

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1685

Summary Calendar

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STEWART LLEWELLYN MCGLINCHEY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,

Respondents-Appellees.

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Appeal from the United States District Court  
for the Northern District of Texas  
3:90 CV 0755 T

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June 23, 1993

( )

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

I.

On March 29, 1990, Stewart L. McGlinchey filed this suit seeking an order which would require the Bureau of Prisons to remove a disciplinary report from his BOP file. McGlinchey also alleged that he was put in a "life threatening situation" and denied "life sustaining medicine" as a result of the allegedly

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

groundless disciplinary report. McGlinchey was permitted to proceed in forma pauperis.

In his motion for summary judgment, McGlinchey stated that the disciplinary report followed the discovery of a butter knife in his laundry bag. He alleged that he was "set-up" by another inmate who had unsuccessfully tried to swindle him out of some jewelry. Upon finding the knife, prison officials "handcuffed him, took all medications away from him, and forced him to walk up a steep set of stairs to the segregation unit after being advised of the Plaintiff's medical conditions." He alleged that he remained in the segregation unit from May 12, 1989, until May 16, 1989.

McGlinchey states that he has had two heart attacks and has diabetes. He alleged that his medication for these conditions, including nitroglycerine, was denied him for over 36 hours. He also alleged that the bottle of medication states "do not take from patient." After he was found guilty by the Unit Disciplinary Committee, McGlinchey was assigned 20 hours extra duty.

The magistrate judge concluded that McGlinchey should be denied all relief requested by him. The magistrate judge reasoned that even accepting all of McGlinchey's Eighth Amendment allegations as true, he had not met his burden of showing that a defendant acted with deliberate indifference to his serious medical needs. The magistrate judge also reasoned that the thrust of McGlinchey's disciplinary complaint was that the disciplinary committee did not accept his version of the facts, not that the proceeding was conducted in an unconstitutional manner. The

district court adopted the report and recommendation of the magistrate judge. McGlinchey appealed.

## II.

The district court dismissed McGlinchey's complaint before the United States was served with the complaint. Although the district court did not expressly state that McGlinchey's claims were "frivolous," the court's dismissal prior to service is treated as a dismissal under 28 U.S.C. § 1915(d). See Holloway v. Gunnell, 685 F.2d 150, 152 (5th Cir. 1982). This court may sustain such a dismissal if the complaint is facially frivolous, in that it lacks an arguable basis in law or fact. Denton v. Hernandez, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1728, 1733-34, 118 L.Ed.2d 340 (1992).

McGlinchey contends that the BOP should remove a disciplinary report from his BOP file. He does not challenge the fact or duration of his confinement, and the disciplinary hearing of which he complains did not lengthen his sentence.<sup>1</sup>

McGlinchey does not allege a violation of federal law. He does not argue that he did not receive due process of law or that his administrative hearing was inadequate. His complaint is largely an attempt to try again the disciplinary committee's finding of guilt.

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<sup>1</sup>In Brown, 528 F.2d at 1053, this court stated that if an agency is subject to the requirements of the Administrative Procedure Act; 5 U.S.C. § 551 et seq, it must comply with the statutory requirements of the Act. The Circuits are split as to whether the APA applies to the BOP. See White v. Henman, 977 F.2d 292, 294 (7th Cir. 1992); Clardy v. Levi, 545 F.2d 1241, 1245 (9th Cir. 1976). The Supreme Court has declined to address the issue. See Bell v. Wolfish, 441 U.S. 520, 529 n.11, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

Federal courts only require of a finding of guilt by a state prison disciplinary hearing that it be supported by "some facts" or "any evidence at all." Gibbs v. King, 779 F.2d 1040, 1044 (5th Cir.), cert. denied, 476 U.S. 1117 (1986). Assuming arguendo that the BOP is subject to the APA, review of the BOP's actions under the APA is limited to whether the BOP's action was "so unlawful as to make the prisoner's custody in violation of the laws of the United States." See Brown, 528 F.2d at 1054. McGlinchey admits that the knife was in his bag. Under either standard, the disciplinary committee's failure to accept McGlinchey's assertion that he was "set-up" did not render the hearing unconstitutional or unlawful. Therefore, that portion of the district court's judgment dismissing McGlinchey's demand to remove the disciplinary report from his prison record is affirmed.

McGlinchey contends that prison officials denied his constitutional rights by depriving him of his prescribed medications. Because McGlinchey is proceeding pro se, his complaint must be construed liberally. See Haines v. Kerner, 404 U.S. 519, 520 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). McGlinchey seeks "any other judicial relief he is so entitled because of such treatment." Construed liberally, McGlinchey has stated a claim under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

A Bivens Eighth Amendment claim is properly analyzed under the standards annunciated in Estelle v. Gamble, 429 U.S. 97, 105-06, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). See Holloway, 685 F.2d at 155-

56. That is, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. Estelle, 429 U.S. at 105-06.

The magistrate judge recommended dismissing McGlinchey's Eighth Amendment claim because McGlinchey alleged nothing to suggest that he suffered any actual harm or injury. In Moore v. Patterson, No. 90-1883 (5th Cir. Jan. 26, 1993) (unpublished; copy attached), this court addressed a similar issue. Moore alleged that he was denied adequate medical treatment because he was not permitted to keep his nitroglycerin in his cell. This court held that, given the legitimate interest behind the prison's medication policy and absent any allegation of injury resulting from that policy, there had been no violation of Moore's constitutional rights. We agree with the recommendation by the magistrate judge.

AFFIRMED.