

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8279

Summary Calendar

EDWARD J. PETRUS, MD.,

Plaintiff-Appellant,

versus

U.S. JUSTICE DEPARTMENT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(A-89-CV-1056)

(February 28, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Dr. Edward J. Petrus filed suit in federal district court against the United States Department of Justice and several individual defendants seeking compensation under the Federal Tort Claims Act and the United States Constitution for inadequate medical treatment he allegedly received while incarcerated. The district court denied Petrus a jury trial and, serving as finder of fact, entered judgment for the defendants. Petrus asserts on

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeal that the district court violated his right to a jury trial and, further, that the court erred in finding for the defendants. We AFFIRM.

I.

Edward J. Petrus filed his original complaint on December 4, 1989, alleging causes of action under the Fifth and Eighth Amendments, the Federal Tort Claims Act, 28 U.S.C. § § 2671, et seq., and Bivens,¹ arising from allegations of insufficient medical treatment provided by the Bureau of Prisons during his incarceration. The district court dismissed Petrus's claims arising under the FTCA as time barred and for failure to state a claim and dismissed Petrus's claims arising under Bivens for failure to plead a specific factual basis.

On appeal, we affirmed in part and reversed in part the district court's judgment and remanded the cause to the district court for further proceedings. We held that a statute of limitations of two years applied, which barred all of Petrus's claims arising before December 4, 1987. We affirmed the dismissal of Petrus's Fifth Amendment claim regarding a disciplinary action taken against him and his claims of deprivation of property, use of excessive force, and retaliatory transfer. These matters arose prior to December 4, 1987, and therefore were time barred.

We concluded, however, that some of Petrus's claims involving his medical treatment arose after December 4, 1987. We therefore

¹Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

reversed the dismissal of his claims under Bivens and the Eighth Amendment for deliberate indifference to serious medical needs and under the FTCA for medical malpractice. We then remanded, holding the claims in abeyance pending exhaustion of administrative remedies.

After Petrus exhausted his administrative remedies, he again pursued his claims in federal district court. Petrus made an untimely request for a jury trial, which the district court denied. The court then entered an order dismissing all of Petrus's claims arising before December 4, 1987, including the claims against all but one individual defendant, Dr. Mirandilla. The district court further dismissed the claims against Mirandilla pursuant to Federal Rule of Civil Procedure 4(j) because Petrus failed to provide proper service. The only remaining defendant was the Department of Justice.

The district court held a bench trial addressing Petrus's claims. Although the court had dismissed Petrus's claims arising prior to December 4, 1987, during trial the court entertained evidence dating back to 1985. The court dismissed Petrus's claims under the FTCA because it found no credible evidence of any injury to Petrus stemming from negligence. It further found that, if the individual defendants had remained in the suit, Petrus nevertheless had no claim against them because there was no violation of Petrus's Eighth Amendment rights and no negligence on the part of the individual defendants in treating Petrus. As a result, the district court entered a take nothing judgment.

II.

A.

The district court was correct to find for the defendants on Petrus's Eighth Amendment claims as Petrus could not pursue them against the Department of Justice or the individual defendants. The Department of Justice is a branch of the government of the United States and, as such, is subject to suit only where the government has given its express consent. The government has not given express permission to individuals, like Petrus, who pursue suits against it under Bivens. Garcia v. U.S., 666 F.2d 960, 966 (5th Cir.), cert. denied, 459 U.S. 832 (1982).

Petrus also cannot pursue his Eighth Amendment claims against the individual defendants. Before Petrus filed suit on December 4, 1989, the statute of limitations had run against all of the individual defendants except Dr. Mirandilla. Further, Petrus failed to serve several of the individual defendants properly, including Mirandilla.² As a result, the district court properly

² Petrus argues that he served Mirandilla properly. Petrus filed the return of service on the day of the order dismissing Mirandilla. The service came over a year and a half after Petrus named Mirandilla in his first amended complaint, well past the 120-day time limit provided under Federal Rule Civil Procedure 4(j). Before a district court will allow out of time service, a litigant must make a showing of good faith and establish some reasonable basis for noncompliance within the time limit. Systems Signs Supplies v. U.S. Dept. of Justice, 903 F.2d 1011, 1013 (5th Cir. 1990). Pro se status does not excuse a litigant's failure to effect proper service. Id. 1013-14. As Petrus offers no adequate explanation for his failure to serve Mirandilla properly, the district court did not abuse its discretion in dismissing the claims.

dismissed Petrus's Eighth Amendment claims against all of the individual defendants.

Petrus argues, however, that the individual defendants' failure to provide him adequate medical care constituted a continuing tort. He asserts that the statute of limitations did not run on any of the acts contributing to the continuing tort until the tort abated. The last act of the continuing tort, according to Petrus's theory, involved actions taken by Dr. Mirandilla after December 4, 1987. Petrus concludes that the statute of limitations does not bar his claims against any of the individual defendants.

We need not assess the accuracy of Petrus's understanding of the continuing tort doctrine, for the doctrine does not apply. The district court found that the inadequate medical treatment that Petrus received, if any, did not give rise to a lasting injury. Petrus had not as of the time of trial pursued the surgical treatment that he claimed he continued to need. Further, he had secured an offer of employment to work as an ophthalmologist. Finally, he had completed 50 hours of surgery on the eyes of animals, thereby acquiring his license to practice in Texas. From these facts, and Petrus's unreliable testimony, the district court reached the sound conclusion that Petrus's injuries no longer affected him.

Where an individual suffers a series of discrete injuries, rather than an ongoing and persistent injury, the continuing tort doctrine does not apply. Wilson v. Zapata Off-Shore Co., 939 F.2d

260, 269 (5th Cir. 1991). The evidence presented at trial suggested, and the trial judge sitting as finder of fact concluded, that each incident of which Petrus complained constituted a distinct harm with no lasting effect. Petrus cannot use the doctrine of continuing tort to evade the statute of limitations.

B.

The statute of limitations bars Petrus from pursuing his claims under the Federal Tort Claims Act except for incidents that occurred after December 4, 1987. The only such incidents involved the alleged negligence on the part of Dr. Mirandilla in failing to treat Petrus's medical needs.

Throughout Petrus's time in prison, the Bureau of Prisons provided him opportunities to receive medical treatment. At times he refused all of the treatment the prison system offered. On at least one occasion he at first accepted a referral for treatment only to withdraw his acceptance in the hope that he would receive permission to visit a different facility that he preferred.

The district court found that the prison system in general and Dr. Mirandilla in particular were not negligent in the medical treatment that they offered. Petrus simply held standards for medical care that were higher than the prison system could meet.

Petrus's only claim based on incidents occurring after December 4, 1987, involves a general failure to provide him adequate medical services. He offered no evidence of the inadequacy of the medical care available during this period. We agree that the efforts of the prison system to satisfy Petrus's

medical needs subsequent to December 4, 1987, did not amount to negligence.

C.

Finally, Petrus complains that the district court violated his Seventh Amendment right to a jury trial. There is no right to a jury trial on a claim under the Federal Tort Claims Act. 28 U.S.C. § 2402; Richards v. U.S., 369 U.S. 1, 13 n.28 (1962). As the district court properly dismissed Petrus's claim under the Eighth Amendment, the bench trial was appropriate.

AFFIRMED.