UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-7111
Summary Calendar

Alvin Ray Cooper,

Plaintiff-Appellant,

VERSUS

Sheriff of Lubbock County, Texas, et al.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas
(CA-5-90-16-C)

(February 17, 1993)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge[*]:

Prisoner brought this Section 1983 suit against the sheriff and others for violating his civil rights after he was denied food for failure to follow prison dress rules. The jury found in favor of the defendants and the prisoner appealed arguing among

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

other things, insufficient evidence to support the jury verdict. For the following reasons, we affirm the judgment on the jury verdict.

I.

Facts and Prior Proceedings

Plaintiff-appellant Alvin Ray Cooper, a Texas state prisoner proceeding pro se, sued officials at the Lubbock County Jail pursuant to Section 1983 of Title 42 contending that they had unconstitutionally deprived him of food in violation of the eighth amendment and due process. Specifically, Cooper asserted that he was deprived of food as a consequence of his failure to comply with the jail's dress rule set forth in the inmate handbook. The rule states that, "All inmates will be fully dressed for all meals." Cooper claimed that for approximately thirteen days[1] he was denied food because he refused to wear his pants or shirt during meal time. Cooper asserted that it was unnecessary to dress because he was essentially in solitary confinement and was forced to eat in his cell anyway. The district court originally dismissed this action pursuant to Fed. R. Civ. P. 12(b)(6), and this Court vacated that disposition. **Cooper v. Sheriff, Lubbock County, Texas,** 929 F.2d 1078 (5th Cir. 1991). On remand, the case proceeded to a jury trial. Cooper represented himself at trial and the jury found in favor of the defendants. Cooper filed a motion for new trial alleging

[1] Cooper alleges that he was deprived of food a total of thirteen days. The longest continuous time period was between January 16 and January 21.

insufficient evidence, improper juror contact, and improper jury instructions. The district court denied his motion for new trial. Cooper timely appealed to this Court and essentially argues that he should have been granted judgment notwithstanding the verdict because the defendants conceded during trial that they withheld his food which violates clearly established law. Cooper argues that the defendants' actions contravened well-established law that prison officials must provide inmates with the necessities of life, including food. Cooper also argues that the jury instructions on cruel and unusual punishment did not state the accurate law and the that he should have been granted a mistrial based on improper contact between the jury foreman and one of the defendants.

II.

Standards of Review

More often than not, pro se prisoner claims are difficult to decipher, and Cooper's claims are no exception. Essentially, Cooper asks us to review the soundness of a judgment predicated on a jury verdict. Although Cooper's claims in his motion for new trial mirror those that might be raised in a motion for judgment notwithstanding the verdict, he lacked a proper predicate to make a motion for judgment notwithstanding the verdict. According to Rule 50(b) of the Federal Rules of Civil Procedure, a party may only base a motion for judgment notwithstanding the verdict on a ground that he included in a

prior motion for directed verdict at the close of all the evidence. **See** Fed. R. Civ. P. 50(b).[2] Since Cooper did not move for a directed verdict, our review of the district court's denial of his motion for new trial (on insufficiency of the evidence grounds) is extremely limited. We review denials of motions for a new trial under an abuse of discretion standard. **Bailey v. Daniel**, 967 F.2d 178, 180 (5th Cir. 1992). The district court abuses its discretion by denying a new trial only when there is an "absolute absence of evidence to support the jury's verdict." **Cobb v. Rowan Companies, Inc.**, 919 F.2d 1089, 1090 (5th cir. 1991) (quoting, **Irvan v. Frozen Food Express, Inc.**, 809 F.2d 1165, 1166 (5th Cir. 1987)); **See Hinojosa**, 834 F.2d at 1228. Cooper's allegation of improper juror contact made in his motion for new trial is also reviewed for abuse of discretion. **Martinez v. Food City, Inc.**, 658 F.2d 369, 372 (5th Cir. Unit A Oct. 1981).

We now consider Cooper's claims in light of the standards discussed above.

III.

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[2] This rule has been liberally construed, however, in certain circumstances, to permit the granting of a motion for judgment notwithstanding the verdict where a motion for directed verdict was made at the close of the plaintiff's case but was not renewed at the close of all the evidence or where the moving party objected to the court's jury instructions on grounds that there was no evidence to support a claim but failed to move for a directed verdict on that claim. **Hinojosa v. City of Terrell, Texas**, 834 F.2d 1223, 1228 (5th Cir. 1988)(citations omitted). Cooper did not move for a directed verdict at any stage in the trial, nor did he object to the jury instructions at any time.

Discussion

A. Jury Verdict

Cooper basically asserts that he should have been granted a directed verdict or judgment notwithstanding the verdict because the defendants conceded that they withheld food from him. Cooper appears to argue that any denial of food is a per se violation of a prisoner's eighth amendment rights.

We are reviewing the denial of Cooper's motion for new trial which was based on insufficient evidence to support the jury verdict in favor of the defendants. If there is **any** evidence to support the jury's verdict, irrespective of its sufficiency or if there is no plain error which would result in a manifest miscarriage of justice, then we must affirm the district court's denial of the motion for new trial. **Hinojosa**, 834 F.2d at 1228. In order to find a violation of the eighth amendment, Cooper was required to prove that (1) the defendants acted with intent to cause him harm or with deliberate indifference to the harm he would suffer and (2) the defendant's continual refusal to give him his meals resulted in unnecessary and wanton infliction of pain. **See Cooper**, 929 F.2d at 1083. After an exhaustive search of the record, we find that there was some evidence presented at trial that Cooper suffered no wanton infliction of pain. Specifically, testimony from prison employees showed that Cooper plotted with others to design a situation which he could use to file a lawsuit against the prison, yet avoid any suffering which the design might encompass. For example, testimony showed that Cooper began the

filing process for this lawsuit before he had ever been deprived of food between January 16 and January 21. In addition, there was testimony that Cooper prepared for his self-imposed hunger strike by inducing the prisoner located in the next cell to purchase over $200.00 worth of snack food from the prison commissary between December 25 and January 16. On at least one documented occasion, prison employees caught Cooper and the prisoner in the adjacent cell passing potato chips and a Snickers bar between the cells. Also, there was testimony by the prison nurse that Cooper showed no signs of malnutrition or dehydration from his alleged thirteen day fast. In addition, Cooper was examined by a physician twice between January 16 and January 21. The physician's report indicated no sign of malnutrition or dehydration. Indeed, testimony from the prison nurse indicated that Cooper's mental state was excellent, citing examples of his jovial disposition as he was examined. We do not imply that the prison officials could have withheld food from Cooper indefinitely, however, there was evidence presented during trial that the jury could have used to conclude that Cooper suffered no wanton infliction of pain. Therefore, we find no abuse of discretion in denying Cooper's motion for new trial nor do we find any plain error.

B. Improper Juror Contact

Cooper asserts that he should have been granted a mistrial based on improper contact between the jury foreman and one of the defendants. Cooper raised this issue in his motion for new trial and the district court solicited the defendants to procure

affidavits from any juror who had a conversation with the particular defendant. One juror indicated that during a recess, he had a conversation with defendant Don Addington about a mutual acquaintance. The juror attested that there was no discussion about the case and that the conversation lasted less than a couple of minutes. The juror also attested that he did not reveal the conversation to other jurors nor did it influence the juror's deliberations.

The decision whether to grant a new trial motion based on improper juror contact is committed to the discretion of the district court, and the discretion extends to the procedures appropriate for investigating the allegations. **Martinez**, 658 F.2d at 372. In this case, the affidavits indicate that there was no improper influence exercised on the jury's verdict by the conversation. The district court did not abuse its discretion.

C. Jury Instructions

In order to preserve the right to complain about jury instructions on appeal, a party must timely object to the perceived error. "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51.[3] In this case, Cooper did not object to the charge and in

[3] There are exceptions to this rule. For example, if Cooper had made his position clear in the charge conference that he found error in the jury instruction and it was plain that further objection would have been unavailing, then further objection may not have been necessary to preserve error for appeal. **See Crist**

addition, the charge correctly stated the applicable eighth amendment standard.[4] Therefore, we find no abuse of discretion by the district court.

D. The First Cooper opinion

Finally, Cooper argues that the finding in the first **Cooper**[5] opinion, that his allegations did state a claim, is tantamount to a finding that he is entitled to relief. He argues throughout his brief that the district court is in violation of the first **Cooper** opinion because the district court did not enter a judgment in his favor. A finding in the first **Cooper** opinion that his allegations did state a claim upon which relief could be granted does not equate with a finding that he is entitled to relief. In fact, this Court in remanding the case specifically noted that it was not "stating or implying any opinion as to the ultimate merits of Cooper's case." **Cooper**, 929 F.2d at 1084. Accordingly, we are not

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v. Dickson Welding, Inc., 957 F.2d 1281, 1287 (5th Cir. 1992). In addition, a reviewing court may still reverse if the error committed by the district court is so fundamental as to result in a miscarriage of justice. **Sandidge v. Salen Offshore Drilling Co.**, 764 F.2d 252, 262 (5th Cir. 1985). We do not find such a situation in the present case since the jury instructions in the case were a correct statement of the applicable eighth amendment standard.

[4] The court instructed that, in order to find a violation of the eighth amendment, the plaintiff was required to prove that:

> (1) the defendants acted with intent to cause him harm or with deliberate indifference to the harm he would suffer, and
> (2) the defendants continual refusal to give him his meals resulted in unnecessary and wanton infliction of pain.

See Cooper, 929 F.2d at 1083; **see also Beck v. Lynaugh**, 842 F.2d 759, 761 (5th Cir. 1988).

[5] **Cooper**, 929 F.2d 1078.

persuaded by Cooper's final argument.

IV.

Conclusion

Finding no merit in Cooper's claims, we affirm the district court.