

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5067
Summary Calendar

JOHN SIMMONS,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, ET AL.,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(6:92CV262)

March 17, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Proceeding IFP and pro se, appellant, John E. Simmons, an inmate of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID) filed a 42 U.S.C. § 1983 action against the state director of TDCJ-ID and several correctional officers for failing to protect him from being attacked by another prisoner. The defendants answered Simmons's complaint and motioned the court

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

to dismiss under Fed. R. Civ. P. 12(b)(6) or 28 U.S.C. § 1915(d). The parties consented to trial by the magistrate judge.

I

Simmons alleged in his complaint and during a Spears hearing that the failure of various correctional officers to observe prison safety procedures on September 2, 1992, resulted in another inmate stabbing him.

According to Simmons, Officer Barry D. Mohan came to his cell and asked him if he wanted to take a shower. Although Mohan failed to use a protective shield, a device that separates a prisoner outside of his cell from the front of the cells of the other prisoners, and was by himself, he escorted Simmons to the shower without incident. Apparently there is a prison safety rule that two officers must accompany inmates of Simmons's classification when they are outside their cells.

When Simmons finished showering, Officer Mark G. Layton told him to return to his cell without an escort and wait for an officer to open his cell door. Simmons contends that he was returning to his cell without an escort when he was stabbed by inmate Frias, who stuck a knife-like object through the bars of his cell. Officer Mohan returned to place Simmons in his cell. Along with a Sergeant Johnson, Mohan took Simmons to the infirmary. Simmons was treated for a two-inch superficial laceration on the back of his right leg that did not require stitches.

Simmons alleges that after he returned from the infirmary, he told Johnson that he had been threatened by an inmate and that Johnson assured him that he would be moved to another cell block. Johnson apparently did not move Simmons immediately. Later that day, Frias threw hot water at him through the bars of his cell.

Simmons argued that either Officer Mohan or Layton, or both, knew that by sending Simmons back to his cell without an escort he would be stabbed. At the hearing Simmons offered a witness statement from another inmate corroborating his version of the events. The magistrate judge read it into the record.

An assistant warden from the facility testified that several investigations revealed that Simmons was moved to another wing, that none of the officers or inmates interviewed could substantiate Simmons's allegations that he was set up or attacked, that a search of the alleged assailant's cell revealed nothing, and that Officer Mohan contended that he and another officer escorted Simmons both to and from his cell with the protective shield without incident.

After the Spears hearing the magistrate judge ordered only the two guards to respond. Subsequently, the magistrate judge ruled that Simmons established neither a "conscious or callous indifference" on the part of the prison officials to Simmons's rights. The court granted defendants' motion to dismiss, dismissed Simmons's case with prejudice, and denied all other pending motions.

Simmons does not challenge the magistrate judge's rationale and essentially reiterates his complaint. He argues that the prison officers were improperly trained and that they knowingly and intentionally violated his Eighth Amendment and Equal Protection Clause rights. Simmons seeks either a remand for trial or, in the alternative, an award of damages from this court.

The magistrate judge did not cite either § 1915(d) or 12(b)(6) directly in her judgment. However, the language the court utilized to justify its decision, "[i]t is clear to the Court that no relief could be granted under any set of facts that could be proved consistent with the allegations in this case," is compatible with the language of § 12(b)(6). A prison guard's negligent failure to protect a prisoner from assault does not amount to a violation of the prisoner's constitutional rights under the Due Process Clause. Davidson v. Cannon, 474 U.S. 344, 347-48, 106 S.Ct. 668, 88 L. Ed. 2d 677 (1986); see Johnson v. Lucas, 786 F.2d 1254, 1260 (5th Cir. 1986). Accepting all of the facts alleged by Simmons as true, see Cooper v. Sheriff of Lubbock County, 929 F.2d 1078, 1082 (5th Cir. 1991), the prison guards at worst were negligent in failing to escort Simmons back to his cell following his shower, thereby exposing him to the front of the other inmates' cells. Simmons's suggestion at the Spears hearing that the officers conspired with the inmate who attacked him is pure speculation unsupported by any facts. Additionally, Simmons's conjectures on this point are inconsistent with the facts alleged in the inmate witness's

statement that he offered into evidence at the Spears hearing. In that statement inmate Long implied that Simmons had an argument with the inmate in I-208 and that the inmate in I-208 requested that Frias stab Simmons after Simmons had left for the shower.

In his complaint and in his brief Simmons focuses on the fact that the officers breached safety procedures. He makes no attempt to demonstrate a "deliberate indifference" on the part of these officers to his right that resulted in cruel and unusual punishment. See Wilson v. Seiter, ___ U.S. ___, 111 S.Ct. 2321, 115 L. Ed. 2d 271 (1991); Alberti v. Sheriff of Harris County, 937 F.2d 984 (5th Cir. 1991), cert. denied, 112 S.Ct. 1994 (1992). A violation of prison procedures does not in itself support a constitutional claim. See Jackson v. Cain, 864 F.2d 1235, 1251-52 (5th Cir. 1989).

The fact that the inmate who stabbed Simmons threw hot water on him before prison officials moved him to another cell does not affect the results of his claim because he does not allege that he was injured in any way by that incident. Additionally, Simmons's allegation that the officers failed to move him to another cell following the stabbing is raised for the first time on appeal. Since it is a factual issue it need not be considered. U.S. v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). Finally, even liberally construed, Simmons's allegation that the defendants were improperly trained cannot be bootstrapped from the statement in his

complaint that he was injured due to "unsafe security practices." Thus it is also raised for the first time on appeal.

Simmons has also filed a motion for a temporary restraining order or injunctive relief against the named defendants and other prison officials because he has since been transferred back to the unit where this incident occurred and he does not feel safe under the care of the defendant guards. He raises no new allegations of a constitutional violation and that motion is dismissed as not properly raised in this court.

The judgment of the district court dismissing all claims is

A F F I R M E D.