

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7312
Summary Calendar

LARRY DONNELL MCSHAN, SR.,

Plaintiff-Appellant,

VERSUS

H.W. FREGIA, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-89-2639)

(February 10, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Larry McShan appeals the dismissal of his state prisoner's civil rights action brought pursuant to 42 U.S.C. § 1983. Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

McShan filed this civil rights action against twenty prison officials, officers, and employees, setting out claims involving several of his disciplinary hearings and various medical-related complaints. The district court conducted a Spears hearing at which it elicited McShan's testimony concerning his medical-related complaints but not his disciplinary hearings. Thereafter, the court dismissed the action on the ground that McShan's claims "have no realistic chance of ultimate success and no arguable basis in law and fact." The court stated reasons in a comprehensive and detailed memorandum opinion.

McShan complains, first, that on December 29, 1987, an officer searched him and confiscated 274 prestamped envelopes and twenty stamps he was carrying in his pocket. He alleged that as a result, he was wrongfully charged with and convicted of trafficking and trading. He alleged that his disciplinary hearing was unfair because (1) he was denied the testimony of one of his three witnesses (In his brief he did not name the person or state what his testimony may have been.); (2) the only reason given for conviction was the accusing officer's testimony; and (3) a counsel substitute was not appointed. In the district court, McShan stated that substitute counsel was appointed but did not attend the hearing.

McShan next complains that he was wrongfully convicted on March 17, 1989, of threatening to harm an officer, creating a disturbance, and using vulgar or indecent language in the presence

of or directed at an employee. He was sentenced to fifteen days' solitary confinement, reduction in class, and loss of commissary privileges for thirty days.

These charges resulted from Officer Looney's report that on February 27, 1989, McShan made pig sounds at her as she passed by him and other inmates in the hallway. McShan asserts that the inmate who actually made the sounds admitted it to the supervisor. McShan argues that there was no evidence to support the charges although he concedes that he was found guilty on the basis of Looney's testimony. He accuses Officers Looney, Turner, and Mills of having conspired to file these false charges against him to cover up their own unspecified misconduct. He complains that the only written statement of the evidence relied upon by Captain Lamatrice was the "accusing officer's testimony."

McShan has alleged that on March 31, 1989, when Officer Leal attempted to awaken him to go to work, McShan did not wake up and report to work because of medications he was taking. As a result, McShan was charged with and convicted of refusing to obey an order. Appellee Fregia found him guilty, based upon Leal's verbal testimony, even though McShan submitted a statement from his supervisor explaining his medical condition.

McShan has claimed that he was convicted of having refused to work on April 27, 1989, even though he was sick and had received a medical excuse from working on that day. He allegedly offered the medical pass and testified at the hearing, but Lt. Scheef found him guilty. Scheef allegedly told McShan he did not care about the

pass. From the notation in the clinic notes, it is not evidence whether McShan received the pass for April 27 or April 28. Scheef opined that the record indicated that it was for April 28.

McShan alleged that at about midnight on October 7, 1988, he was sitting on the toilet in his cell. Officer Debra Jensen allegedly kept peeping at him through a vent in the wall by the commode. McShan covered the vent with paper "to have privacy while he defecated." Jensen allegedly stuck a sharp object through the paper and into McShane's right eye, severely injuring him. At the Spears hearing, McShan admitted that Jensen could not see him when allegedly she stuck him in his left eye. The clinic notes for October 8, 1989, state that a dark area about the size of a pencil tip was noted in McShan's right eye, but no redness. The nurse reported that he told her his right eye had been injured.

McShan alleged in his complaint that shortly after he was injured, he went to the picket area to find out whether Jensen had done it. Jensen allegedly replied yes to his question and laughed. McShan alleged that in retaliation for his reporting what she did to him, she charged him with use of indecent or vulgar language. Captain Lamatrice found him guilty. McShan alleged that he was denied due process (1) by denial of his three witnesses (He did not allege what their testimony may have been.); (2) because Lamatrice did not give a written statement of the evidence he relied upon; and (3) because Lamatrice failed to comply with other rules and procedures, which he specified only by numbers. McShan asserted that Jensen filed the false charge in retaliation for his having

sought medical treatment.

McShan also seeks relief because employee Richard Hatfield noted that he had seen McShan playing basketball on July 20, 1988, walking, running, and jumping without apparent discomfort. McShan asserts that this was a false report. As a result, Dr. Reinhardt took away McShan's "cane pass" without examining him. McShan states that his knee condition was aggravated by not having his cane.

McShan complains that on August 30, 1988, Dr. Stauber erroneously ordered an x-ray of his ankle, when it should have been of his foot (post-surgery). He then allegedly was denied all x-rays after he notified the infirmary administrator of the error. In his brief he does not allege any specific harm that may have resulted from this. The clinic notes indicate that the x-rays were ordered to determine whether McShan needed a cane. After he refused x-rays on September 23, 1988, the doctor found no medical reason for a cane pass.

Finally, McShan complains that from April 4, 1988, to January 6, 1989, Warden Scott and Captain Dawson made him work standing up for eight hours a day, beating and chipping paint from bars with a very sharp tool. They allegedly thereby overruled the judgment of the medical personnel. While he was working on December 27, 1988, McShan allegedly passed out. He stated that he was not injured, because other inmates caught him as he fell.

The clinic notes show that on December 23, 1988, Dr. Reinhardt ordered "no prolonged standing" for McShan and allowed him to "lay

in" for two days. The clinic notes entry for December 27 show that McShan complained of persistent migraine headaches, dizziness, and blacking out. Two days later, he received medication for these complaints.

II.

A.

McShan contends that the district court erred by dismissing his claims of violation of due process relative to his disciplinary hearings. He argues, first, that there was no evidence to support his conviction of trafficking and trading, because he was found only to possess the 274 stamped envelopes and twenty stamps. The large number of these items he possessed supports an inference that he was trafficking in them, however, just as possession of a large quantity of drugs can support an inference of intent to distribute. See United States v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S. Ct. 332 (1992).

McShan contends that he was denied due process by various actions and omissions of his disciplinary boards. He complains of the denial of one of his three witnesses in the trafficking case, but he does not allege how that person's testimony may have helped him. This is a matter left to the sound discretion of the prison officials. Wolff v. McDonnell, 418 U.S. 539, 566-69 (1974). McShan has not shown any abuse of discretion.

McShan asserts that he was found guilty in some case on no evidence or less than preponderance. This is refuted by his

acknowledgement that he was convicted on the basis of the accusing officers' testimony. He contends further that he was entitled to a written statement of the evidence relied upon by the board, not just a notation that he was found guilty on "the accusing officer's testimony."

At least in cases in which good-time is ordered forfeited or solitary is imposed as punishment, the inmate is entitled to a "written statement by the factfinders as to the evidence relies on and reasons for the disciplinary action." Id. at 564, 571 n.19 (internal quotation marks and citation omitted). Since McShan heard the accusing officers' testimony, the boards' notations that their decisions were based upon that testimony constituted adequate "written statement[s]" under Wolff.

McShan contends that he was denied "state-created rights" at the hearing before Lt. Scheef because he was working on April 27, 1989. At stated ante, the relevant clinic note is ambiguous, and Scheef's answer to step 1 of the grievance procedure shows that he believed McShan had been excused from working on April 28. Thus, there was enough evidence in support of the conviction to pass constitutional muster. See Stewart v. Thigpen, 730 F.2d 1002, 1007 (5th Cir. 1984).

An inmate's allegation of factual innocence is not actionable under section 1983 if his disciplinary proceeding otherwise was fair and adequate. Collins v. King, 743 F.2d 248, 253-54 (5th Cir. 1984). McShan's conclusional assertions of bad faith and conspiracy of Scheef and other defendants are insufficient to avoid

dismissal on authority of 28 U.S.C. § 1915(d). See Hale v. Harvey, 786 F.2d 688, 690 (5th Cir. 1986). These cases and Jackson v. Cain, 864 F.2d 1235, 1248-49 (5th Cir. 1989), also support the dismissal of McShan's conclusional claim that Officer Jensen retaliated against him by falsely charging him with using indecent or vulgar language.

B.

McShan contends that the district court should not have dismissed his claim concerning his medical treatment and classification. McShan accuses Hatfield, a physician's assistant, of having falsely reported seeing him playing basketball. McShan's loss of his "cane pass" allegedly caused him pain and aggravated his knee injury. He also faults Dr. Stauber for allegedly ordering the wrong x-rays. As stated ante, the doctor ordered the x-rays in order to determine whether McShan needed a cane. His refusal to have the x-rays, not misconduct by the doctor or Hatfield, was responsible for his not having a cane. These and many other clinic records and McShan's hospital records show that there has been no disregard or indifference to McShan's serious medical needs, such as would be actionable under section 1983. See Johnson v. Treen, 759 F.2d 1236, 1237-38 (5th Cir. 1985).

McShan contends that making him stand for long hours chipping paint constituted deliberate indifference to his serious medical needs in violation of the Eighth Amendment. He asserts that as a result, he suffered severe swelling in his left knee and foot and

that he passed out on one occasion. He was not injured when he passed out, however, and he received prompt treatment and medication for his complaints)) he did not then mention any problem with his foot or knee. While Dr. Reinhardt had ordered "no prolonged standing" for McShan, there is no showing that Warden Scott and Captain Dawson knew of this directive. Thus, the clinic notes refute McShan's Eighth Amendment allegations based upon his work assignment. See Jackson v. Cain, 864 F.2d at 1246.

McShan alleges that on October 9, 1989, Dr. Moskowitz discontinued all of his medications at the urging of Warden Scott. The clinic notes indicate that this was some sort of computer error. His medications were reordered two days later, however. There was no Eighth Amendment violation.

C.

McShan contends that the district court erred by dismissing his claim against Officer Jensen for wanton infliction of pain and injury by sticking him in one of his eyes. This claim is suspect, because he reported an injury to his right eye to the clinician, clinic notes, but at the Spears hearing he testified it was his left eye.

Furthermore, his own Spears testimony refutes his allegations of wantonness and malicious intent. McShan testified that Jensen could not see through the paper that covered the vent; thus, she would have had no reason to expect that McShan may have had his eye only about three inches from the vent. If Jensen was a "peeping

Tom," as McShan alleges, it is reasonable to conclude that she intended only to make a peephole. A state agent's merely negligent act that causes unintended injury is not actionable under section 1983. See Daniels v. Williams, 474 U.S. 327, 330-36.

AFFIRMED.