

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-7184

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JAMES GREGORY BANANA,

Plaintiff-Appellant,

VERSUS

SAMMIE MCNEEL, et al.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Mississippi  
(CA EC 89-174-B-D)

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(September 22, 1993)

Before GARWOOD, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:\*

James Banana, a state prisoner, appeals a summary judgment granted in his civil rights action brought pursuant to 42 U.S.C. § 1983. Finding no genuine issue of material fact regarding Banana's claim that prison officials were deliberately indifferent to his safety and serious medical needs, we affirm.

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\* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Banana brought suit against certain jail officials, challenging the conditions of his confinement. He alleged the defendants violated his rights under the Eighth and Fourteenth Amendments by (1) failing to protect from assaults by other inmates on four separate occasions; (2) denying medical care for an ingrown toenail and asthma; (3) subjecting him to unsanitary eating and living conditions; (4) denying adequate exercise opportunities; and (5) denying adequate access to a law library. The magistrate judge issued a report and recommendation that the district court adopted by entering summary judgment.

We review the grant of summary judgment de novo. Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991). For summary judgment to be granted, the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, must demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

There is no evidence in the record that the prison officials acted with "deliberate indifference" to Banana's rights, as required under Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).<sup>1</sup> Banana admits that the prison officials were unaware of the assaults.<sup>2</sup>

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<sup>1</sup> Banana contends that the district court mistakenly applied the "serious injury" standard. The record indicates, however, that the court reached its conclusion under the deliberate indifference test.

<sup>2</sup> Banana argues that the magistrate judge addressed only two of the four inmate assaults. No evidence was presented, however, to show that the other assaults took place with deliberate indifference by prison officials. Therefore, summary judgment was appropriate with respect to all four assaults.

The same standard is applied to Banana's claim for inadequate medical care. In two recent opinions, Sodie v. Canulette, No. 91-3620 (5th Cir. Aug. 13, 1992) (per curiam) (unpublished), and Williams v. County of El Paso, No. 91-8505 (5th Cir. June 3, 1992) (unpublished), we have held that in both failure-to-protect and medical care cases, a court must apply a deliberate indifference test. "Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain and states a cause of action under 42 U.S.C. § 1983. [One] is deliberately indifferent if he intentionally denies or delays access to medical care." Walker v. Butler, 967 F.2d 176, 178 (5th Cir. 1992) (per curiam) (citation omitted).

Banana has not presented any summary judgment evidence indicating that prison officials intentionally or wantonly denied or delayed access to medical care. In fact, the evidence shows that Banana was provided with iodine, cotton swabs, and bandages for his toe and received treatment for asthma.

No genuine issue of material fact existed regarding unsanitary living and eating conditions. The Court stated in Wilson that the Constitution forbids only "those deprivations denying the minimal civilized measure of life's necessities . . . ." 111 S. Ct. at 2324 (citation omitted). Reports of the Mississippi Department of Health stated that the food and sanitary conditions were adequate, and Banana provided no evidence to the contrary.

Banana also claims he was denied adequate opportunity to exercise and access to law books. He failed to mention these

matters in his objection to the report and recommendation of the magistrate judge, however, so he is barred from complaining of these matters on appeal. See Nettles v. Wainwright, 677 F.2d 404, 409-10 (5th Cir. Unit B 1982) (en banc).

AFFIRMED.