

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8345

Summary Calendar

C. Joseph Salazar, II,

Plaintiff-Appellant,

versus

James A. Collins, Director,
Texas Department of Criminal Justice
Institutional Div., Et Al.,

Defendants,

William F. Montgomery, Physician's
Assistant, Hughes Unit, TDCJ, Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
W 91 CV 335

April 27, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Salazar, an inmate in the custody of the TDCJ-ID, filed this pro se action in forma pauperis against various TDCJ-ID supervisory officials, employees at the Hughes Unit, and the Hughes Unit Medical Department. Following a Spears hearing, the magistrate judge dismissed Salazar's § 1983 action as frivolous pursuant to 28 U.S.C. § 1915(d). We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

We briefly restate the substance of the allegations relied upon. On July 27, 1991, Salazar developed stomach pains that were not serious and he did not inform prison officials. The next day, he continued to experience worsening pain. At 6:30 p.m. on July 28, he told guard Pinney. Later that evening Pinney told Salazar that he instructed guard Maglietta to call the infirmary.

After seeing Pinney at 6:30 p.m., Salazar vomited and noticed blood in his vomit. At 9:00 p.m., inmates began banging on their cells to attract guards' attention to Salazar's condition. When guard Jones came by Salazar's cell at 10:00 p.m., Salazar explained his condition. Jones summoned sergeant Massey. Salazar told Massey of his vomiting and severe pain and said he wanted medical attention. Massey asked Salazar if he could wait until sick call the next morning. Salazar answered that the pain was too severe. Salazar noted that he had not had a bowel movement in two days. He produced a sick call request detailing his symptoms. Massey told Salazar that he would deliver the request to the nurse but that no one was on duty at the infirmary at that time.

At 10:30 p.m., the shift changed. Salazar told the new guard, Manning, about his problem and asked to see medical personnel. Manning replied that he would see about it. Salazar again requested medical attention about one hour later. Salazar saw Manning three more times before breakfast at 3:00 a.m. and each time asked whether Manning had notified medical personnel. Manning responded that the shift sergeant had been told.

Salazar was too ill to eat breakfast. Manning and guard Dorman returned to his cell at 4:00 a.m. but did not then act on Salazar's request for medical help. At 4:50 a.m., Salazar was taken to the infirmary by stretcher. He explained his symptoms to nurse Bone. Shortly before Salazar's arrival Bone found his sick call request with an attached note under the door of one of the nurse's offices. Bone stated that she had made rounds on Salazar's cell block earlier that night and would have seen him had she been told about his problem. Bone opined that Salazar might have appendicitis, recommended that he be seen by a physician, and gave him analgesics. Guards then returned Salazar to his cell.

At 10:00 a.m., Salazar was taken to the infirmary and examined by physician's assistant Montgomery. Montgomery ordered x-rays and blood tests. He did not give Salazar any pain medication. Once more guards returned Salazar to his cell.

At 3:30 p.m., Salazar complained to guard Davis that he had not been called back to the infirmary. After a second complaint at 6:30 p.m., Davis notified his superiors that no medical personnel had checked on Salazar. At 6:45 p.m., Salazar was taken back to the infirmary where Nurse Cooper examined him. Salazar was running a fever. Cooper's medical file entry indicated that there was no lab data on Salazar's condition, despite the x-rays and samples taken that morning.

At 8:15 p.m., Salazar was transported to Coryell Memorial Hospital. While being examined there, Salazar lost consciousness. He was prepared for surgery and doctors removed his swollen appendix that evening, July 29, 1991.

Salazar's case was transferred to the magistrate judge by consent. The magistrate judge developed the allegations at a Spears hearing. See Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). He concluded that the alleged acts, if true, constituted no more than negligence and did not suffice to show deliberate indifference. The magistrate judge dismissed the § 1983 claims as frivolous. He also dismissed claims against five supervisory officials and the medical department. Finally, the magistrate judge dismissed the pendent state law claims without prejudice.

This court granted Salazar's motion for leave to appeal in forma pauperis against all named defendants except supervisory officials Collins, Scott, Warren, Garner, and Dretke.

28 U.S.C. § 1915(d) permits district courts to dismiss frivolous in forma pauperis suits sua sponte. A complaint is frivolous where it lacks an arguable basis either in law or in fact. Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992); Neitzke v. Williams, 490 U.S. 319, 325, 109 S. Ct. 1827 (1989). We review a § 1915(d) dismissal for abuse of discretion. Denton, 112 S. Ct. at 1734.

To state a violation of constitutional rights, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976). Inadvertent failure to provide adequate medical care

does not support a claim. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Id. Deliberate indifference can be manifested by doctors in their response to needs or by guards in denying or delaying access to medical care. Id. at 104-05, 97 S. Ct. at 291. The legal conclusion of deliberate indifference must rest on facts that clearly evince wanton actions on the part of the defendants. Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985). Wanton conduct does not include mere negligence, neglect, or medical malpractice. Fielder v. Bosshard, 590 F.2d 105, 107 (5th Cir. 1979).

Salazar argues that various officials demonstrated deliberate indifference to his needs by failing to notify medical personnel of his condition despite repeated requests. More than ten hours passed between his first complaint of severe pain and his first trip to the infirmary. Furthermore, he contends, when he received medical attention it was grossly inadequate to meet his needs. In particular, the test results of his second examination were not properly handled and he was given no pain medication after the first examination.

Salazar's allegations do not evidence a constitutional violation. There is no allegation or testimony that guards intentionally delayed his access to medical care. See Walker v. Butler, 967 F.2d 176, 178 (5th Cir. 1992). To the contrary, someone attempted to deliver Salazar's sick call request to the infirmary by placing it under a nurse's door. His complaints were not ignored, so that his symptoms went unexamined. Guards took Salazar to the infirmary. They returned him there a third time that evening when no medical personnel came to check on him. The fact that nurse Bone made rounds on Salazar's block without learning of his complaints, without more, does not indicate that officials delayed or denied treatment with deliberate indifference.

The actions of the medical staff also do not demonstrate deliberate indifference. Salazar was examined three times on July 29, 1991. He was given analgesics only once, but Dr. Hurley testified at the hearing that pain medication is not indicated when appendicitis is suspected because it may mask the symptoms. Appropriate tests were performed, but Salazar did not exhibit classic symptoms of appendicitis such as rebound and guarding. Dr. Hurley stated that appendicitis is difficult to

diagnose and many patients will be watched for days before a final diagnosis is made. Nonetheless, Salazar was transported to a hospital following the third examination. Several labels might be applied to the defendants' actions but "deliberately indifferent" cannot.

Salazar complains that the magistrate judge based his decision on disputed facts and credibility choices. This complaint lacks merit. The magistrate judge stated that he was not rejecting the credibility of Salazar's version of the facts. Even reviewing the allegations in Salazar's favor, they are insufficient to support a finding of deliberate indifference and fail to state an arguable claim.

Salazar's contention that the magistrate judge improperly dismissed his pendent claims lacks merit. A federal court may decline to exercise supplemental jurisdiction when it has dismissed all federal claims. 28 U.S.C. § 1367. The magistrate judge did not abuse his discretion by doing so here.

We will not entertain Salazar's arguments regarding the purported liability of defendants Collins, Scott, Warren, Garner, and Dretke. This court denied Salazar permission to appeal the judgment as to these defendants in forma pauperis on December 16, 1992.

Finally, Salazar requested in his reply brief that the defendants' brief be struck as untimely filed. We extended the deadline for filing defendants' brief to February 8, 1993. Defendants' filed their brief in typed form, postmarked February 8, 1993. Briefs are deemed filed on the day of mailing. Fed. R. App. P. 25(a). Later filing of additional bound copies of the identical text did not constitute a violation of the filing deadline.

AFFIRMED.