IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1694

Summary Calendar

JIMMY GARCIA,

Plaintiff-Appellant,

v.

ASSISTANT WARDEN SANDERS,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(CA 92 CV 58)

(April 28, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Jimmy Garcia appeals the district court's dismissal of his complaint, brought pursuant to 42 U.S.C. § 1983, as frivolous. We affirm the judgment of the district court.

I.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Jimmy Garcia, currently a Texas state prisoner at the Clement Unit of the Texas Department of Criminal Justice, filed a § 1983 pro se complaint against Assistant Wardens Darwin Sanders and Smith, Regional Director Michael Moore, Drs. Timothy Revell and Steve Elston, Captains Jimmy Lawson and Robert Harrell, and Correctional Officer Kelvin Dowlen. He alleged that he had received delayed and inadequate medical treatment, been forced to perform work which aggravated his medical condition, and been denied access to the law library and to the courts.

Garcia's motion to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a) was granted. The magistrate judge denied Garcia's motion for appointment of counsel. The magistrate judge filed a Report and Recommendation and a Supplemental Report and Recommendation recommending that Garcia's complaint be dismissed as frivolous. The district court adopted the magistrate's recommendation and dismissed Garcia's complaint without prejudice.[1]

II.

An in forma pauperis complaint is "frivolous" within the meaning of § 1915(d) if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). The Supreme Court has determined that pursuant to § 1915(d), a federal court has "not only the authority to dismiss a claim

[1] The judgment dismissing Garcia's complaint does not state whether the dismissal is with or without prejudice. We have held that when a § 1915(d) dismissal is silent, we will presume that the dismissal is without prejudice. Graves v. Hampton, 1 F.3d 315, 319 (5th Cir. 1993).

based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Id. at 327.

The Court has emphasized that "legal frivolousness" within the framework of § 1915(d) "refers to a more limited set of claims than does Rule 12(b)(6)" of the Federal Rules of Civil Procedure, which governs the dismissal of a complaint for failure to state a claim. Id. at 329. A complaint is not automatically frivolous in the context of § 1915(d) because it fails to state a claim, id. at 331, and thus should be dismissed only in limited circumstances. However, the Court has explained that a complaint would be legally frivolous if the plaintiff alleges "claims of infringement of a legal interest which clearly does not exist" or "claims against which it is clear that the defendants are immune from suit." Id. at 327.

The Court has also made it clear that a complaint should be dismissed as "factually frivolous" under § 1915(d) if the facts alleged are "fanciful," "fantastic," "delusional," or "clearly baseless." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992). As those terms suggest, the Court explained, "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible," but not simply because the alleged facts are deemed unlikely. Id.

We review § 1915(d) dismissals for an abuse of discretion because a determination of frivolousness--whether legal or

factual--is a discretionary one. Id. at 1734; Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992). Factors we consider on review, among others, are whether (1) the plaintiff is proceeding pro se, (2) the court inappropriately resolved genuine issues of disputed fact, (3) the court applied erroneous legal conclusions, (4) the court has provided an adequate statement of reasons for dismissal which facilitates intelligent appellate review, and (5) the dismissal was with or without prejudice. Denton, 112 S. Ct. at 1734; Moore, 976 F.2d at 270.

III.

A. Delayed and Inadequate Medical Treatment

For a prisoner to set forth a claim for relief under § 1983 for denial of medical treatment, he must show that care was denied or delayed and that this denial or delay constituted deliberate indifference to his serious medical needs. See Whitley v. Albers, 475 U.S. 312, 319-20 (1986); Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). Deliberate indifference is a legal conclusion which must rest on facts evincing wanton action on the part of the defendant. Walker v. Butler, 967 F.2d 176, 178 (5th Cir. 1992). Negligent medical care does not constitute a valid § 1983 claim. Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993).

Garcia alleged that he complained of pain in the lower right side of his chest to a correctional officer early in the morning on August 2, 1991. About an hour and a half later, Garcia was examined by unnamed medical personnel who disregarded his

complaints about the pain. On the evening of August 6, 1991, Garcia again complained about chest pain. Garcia went to the infirmary, and he was issued a pass to see Dr. Elston early the next morning.

On August 7, 1991, Dr. Elston examined Garcia with a stethoscope, and he found no condition warranting medical attention. Garcia requested Dr. Elston to take an x-ray of his chest, but Dr. Elston refused the procedure. Dr. Elston told Garcia that he would prescribe some pain medication, but Garcia never received the medication. That same day, Garcia told his field boss, Dowlen, that he would not be able to work because of his chest pain. Dowlen threatened Garcia with disciplinary action if he did not go to work. Garcia then complained to Harrell, who was in charge of Dowlen, and he also told Garcia to go to work.

On August 15, 1991, Garcia had an appointment with Dr. Revell. Dr. Revell ordered an x-ray of Garcia's chest and discovered that Garcia had a fractured rib. Dr. Revell then ordered Garcia a rib belt and gave him a thirty pound lifting restriction for thirty days. Garcia was given a medical pass. Because Garcia was not taken off his hard labor field force squad, he went back to the infirmary the next day and complained that he could not continue his work related duties. The infirmary personnel informed Dr. Revell of Garcia's complaint; Dr. Revell told Garcia to go back to work. Garcia returned to the infirmary on August 20, 21, 26, and 27 to complain about his

work assignment and each time infirmary personnel refused to change Garcia's job restriction.

On August 7, 1991, Garcia filed a grievance complaining of Dr. Elston's treatment. Sanders returned the grievance without expressing concern over Garcia's complaints. Garcia appealed, but he received no satisfaction.

On August 21, 1991, Garcia was punished for failing to report to work on August 7, 1991. Lawson was the hearing officer. Lawson disregarded Garcia's contention that he should have been excused from work because he had been at the infirmary due to his injury. Lawson imposed a punishment of thirty days lost privileges, thirty days special cell restriction, thirty days loss of property, and thirty days commissary restriction. Garcia unsuccessfully appealed the decision.

The magistrate judge dismissed Garcia's claims concerning his medical treatment because his allegations alleged nothing more than negligence on the parts of Drs. Revell and Elston. The magistrate also determined that Garcia's allegations that other correctional officers required him to perform work which greatly increased his pain should also be dismissed because those allegations did not demonstrate that the defendants were deliberately indifferent to Garcia's condition. The magistrate judge stated that "[t]here is nothing to indicate that prison officers did not abide by the restrictions that were prescribed by Dr. Revell."

1. Defendants Drs. Revell and Elston

Garcia alleged that Dr. Elston misdiagnosed his condition and that Dr. Revell underestimated the seriousness of his injury. He also contended that the defendants should have known or foreseen that hard labor would aggravate his medical condition. Garcia also alleged that Dr. Elston prescribed pain medication, which he never received.

We agree with the district court's determination that Garcia's complaints do not reveal any condition which evinces an intentional indifference to a serious medical need. At most, Garcia has alleged that the doctors were negligent in not diagnosing his rib injury sooner. In relation to the pain medication which was never given to him (Garcia alleges that Dr. Elston initially prescribed "Ibuprofen 800 mg. TID X 21 days"), we do not believe that Garcia has alleged intentional indifference to a serious medical need; Garcia also stated in his objections to the magistrate's report and recommendation that Dr. Elston later changed his mind in prescribing the pain medication because he believed that Garcia was trying to be removed from working on the field force squad by exaggerating his pain.

2. Defendants Captains Jimmy Lawson, Robert Harrell, and Correctional Officer Kelvin Dowlen.

Garcia also complains that prison officials inflicted cruel and unusual punishment because they forced him to do work which would aggravate his injury. Because Garcia does not allege that the work that he was required to do was violative of the Eighth Amendment, the defendants are liable only if they knew that the

work would significantly aggravate Garcia's serious medical ailment. However, Garcia does not allege that prison officials purposely violated the work restrictions which Dr. Revell placed on him. His argument is based on a personal belief that his injury required him to be excused entirely from his work assignment. Therefore, we do not believe that the district court erred in dismissing these claims.

Garcia further contends on appeal that he was wrongly disciplined for refusing to work because he had a valid excuse for not working. Corrections officers cannot be faulted for requiring Garcia to work because prison medical personnel concluded that he could work. Therefore, this claim is also frivolous.

3. Defendants Assistant Wardens Darwin Sanders and Smith, and Regional Director Michael Moore

Garcia also argues that Assistant Wardens Darwin Sanders and Smith, and Regional Director Michael Moore should be held accountable for the wrongful acts of their subordinates. "Under section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability." Thompkins v. Belt, 828 F.2d 298, 303 (5th Cir. 1987). Liability exists only if the supervisor is personally involved in the constitutional deprivation or there is a causal connection between the supervisor's conduct and the violation. Garcia has not alleged any facts from which it can be concluded that any defendant supervisors were personally involved in a

constitutional deprivation or that their actions were causally connected with a constitutional violation committed by a subordinate. Thus, the district court did not err in dismissing these claims.

B. Denial of access to law library and delay of mail

Garcia also asserts that the district court should have considered his claims that his rights under the First and Fourteenth Amendments were violated by prison personnel. Specifically, he asserts that he was denied access to the prison unit's law library and that prison officials delayed the delivery of his legal mail in response to his filing of grievances and preparing a civil rights complaint. He alleges that the withholding of his mail was so excessive as to constitute a violation of his First and Fourteenth Amendment rights.

Although the magistrate judge noted that Garcia had included a claim concerning access to the law library and to the courts in both his original and amended complaints, the magistrate judge did not discuss those claims because Garcia had not named any defendants. When prison authorities intentionally delay an inmate's legal mail, the inmate may have a cause of action under § 1983 for interference with his access to the courts if he was prejudiced as a result of any delay. Jackson v. Procunier, 789 F.2d 307, 311 (5th Cir. 1986). Garcia has not alleged that he was prejudiced as a result of any delay. Nor has he alleged that he was prejudiced because he was denied access to the law library. Therefore, the district court did not err in dismissing

Garcia's claims for delay of his legal mail or for denial of access to the law library.

C. Appointment of counsel

Garcia also alleges that the district court erred in denying his motion for appointment of counsel. The district court was not required to appoint counsel for an indigent party asserting a § 1983 case. Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). We will not reverse a district court's decision denying the appointment of counsel unless the court has abused its discretion. Id. at 213. Among the factors used to determine whether the court abused its discretion are (1) the type and complexity of the case, (2) whether the indigent was capable of adequately presenting the case, (3) whether the indigent was in the position to investigate the case adequately, and (4) whether the evidence would consist in large part of conflicting testimony requiring skill in the presentation of evidence and in cross-examination. Id. The magistrate judge denied Garcia's motion for appointment of counsel because Garcia had not shown any inability to set forth his claims or any extraordinary circumstances which would justify the appointment of counsel. We conclude that the court below did not abuse its discretion in denying Garcia's motion for appointment of counsel.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.