IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1744
Conference Calendar

ARVESTER GARNER,

Plaintiff-Appellant,

versus

TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, ROACH UNIT, Infirmary,
ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:92-CV-0184
- - - - - - - - - -
(May 18, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Arvester Garner appeals the judgment of the district court dismissing his civil rights action as frivolous under 28 U.S.C. § 1915(d). He argues that prison medical personnel were deliberately indifferent to his serious medical needs and that the magistrate judge violated his rights to due process at the hearing held pursuant to Spears v. McCotter, 766 F.2d 179, 181 (5th Cir. 1985).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In order to state a cognizable claim of an Eighth Amendment violation in the medical sense, prisoners must show that prison officials were deliberately indifferent to their serious medical needs constituting unnecessary and wanton infliction of pain. Estelle v. Gamble, 429 U.S. 97, 104-06, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Deliberate indifference entails wanton actions. Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985). It is not enough that the plaintiff is dissatisfied with the medical treatment he receives or that he alleges mere negligence. See Spears, 766 F.2d at 181; Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

Garner does not demonstrate that the defendants took any wanton action that amounted to deliberate indifference to his medical needs. The doctors performed a surgical procedure on a pre-existing medical condition. When Garner continued to experience discomfort and side effects, the doctors referred him to John Sealy Hospital. Garner concluded that, because the results were unsatisfactory, the doctors were negligent and the surgery was unnecessary. His claim, however, does not rise to the level of an Eighth Amendment violation.

Garner challenges that portion of the magistrate judge's report which considered his involvement in a fight as a "defense" to the inadequate medical care he received. Contrary to Garner's assertion, the analysis turns on the medical treatment provided and not his involvement in a fight. His claim is meritless.

Moreover, Garner asserts that he was deprived of due process because the magistrate judge made a prejudicial statement at the

Spears hearing. According to Garner, the magistrate judge expressed concern about his scar but stated that a doctor is only human and makes mistakes.

Garner's argument is frivolous because a Spears hearing does not implicate the Due Process Clause. The purpose of the Spears hearing is to obtain "a more definite statement" of the claim to determine whether the claim is frivolous, not to determine the case on the merits. Spears, 766 F.2d at 181-82. The magistrate judge's statement that Garner was still suffering and that the doctors had not made him well did not impinge on the standard for an Eighth Amendment violation.

For the first time on appeal, Garner asserts that prison medical personnel failed to provide the high fiber treatment recommended at John Sealy. This Court will not consider issues that have not presented in the district court unless "they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado, 920 F.2d at 321.

Accordingly, Garner's claim has no arguable basis in law and fact. The district court did not abuse its discretion in dismissing the claim as frivolous. See Ancar v. Sara Plasma, 964 F.2d 465, 468 (5th Cir. 1992).

AFFIRMED.