UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1828
Summary Calendar

REGINALD SLACK,

Plaintiff-Appellant,

versus

DON CARPENTER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas
(4:92-CV-616-A)

(January 5, 1992)

Before POLITZ, Chief Judge, JOLLY and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Reginald Slack, a Texas state prisoner, appeals the failure-to-prosecute dismissal of his *pro se in forma pauperis* civil rights action against two prison guards. For the reasons assigned, we vacate and remand.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Slack alleges that two prison guards used excessive force against him in violation of the eighth and fourteenth amendments. Such a claim is redressable in a civil action under 42 U.S.C. § 1983.

In his complaint Slack alleges that on June 29, 1990, at approximately 4:00 a.m., he was taken from his cell in the Tarrant County Jail and placed in a temporary holding cell which did not have a bed. After approximately 35 minutes he says that he pressed an emergency button to request a bed. Deputy Elvin Taylor responded and a verbal exchange resulted. Slack alleges that Taylor said that he also was tired and that Slack should not complain. Slack countered that if Taylor was tired he at least was being paid and that he was there in the jail by choice. Taylor allegedly then threw Slack's clean clothes on the floor and told Slack to shut up. Slack's final contribution to the conversation allegedly was "[you] can't tell me to shut up, or make me" shut up and "[you] can't put your hands on me." According to Slack, and much to his chagrin, Taylor proved him wrong on both counts. Taylor is said to have concluded the discussion by telling Slack that he was in need of "an 'attitude adjustment.'"

Taylor then opened the cell door, entered the cell, and allegedly grabbed Slack by the throat and slammed him into the wall with force sufficient to cause Slack's head to strike the wall. According to Slack's allegations, Taylor then punched him in the face and threw him to the floor. Slack claims that he did not

resist or offer any physical threat to the officers or other inmates. Slack further claims that Deputy Charles Pruitt assisted and encouraged Taylor. Slack alleges injury to his neck, rib cage, and ear, as well as mental anguish as a direct result of the incident.

The district court determined that Slack had not met the likely defense of qualified immunity and ordered him to detail his factual claims. Slack responded as set forth above, with the facts as related in his original complaint. The court dismissed the complaint under Rule 41(c) for failure to prosecute. There was no **Spears**[1] hearing; Slack had requested one. Slack timely appealed.

Analysis

A civil rights plaintiff must be prepared to plead with particularity whenever the action raises the likely issue of qualified immunity.[2] In order to state a viable claim, the plaintiff must allege specific facts which, if true, would allow the entry of judgment in his favor despite the defendant's qualified immunity. A plaintiff obviously does not have to prove his case at this point.

The qualified immunity defense is by definition not absolute. The defendants are immune from liability only if a "reasonably competent law enforcement agent would not have known that his

[1] **Spears v. McCotter**, 766 F.2d 179 (5th Cir. 1985).

[2] **Elliott v. Perez**, 751 F.2d 1472 (5th Cir. 1985).

actions violated clearly established law."[3] The objective reasonableness of the agent's conduct must be measured against the clearly established law at the time of the incident.[4] When Slack claims to have been beaten, the law clearly condemned the use of force grossly disproportionate to the need which resulted in significant injury.[5]

Slack's complaint alleges that he was locked in his cell and was not presenting a threat to anyone when Taylor beat him to adjust his attitude. He also alleges that the beating caused injury to his neck, ribs, and ears, as well as mental anguish. Slack's original complaint alleged specific facts and conduct on the part of both defendants which reasonably competent law enforcement agents knew or should have known was beyond that authorized by clearly established law. Slack's failure to amend his complaint to allege further specific facts cannot be viewed as a failure to prosecute within the purview of Rule 41(b). We therefore conclude that the district court abused its discretion in dismissing Slack's complaint for failure to prosecute.

Conclusion

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[3] **King v. Chide**, 974 F.2d 653 (5th Cir. 1992).

[4] **Pfannstiel v. City of Marion**, 918 F.2d 1178, 1185 (5th Cir. 1990).

[5] **Huguet v. Barnett**, 900 F.2d 838 (5th Cir. 1990). The significant injury requirement was rejected by the Supreme Court in **Hudson v. McMillian**, 112 S.Ct. 995, 117 L.Ed. 156 (1991).

Some or all of Slack's allegations may be apocryphal. On the other hand, there may be substantially more to the story. A **Spears** hearing might assist the court in determining whether Slack presents a substantial federal question.[6] Regardless, on the facts as pled, Slack is entitled to proceed with his efforts to prove his case.

The judgment of the district court is VACATED and the matter is REMANDED for further proceedings consistent herewith. Appellant's motion for appointment of counsel on appeal is DENIED as moot. Whether counsel should be appointed to assist Slack in the trial court proceedings is a matter more appropriately addressed to the district court.

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[6] A **Spears** hearing allows the district or magistrate judge to interview the prisoner/litigant in a controlled setting to determine whether the claimant is truly indigent and/or whether the claim is frivolous. To determine whether the proffered claim is frivolous, the judge may make limited credibility determinations but must guard against treating as frivolous claims of whose merits the judge is merely circumspect. See **Wilson v. Barrientos**, 926 F.2d 480 (5th Cir. 1991) (modified on rehearing).