

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1028
Summary Calendar

JOE D. MILLER, JR.,

Plaintiff-Appellant,

VERSUS

JIM BOWLES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:91-CV-1212-X)

June 29, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Joe D. Miller appeals, *pro se*, the summary judgment granted Dallas County, Texas, and its sheriff, Jim Bowles, in his 42 U.S.C. § 1983 action for violation of his constitutional rights and resulting injuries sustained while in pre-trial detainment at the Dallas County Jail. We **AFFIRM** in part, **REVERSE** in part, and **REMAND**.

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

Miller alleges the following in his complaint. He was arrested and placed in the Dallas County Jail on February 11, 1991. There, he was one of 13 blacks placed in a cell designed for eight people. The other individuals were gang members who verbally and physically assaulted Miller during the next several days, culminating in a severe beating inflicted on February 20. Prior to that, the gang members had also set several fires in the cell, including one to Miller's cousin while he was sleeping, and had beaten another detainee "all over the tank". The smoke from the fires made it difficult to breathe, and the smoke alarm did not work.

During this time, Miller repeatedly, including by written letter, asked jail guards for protection and to be moved to another cell, but his requests were ignored; and the guards turned off the intercom to the cell. Additionally, Miller and his cousin executed signed affidavits to a guard, stating that they wanted to press charges against the gang members for aggravated assault, but no action was taken.

Following the February 20 beating, Miller was taken to the hospital, where he received stitches to his hand and ear. He continues to suffer severe headaches, dizziness, and eating and sleeping disorders. Following his transfer from the jail to the prison system, Miller learned from prison medical authorities that X-rays revealed a piece of ball-point pen lodged in his head, presumably from when a gang member stabbed him with one during the

beating. The prison doctors cited this as a cause of his dizziness, severe headaches, and eating disorders. The jail medical personnel had taken two head X-rays, but told Miller that there was nothing found which would explain his symptoms.

Miller filed this § 1983 action in June 1991, proceeding *in forma pauperis* and *pro se*. His initial complaint was amended, and named as defendants Bowles and Dallas County. He claimed that the defendants' policies of under-staffing, over-crowding, and segregating cell mates by race "creat[ed] the jail environment that allowed the ... gang members to operate unchecked by jail authorities". He also claimed inadequate medical treatment, failure to protect him from physical harm, and failure to file criminal charges against the gang members despite his affidavit.

Bowles moved for dismissal or, alternatively, summary judgment, asserting failure to state a claim and to state sufficient facts to overcome the defense of qualified immunity, and filed a supporting affidavit. The district court granted summary judgment in December 1992, addressing only Miller's claim of inadequate medical care, and holding that Miller had presented no evidence that Bowles was personally involved in any denial of medical care or that Bowles initiated a policy of providing inadequate medical care.²

² It appears that the district court based the summary judgment primarily on a conclusion that Miller failed to state a claim under § 1983, not on the affirmative defense of qualified immunity, which would have involved finding that Bowles' alleged actions, even if unconstitutional, were objectively reasonable in light of clearly established constitutional standards at the time. See ***Spann v. Rainey***, 987 F.2d 1110, 1114 (5th Cir. 1993). We, therefore, limit

The district court dismissed *sua sponte* the action against Dallas County for want of prosecution, as process had never been served on the county. Although he appealed the entire judgment, in his brief on appeal, Miller does not challenge the dismissal.

II.

As always, we review a summary judgment *de novo*, **Campbell v. Sonat Offshore Drilling, Inc.**, 979 F.2d 1115, 1118-19 (5th Cir. 1992), drawing all factual inferences in favor of the party opposing the motion, **Letcher v. Turner**, 968 F.2d 508, 509 (5th Cir. 1992). It will be upheld only if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); **Letcher**, 968 F.2d at 509.

The pleadings of a *pro se* litigant are construed liberally. **Wesson v. Oglesby**, 910 F.2d 278, 279 (5th Cir. 1990). We address in turn Miller's claims regarding failure to protect, inadequate medical care, and remaining conditions of confinement (relating to overcrowding, and racial segregation, and failure to prosecute gang members).

A.

Post-conviction prisoner claims regarding conditions of confinement, including for inadequate medical care and failure to

our review to that basis. In any event, Bowles did not brief qualified immunity to us. On remand, of course, the district court may reconsider qualified immunity. (This circuit's heightened pleading requirement for qualified immunity has been recently overruled by the Supreme Court. See **Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit**, ___ U.S. ___, 113 S. Ct. 1160 (U.S. 1993).)

protect, are governed by the "deliberate indifference" standard of the Eighth Amendment. **Wilson v. Seiter**, ___ U.S. ___, 111 S. Ct. 2321, 2326-27 (1991). Pre-trial detainees, such as Miller, however, enjoy rights accorded under the due process clause that are not afforded convicted inmates. **Jones v. Diamond**, 636 F.2d 1364, 1368 (5th Cir.) (*en banc*), *cert. dismissed*, 453 U.S. 950 (1981), *overruled on other grounds*, **International Woodworkers of America v. Champion Int'l Corp.**, 790 F.2d 1174 (5th Cir. 1986). This is because "the due process clause forbids punishment of a person held in custody awaiting trial but not yet adjudged guilty of any crime". **Id.** at 1368. Under the due process standard, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment'". **Id.** at 1369.

This court has held that the less demanding due process standard governs pre-trial detainee claims of inadequate medical care. See **Cupit v. Jones**, 835 F.2d 82, 84-85 (5th Cir. 1987). We have not, however, specifically addressed whether the same test applies to other pre-trial detainee conditions-of-confinement claims, including failure to protect, although **Wilson** supports such a claim being governed by the same standard as one for inadequate medical treatment. See **Wilson**, 111 S. Ct. at 2326-27 (grouping inadequate medical care and failure to protect together for Eighth Amendment analysis). Because, as explained below, we must remand for other reasons, we decline to rule on this issue until after the district court has done so.

Regardless of the constitutional standard to be applied, a supervisory official may be held liable under § 1983 only if the plaintiff shows that (1) the supervisor was personally involved in the alleged constitutional deprivation, or (2) there is "a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation". **Thompkins v. Belt**, 828 F.2d 298, 304 (5th Cir. 1987). In his affidavit, Bowles stated in part that at all relevant times, he "had a policy, practice, custom and procedure that required all [his] employees, where possible, to act to protect the personal safety of all inmates in [his] custody and, where possible, to act to prevent any act of violence by one inmate against another". He also stated in part that it would violate this policy for a guard to turn off the intercom to a cell. Miller's pleadings, however, tend to contradict the existence of such a policy by asserting several instances in which his requests for protection were ignored.³ Although one incident does not establish a policy, see **Thompkins**, 828 F.2d at 305, several instances may. Miller's pleadings, therefore, when viewed in conjunction with Bowles's affidavit, are sufficient to create a genuine issue of material fact on whether Bowles's policymaking actions (or inactions) had a "causal connection" to the guards' alleged failure to protect Miller from harm. See **Thompkins**, 828 F.2d at 303.

³ We may consider Miller's sworn pleadings as summary judgment evidence, because they meet the requirements of Fed. R. Civ. P. 56(e). See **Isquith v. Middle South Utilities, Inc.**, 847 F.2d 186, 194-95 (5th Cir.), cert. denied, 488 U.S. 926 (1988).

Finally, the record indicates that Miller may be able, through discovery, to identify the guards responsible for his injuries.⁴ A *pro se* plaintiff should be given leave to amend when his complaint raises constitutional claims but names the wrong parties. ***Parker v. Fort Worth Police Dept.***, 980 F.2d 1023, 1025-26 (5th Cir. 1993). Miller, therefore, should be given the opportunity to amend his complaint to name the guards if so requested.

B.

The standard for establishing a claim of inadequate medical care is set out above. Under that standard, Miller states no facts which would support a claim against Bowles or any jail medical personnel. There are no allegations that Bowles was personally involved in denying him adequate medical care, and no evidence of even one instance in which Miller was provided inadequate care.⁵ The failure, if any, of jail personnel to identify the object lodged in Miller's head, without more, does not demonstrate that he received inadequate care. His allegations in this regard amount to no more than conclusory speculation.

C.

Miller's remaining claims are that jail policies of overcrowding, understaffing, and racial segregation in cells

⁴ In fact, his complaint identifies one as "Officer Scott". Bowles was granted a protective order shielding him from discovery pending resolution of the qualified immunity issue. Until that issue is resolved and discovery commences, Miller may properly name additional defendants simply as "unknown guards". *E.g.*, ***Partridge v. Two Unknown Police Officers***, 791 F.2d 1182 (5th Cir. 1986).

⁵ In his affidavit, Bowles stated that all inmates were to be given adequate medical treatment.

contributed to his injuries, and that no criminal charges were brought against the gang members. *Cf. Wright v. El Paso County Jail*, 642 F.2d 134, 136 n.3 (5th Cir. Unit A 1981) (Eighth Amendment claim of inhumane conditions, including overcrowding and failure to protect); *Oliver v. Collins*, 904 F.2d 278 (5th Cir. 1990) (§ 1983 claim of sheriff's failure to press charges relating to attack on inmate). These claims were not addressed by the district court, and Bowles presented no summary judgment evidence or authority regarding them. Accordingly, we must reverse the summary judgment insofar as it disposes of those claims and remand for further consideration of them.

III.

For the foregoing reasons, we **AFFIRM** the dismissal of the county. As to Bowles, we **AFFIRM** summary judgment on the claim of inadequate medical care, **REVERSE** on the claims regarding failure to protect and other conditions of confinement, and **REMAND** for further proceedings consistent with this opinion.

AFFIRMED in part, **REVERSED** in part, and **REMANDED**.