual treating physicians and the prison officials who personally and directly control prisoner access to medical facilities. *Thompkins v. Belt*, 828 F.2d 298, 303

(5th Cir. 1987). Those individuals whose own actions deprive a prisoner or detainee of appropriate care are potentially liable under section 1983 (subject to the defense of qualified immunity in appropriate circumstances). *Id.* Also, under *Monell v. Department of Social Services*, 98 S.Ct. 2018, 2037 (1978), supervisory officials who maintain an implicit or explicit policy of mandating or tolerating improper conduct by their subordinates may be liable. *See Thompkins*, 828 F.2d at 304-05. The mere fact that one holds a supervisory position does not establish liability under section 1983. Supervisors who are personally involved with a particular prisoner are liable for their own unconstitutional actions concerning that prisoner. *Id.*

Escalante has not offered summary judgment evidence of facts showing that Sparks and Copeland personally in any way contributed to his alleged mistreatment. Escalante has also not shown that Sparks, as medical director, and/or Copeland, as sheriff, had any kind of policy supporting, tolerating or causing the mistreatment of prisoners' medical conditions. No pattern of improper prisoner medical care was shown. Sparks had little direct contact with Escalante, and Copeland had none. Sparks examined and treated Escalante a couple of times and was responsible for addressing some of Escalante's grievances (which he did). We note that the physicians who treated Escalante on a regular basis were not defendants in this suit. The fact that the jail staff at large may have been negligent in caring for Escalante does not make Sparks or Copeland liable in their supervisory capacities. *See Thompkins*, 828 F.2d at 303.

Even if the facts that Escalante alleged are true, since no summary judgment evidence established the essential elements of his cause of actionsQthat he received unreasonable medical care, that care was provided with deliberate indifference, or that Sparks and Copeland had any substantial involvement in his medical treatment sQdefendants are entitled to a summary judgment on this claim.

Escalante raises four additional claims. First, he contends that BCADC denies inmates, including himself, the right of access to the courts and to law books. Inmates have a constitutional right of access to the courts under which prison officials are obligated to provide adequate law libraries or other equivalent aid such as the assistance of trained legal counsel. *Bounds v. Smith*, 97 S.Ct. 1491, 1499 (1977). To prevail on a claim of denial of access to the courts, a prisoner must show actual prejudice. *Henthorn v. Swinson*, 955 F.2d 351, 354 (5th Cir.), *cert. denied*, 112 S.Ct. 2974 (1992). Escalante's claim is without merit. Although his access to law materials may have been limited and some of his materials stolen, he has been able to pursue all of his claims and has submitted researched briefs to both the district court and this court.[3] He has made no showing with summary judgment evidence that BCADC actually impaired his access to the courts or prejudiced this or any other action.

Second, Escalante contends that BCADC officials retaliated against him after he filed his complaint. This allegation was entirely conclusory. No specific facts supporting this claim were

[3] And, he made no showing that his ability to offer summary judgment evidence was impaired by prison officials.

alleged. *See Whittington v. Lynaugh*, 842 F.2d 818, 819 (5th Cir.), *cert. denied, sub nom Johnson v. Lynaugh*, 109 S.Ct. 108 (1988). Consequently, this claim was properly dismissed.

Third, he contends that BCADC was overcrowded; was a fire hazard; had sanitation problems including inadequate plumbing; had inadequate food-handling procedures; and followed safety practices that were inadequate under state law. Additionally, he complained that he was forced to tolerate excess amounts of tobacco smoke. All of these problems, he complains, amount to cruel and unusual punishment under the Eighth Amendment. To survive summary judgment, Escalante must offer facts showing that prison officials were deliberately indifferent to prison conditions. *Wilson v. Seiter*, 111 S.Ct. 2321, 2327 (1991). Escalante offered no facts supporting these contentions. Even if prison conditions amounted to cruel and unusual punishment, Escalante has not shown that Copeland and Sparks were responsible for the conditions. These claims were properly dismissed.

Fourth, Escalante complains that while he was a pretrial detainee, he was placed in a cell with a blind prisoner named Vega who continually beat him and that prison officials are responsible for these injuries under section 1983. Under *Cupit*, 835 F.2d at 85, the conditions surrounding pretrial detention cannot be imposed for purposes of punishment. Escalante did not offer facts showing that he was placed in Vega's cell for purposes of punishment and he also did not show how the named defendants, Sparks and Copeland, were responsible for this condition. Escalante was eventually moved from his cell with Vega as a result of his complaints.

Because Escalante again failed to allege or proffer any specific facts supporting this claim, this claim was properly dismissed.

Conclusion

Escalante has failed to offer sufficient summary judgment proof in support of any of his claims. Accordingly, the judgment of the district court is

AFFIRMED.