

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3457

Summary Calendar

KEVIN T. GROSS,

Plaintiff-Appellant,

v.

J. EDWARD LAYRISSON, ET AL.,

Defendant-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 91 322 E)

(January 11, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Kevin T. Gross, a prisoner in the Tangipahoa Parish Jail, filed a complaint under 42 U.S.C. § 1983 claiming that his lawyers Robert Troya and Jimmy Dukes had been ineffective in representing him. The requested relief was release from prison. Additionally, Gross claimed that officials of the Tangipahoa Parish Jail had been deliberately indifferent to his serious

*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 Pursuant to that Rule, the court has determined that this opinion should not be published.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 needs. Gross named J. Edward Layrisson, Randy Pinion, Gerald Fairburn, Earl Bankston and Judge Joseph E. Anzalone, Jr. as defendants to this part of the action. Judge Anzalone was later dropped as a defendant by stipulation of the parties. Throughout the proceedings on these claims, Gross was represented by an attorney, Michael Giambelluca.

Troya and Dukes, the public defenders for Gross's criminal trial, filed a motion to dismiss for failure to state a claim upon which relief could be granted. The magistrate judge considered this motion and recommended that it be granted and that Gross's claim on these grounds be dismissed with prejudice. The district court considered this recommendation and dismissed the complaint against Troya and Dukes.

With respect to the rest of the claim, the parties consented to proceed before the magistrate judge. Subsequently, Layrisson, the sheriff of Tangipahoa Parish, Pinion, the warden of the Tangipahoa Parish Jail, Fairburn, the assistant warden, and Bankston, the administrator of the Tangipahoa Parish Jail, filed a motion for summary judgment. A hearing was held on the motion after which the magistrate judge granted the motion for summary judgment and dismissed Gross's complaint with prejudice. Gross's counsel then timely filed a notice of appeal. Gross has proceeded pro se on appeal.

DISCUSSION:

A § 1983 action is the appropriate remedy for recovering damages for mistreatment or illegal administrative procedures.

Richardson v. Fleming, 651 F.2d 366, 372 (5th Cir. 1981). The writ of habeas corpus is the appropriate federal remedy for a state prisoner challenging the fact of confinement. Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). To determine which remedy a prisoner should pursue, the court looks beyond the relief sought to determine whether the claim, if proved, would factually undermine or conflict with the state court conviction.

Richardson, 651 F.2d at 373. If the basis of the claim goes to the constitutionality of the conviction, a petition for habeas corpus relief is the exclusive initial federal remedy. Id. If a complaint contains both habeas and § 1983 claims, the district court should separate the claims and decide the § 1983 claims. Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1119 (5th Cir. 1987).

ISSUE 1:

In this case, the district court made no finding that Gross's complaint of ineffective assistance of counsel was actually an attack on his conviction; however, there is no doubt that this is the case. If his counsel had been ineffective at trial, Gross's conviction would be unconstitutional. As a result, the claim serves as a challenge to the legality of his confinement and must have first been brought as a habeas corpus action. See Serio, 821 F.2d at 1112. A district court may not dismiss with prejudice a civil rights claim irrespective of merit until the habeas remedies have been exhausted. Williams v. Dallas County Com'rs, 689 F.2d 1212, 1215 n.2 (5th Cir. 1982),

cert. denied, 461 U.S. 935 (1983). The claim could have properly been dismissed without prejudice, if such a dismissal would not in fact prejudice Gross's claim by action of any applicable statute of limitations. The claim also could have been stayed pending the outcome of the habeas action. See Serio, 821 F.2d at 1119; Clark v. Williams, 693 F.2d 381, 382 (5th Cir. 1982). As such, the judgment of the district court dismissing this portion of the § 1983 complaint is therefore vacated and the case remanded for entry of a judgment consistent with the above cited authority.

ISSUE 2:

Gross's complaint of deliberate indifference to his serious medical needs while in the Tangipahoa Parish Jail does not affect his underlying conviction and could have been addressed by the district court. The Supreme Court in Wilson v. Seiter, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), revisited the issue of medical care for prisoners previously addressed in Estelle v. Gamble, 429 U.S. 97 (1976). The Supreme Court reaffirmed that allegations of wanton acts or omissions sufficiently harmful to evidence deliberate indifference to a prisoner's serious medical needs state a claim for relief under 42 U.S.C. § 1983. Wilson, 111 S.Ct. at 2323, 2326-27; Gamble, 429 U.S. at 106. The facts underlying a claim of deliberate indifference must clearly evince the medical need in question and the alleged official dereliction. Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985). Acts of negligence, neglect, or medical malpractice are

not sufficient. Fielder v. Bosshard, 590 F.2d 105, 107 (5th Cir. 1979); see Gamble, 429 U.S. at 105-06.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); GATX Aircraft Corp. v. M/V COURTNEY LEIGH, 768 F.2d 711, 714 (5th Cir. 1985). To defeat a motion for summary judgment Gross must have set forth specific facts showing a genuine issue as to a material fact. Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 61 U.S.L.W. 3354 (U.S. Nov. 09, 1992) (No. 92-393).

Gross's original complaint against the four officials of the Tangipahoa Parish Jail was that they ignored the order of the sentencing court transferring Gross "to [a] facility that could best handle [his] medical needs." The transcript of sentencing was included in the summary judgment materials and does not show any order to transfer Gross.¹ Gross's medical records were also submitted in support of the motion for summary judgment. These records reflect that Gross complained of back pain on September 29, 1990, and was seen by Dr. Cefalu who diagnosed him as having chronic lumbar strain and gave him a prescription. While Gross complains that he was not allowed to see his own orthopedist, the

¹ At sentencing, in response to Gross's concerns about his medical care, the judge did tell him that the medical problems were not the responsibility of the State of Louisiana.

Eighth Amendment does not require treatment by one's chosen physician, but merely prohibits wanton acts of deliberate indifference to a prisoner's medical needs. With respect to his complaints of back pain, Gross has not established a genuine issue of fact showing deliberate indifference on the part of any of the four defendants. With respect to his claim that he was not allowed to see a dermatologist, Gross has not, even on appeal, specifically stated what his serious medical need was that required the treatment of a dermatologist. As a result, Gross has not shown a genuine issue as to material fact with respect to this claim and the district court was correct in granting summary judgment.

AFFIRMED in part; VACATED and REMANDED in part.