

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1066  
Summary Calendar

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DONNIE GENE ARPS,

Plaintiff-Appellant,

versus

THOMAS J. CALLAHAN, Sheriff,  
Wichita County, Texas, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the  
Northern District of Texas  
(7:89-CV-0027-K)

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(August 2, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.\*

GARWOOD, Circuit Judge:

Plaintiff-appellant Donnie Gene Arps (Arps) appeals the dismissal of his section 1983 civil rights complaint based on the district court's ruling that it was frivolous and failed to state a claim. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

### **Facts and Proceedings Below<sup>1</sup>**

On September 12, 1988, Arps was a pretrial detainee at the Wichita County Jail (the Jail). Arps was housed in the same cell block as Mark Miser (Miser), a convicted felon awaiting transfer to a Texas prison. During that day, Arps and Miser had an exchange of words and Miser threatened to punch Arps. Afterwards, in an attempt to get help, Arps began waving a legal pad at a security camera located in the cell block. Arps waved the legal pad for about two minutes and then returned to his cell. Arps repeated this process of waving the legal pad and returning to his cell three more times over a period of approximately thirty minutes. Thereafter, Arps returned to his cell door and began watching television. Miser came over to Arps' cell, punched Arps, and slammed his body to the floor. Miser then stomped and repeatedly kicked Arps until a guard arrived.

For five to ten minutes immediately following the attack, Arps remained on the floor. He was then removed from the cell and placed near the Jail's control center. Approximately ten minutes later, he was placed in a wheelchair and taken downstairs. He remained downstairs in the wheelchair for about twenty to thirty minutes. Thereafter, Arps was shackled and told to walk to the back seat of a deputy's car. Arps was then taken to the hospital.<sup>2</sup>

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<sup>1</sup> The facts are based on Arps' testimony at a hearing held by a magistrate judge in accordance with *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

<sup>2</sup> In his complaint, Arps alleged that prison officials failed to provide adequate medical attention because prison officials (1) took too long to take him to the hospital and (2) aggravated his injuries by shackling him and transporting him in the very

Later Arps learned that as a result of the attack his shoulder was dislocated and his foot was broken.

On April 19, 1989, proceeding *pro se* and *in forma pauperis*, Arps<sup>3</sup> filed this lawsuit pursuant to 42 U.S.C. § 1983. The only defendants are Wichita County, Texas, Sheriff Tom Callahan, and several Wichita County county commissioners (collectively the Defendants). In his complaint, Arps alleged that the Defendants violated his rights under the Fourteenth and Eighth Amendments by permitting a convicted prisoner to attack him, by failing to provide adequate medical attention, and by forcing him to pay for medication. Arps also asserted that the Defendants were responsible for the injuries he sustained during the attack because pretrial detainees and felons were improperly housed together.

After an August 15, 1990, *Spears* hearing on Arps' claims, the magistrate judge issued a report dated September 27, 1991, recommending that the case be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d) and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). In response to objections by Arps, the magistrate judge issued a supplemental report on November 6, 1992. On December 21, 1992, the district court adopted the magistrate's reports and recommendations and dismissed the lawsuit.

On appeal, Arps argues that the district court erred by (1)

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small and cramped back seat of the deputy's car. On appeal, however, Arps fails to assert that he received inadequate medical care; thus he has waived this claim.

<sup>3</sup> At the time he filed the lawsuit, Arps was a state prisoner at the Texas Department of Criminal Justice.

dismissing his lawsuit as frivolous and for failure to state a claim; (2) dismissing his lawsuit without considering his amended complaint; and (3) denying his request for the appointment of counsel.

### **Discussion**

#### I. District Court's Dismissal Under 28 U.S.C. § 1915(d)<sup>4</sup>

A dismissal of an *in forma pauperis* action, pursuant to 28 U.S.C. § 1915(d), is reviewed under the abuse of discretion standard. See *Cay v. Estelle*, 789 F.2d 318, 325 (5th Cir. 1986) (noting district courts have broad discretion in making a determination pursuant to section 1915(d)). Under section 1915(d), the district court may dismiss an *in forma pauperis* proceeding if it is "satisfied that the action is frivolous or malicious." Dismissal pursuant to section 1915(d) is proper where the claim has no arguable basis in law or fact. See *Eason v. Thalee*, 14 F.3d 8, 9 (5th Cir. 1994).

Supervisory officials are not liable under section 1983 for the actions of subordinates under any theory of vicarious liability. *Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987). A supervisory official may be held liable if a civil rights plaintiff shows (1) the supervisor was personally involved in the constitutional deprivation or (2) that there was causal connection between the supervisor's wrongful conduct and the constitutional violation. *Id.* at 304. However, supervisory officials would be

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<sup>4</sup> Arps also complains of the district court's dismissal for failure to state a claim under Rule 12(b)(6). Because we find that dismissal was proper under section 1915(d), we need not address dismissal pursuant to Rule 12(b)(6).

liable if they implemented a policy so deficient that the policy "itself [was] a repudiation of constitutional rights" and was the "moving force of the constitutional violation." *Id.* (citations omitted).

Arps made no claim that the sheriff or the county commissioners were personally involved in the failure of guards to protect him from attack. Thus, the question becomes whether Arps has any meritorious claims based on the Defendants' implementation of a constitutionally deficient policy.

A. Failure to protect

Arps claims that the Defendants violated his rights when they failed to protect him from Miser's attack. Our standard for a failure to protect claim is deliberate indifference. *See, e.g., Rhyne v. Henderson*, 973 F.2d 386, 392 (5th Cir. 1992) (evaluating municipality's policy for protecting suicidal pretrial detainees under deliberate indifference standard); *Sodie v. Canulette*, No. 91-3620 at 6 (5th Cir. 1992) (unpublished opinion) (applying deliberate indifference standard for pretrial detainees' failure to protect claim); *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir. 1986) (stating "[w]here dealing with the constitutionally rooted duty of jailers to provide their prisoners reasonable protection from injury at the hands of fellow inmates, 'we need not dwell on the differences in rights enjoyed by pre-trial detainees and convicted persons . . . .'") (citation omitted).

At the *Spears* hearing, Arps stated that until thirty minutes before the attack he had never had any problems with Miser and had no reason to expect trouble. Therefore, Arps' main complaint is

that prison officials failed to respond to his gestures at the security camera.

Sheriff Callahan stated at the *Spears* hearing that the Jail had a voice activated alarm system.<sup>5</sup> He stated that Arps' waving a legal pad at the camera would not alert the guards because it was not unusual for inmates to constantly wave at the security cameras without being in any need of assistance.

Arps' testimony fails to show how the guards' failure to identify his gestures at the security cameras as a request for assistance is due to a constitutionally deficient policy implemented by the Defendants.<sup>6</sup> Arps fails to suggest how the Defendants, who had no prior notice of Miser's violent nature, could have protected him from this random incidence of violence. Arps cannot establish any policy or action implemented by the Defendants which was deliberately indifferent to the protection of inmates. Since Arps' failure to protect claim has no arguable basis in law or fact, the district court did not abuse its discretion by dismissing this claim as frivolous.

B. Failure to segregate

Arps asserts that his due process rights were violated when he was housed with Miser, a convicted felon. "[T]he due process clause forbids punishment of a person held in custody awaiting

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<sup>5</sup> This testimony is supported by Arps' own statement that a guard arrived in the cell block soon after the attack.

<sup>6</sup> Even assuming that the prison guards deliberately ignored Arps' pleas for help, none of the guards are named in the lawsuit. As the Defendants are supervisory officials who were not personally involved in the incident, they are only liable for a constitutionally deficient Jail policy.

trial but not yet adjudged guilty of any crime." *Jones v. Diamond*, 636 F.2d 1364, 1368 (5th Cir. 1981). However, "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 (quoting *Bell v. Wolfish*, 99 S.Ct. 1861, 1874 (1979)).

The district court found that the unrebutted evidence at the *Spears* hearing established that Arps was classified with other nonassaultive convicted felons because he had prior felony convictions. Testimony by Sheriff Callahan revealed that it was the Jail's policy to classify pretrial detainees that had prior felony convictions as convicted felons. This policy of classifying pretrial detainees with prior felony convictions with other convicted felons is reasonably related to the Jail's interest in maintaining jail security. *See, e.g., Sodie*, No. 91-3620 at 5 (5th Cir. 1992) (finding that the classification of a pretrial detainee who had an extensive criminal history with other convicted felons was reasonable). Arps did not challenge Callahan's testimony that he had prior felony convictions. Thus, even if all of Arps' testimony is accepted as true, he fails to establish that the Defendants' policy of housing prior felons with convicted felons violated his constitutional rights. Thus, the district court did not abuse its discretion by dismissing this claim as frivolous.

#### C. Deprivation of property

In his complaint Arps asserted that Defendants improperly charged him for aspirin in an attempt to discourage inmates at the Jail from seeking medical attention. Arps argued that the Jail's

policy violated his due process rights because he was not provided an indigency hearing before money was deducted from his prison account for the medication.

Arps never asserted in his complaint or in any of his objections to the magistrate's report that he *requested* an indigency hearing. In addition, Arps has never asserted that he did not have the funds to pay for the aspirin. Since Arps never pursued a hearing on the matter, he fails to establish a due process violation. As Arps did not offer any facts or law to support his allegations, the district court did not abuse its discretion by dismissing this claim as frivolous pursuant to section 1915(d).

## II. Motion For Leave to Amend

Federal Rule of Civil Procedure 15(a) states that leave to amend "shall be freely given when justice so requires." The denial of a plaintiff's motion for leave to amend is reviewed for abuse of discretion. *Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp.*, 992 F.2d 1398, 1403 n.8. (5th Cir. 1993). In ruling upon such a motion, the district court may consider factors such as prejudice to the opposing party, undue delay, bad faith or dilatory motive on the part of the movant, the repeated failure of the movant to cure deficiencies in previous amendments, and the futility of the amendment. See *Whitaker v. Houston*, 963 F.2d 831, 836 (5th Cir. 1992).

On March 5, 1992, nearly five months after he filed his objections to the magistrate's original report and recommendations, Arps filed a motion for leave to file an amended complaint. In his



motion, Arps asserted that the amended complaint was "better organized and more clearly set[] forth [his] Constitutional law claims." Arps, however, never tendered the proposed amended complaint to the district court, nor has he ever submitted it as part of the appellate record.

Considering Arps' five-month delay before filing his motion to amend and his failure to tender the proposed amended complaint to the district court, we are unable to conclude that it was an abuse of discretion to deny his motion for leave to amend.

### III. Motion for Appointment of Counsel

A district court is not required to appoint counsel for an indigent plaintiff asserting a claim under section 1983 unless there are exceptional circumstances. *Jackson v. Cain*, 864 F.2d 1235, 1242 (5th Cir. 1989). The district court does have the discretion to appoint counsel for a plaintiff proceeding *pro se* if doing so would advance the proper administration of justice. *Id.*

Arps' lawsuit does not present any exceptional circumstances, and the district court did not abuse its discretion by denying Arps' motion for appointment of counsel.

The district court's judgment is therefore

AFFIRMED.