

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2686

Summary Calendar

KENNETH A. HENDERSON,

Plaintiff-Appellant,

v.

MONTGOMERY COUNTY,

MONTGOMERY COUNTY MEDICAL STAFF,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 92 2186)

(December 30, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Kenneth A. Henderson appeals the district court's dismissal of his complaint, brought pursuant to 42 U.S.C. § 1983, as frivolous. We vacate the judgment of the district court and remand for further proceedings.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Kenneth A. Henderson, currently a federal prisoner in Leavenworth, Kansas, filed a pro se complaint against officials of the Montgomery County jail in the United States District Court for the Southern District of Texas, pursuant to 42 U.S.C. § 1983. He alleged that he had received delayed and inadequate medical treatment.

The district court ordered Henderson to submit a more definite statement and thus to explain his cause of action in more detail. In compliance with the district court's order, Henderson alleged that officials at the Montgomery County jail delayed giving him medical treatment for existing medical problems--i.e., asthma, diabetes, a "herniated disc," a "hurt right side," high blood pressure, and "continual bleeding from penis"--until his symptoms became so severe that he had to be rushed to Conroe Hospital, where he stayed for several days until he was released in "tolerable condition."

Henderson also filed a motion "for relief," or in the alternative for summary judgment. At the same time, he filed a "memorandum of law" in which he alleged that officials at the Montgomery County jail had violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. He asserted that he was subjected to cruel and unusual punishment because of the inadequate food served to him and the unsanitary conditions with which he had to contend in jail. He also stated

that he had to be rushed to the hospital because jail officials ignored his repeated requests for medical treatment.

The district court granted Henderson pauper status, pursuant to 28 U.S.C. § 1915(a), and then dismissed with prejudice Henderson's complaint as frivolous, pursuant to 28 U.S.C. § 1915(d). Henderson filed a timely notice of appeal.

II.

Henderson argues that the district court erred in dismissing his § 1983 complaint as frivolous. We agree.

An in forma pauperis complaint is "frivolous" within the meaning of § 1915(d) if "it lacks an arguable basis in either law or fact." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992); 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 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." Neitzke, 490 U.S. at 327. We review § 1915(d) dismissals for an abuse of discretion because a determination of frivolousness--whether legal or factual--is a discretionary one. Hernandez, 112 S. Ct. at 1734; Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992).

A pro se litigant is entitled to liberal construction of his pleadings. Rodriguez v. Holmes, 963 F.2d 799, 801 (5th Cir.

1992). To set forth a cognizable claim under 42 U.S.C. § 1983, a plaintiff must show that he was deprived of a federal constitutional or statutory right and that the person or persons depriving him of that right acted under color of state law. Hernandez v. Maxwell, 905 F.2d 94, 95 (5th Cir. 1990); Daniel v. Ferguson, 839 F.2d 1124, 1128 (5th Cir. 1988).

Henderson alleges that he was arrested while on parole and initially taken to the Harris County jail. He also alleges that he was later transferred to the Montgomery County jail after he had filed grievances against Harris County jail officials for not giving him required medical treatment. It is thus unclear from the record whether Henderson was a convicted prisoner or a pre-trial detainee at the time the allegations on which the instant case is based took place.

For a convicted 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); Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). 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); Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985); see Whitley, 475 U.S. at 319. A pre-trial detainee is entitled to reasonable medical care unless the failure to supply

the care is reasonably related to a legitimate government objective. See Jones v. Diamond, 636 F.2d 1364, 1378 (5th Cir.) (en banc), cert. dismissed, 453 U.S. 950 (1981). Negligent medical care does not constitute a valid § 1983 claim. Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993); Varnado, 920 F.2d at 321.

The district court concluded that Henderson was a convicted criminal and reviewed Henderson's claim according to the "deliberate indifference" standard. Assuming arguendo that this more stringent standard was applicable in Henderson's case, Henderson has stated a claim for relief under § 1983 that is not frivolous. Henderson alleges that he had to be rushed to the hospital because jail officials ignored his repeated requests for treatment and failed to treat him. Although he uses the words "negligence" and "medical neglect" throughout his pleadings, the facts he states are capable of construction as intentional conduct and deliberate indifference. See Hall v. Jenkins, No. 93-1398, at 3 (5th Cir. Oct. 29, 1993) (unpublished opinion) (determining that the plaintiff's allegation that officials refused him medical treatment indicated intentional conduct); Johnson, 759 F.2d at 1238 (explaining that evidence of prison personnel's refusal of treatment or ignorance of the prisoner's medical complaints would evince a "wanton disregard for any serious medical need"). Therefore, Henderson's claims have an arguable basis in law, and the district court abused its

discretion in dismissing Henderson's § 1983 complaint as frivolous.

III.

Liberally construing Henderson's appellate brief, we also note that Henderson raises the argument that the district court erred in denying his amendment to his complaint. In its dismissal order, the district court recognized that Henderson had filed a subsequent pleading (Henderson's "memorandum of law"), but indicated that it was unclear whether the claims alleged in that pleading were the same as those identified in Henderson's original complaint. The district court then dismissed with prejudice Henderson's entire complaint as frivolous under § 1915(d).

Although Henderson's original complaint contained only his claims for denial of medical treatment, Henderson's "memorandum" repeated his initial claims and added constitutional claims regarding food and sanitary conditions at the Montgomery County jail. Moreover, Henderson's "memorandum" was in the form of a complaint and set out jurisdiction, identified claims, demanded a jury trial, and requested monetary damages.

The district court need not afford a plaintiff the opportunity to amend his complaint when his complaint does not contain sufficient factual support to maintain a constitutional claim. See Graves v. Hampton, 1 F.3d 315, 318 n.12 (5th Cir. 1993) (explaining that § 1915(d) does not procedurally provide a

plaintiff an opportunity to amend his complaint before dismissal). However, "[i]f it appears that frivolous . . . allegations could be remedied through more specific pleading, a court of appeals reviewing a section 1915(d) disposition should consider whether the district court abused its discretion by dismissing the complaint with prejudice or without leave to amend." Id. at 318 (quoting Denton, 112 S. Ct. at 1734).

In the interest of justice, Henderson's "memorandum," which raised new claims, should have been construed as a motion to amend his pleadings. See Cash v. Jefferson Assocs., Inc., 978 F.2d 217, 218 (5th Cir. 1992) (deciding that a response to a motion to dismiss, in which for the first time the plaintiff alleged that she had been discriminated against "willfully," should be treated as a motion to amend her pleadings); Sherman v. Hallbauer, 455 F.2d 1236, 1242 (5th Cir. 1972) (determining that a memorandum in opposition to a motion for summary judgment raised a new allegation and should have been construed as an amendment to the original complaint). Henderson's "memorandum" gives added detail to his claims that officials at the Montgomery County jail gave him delayed and inadequate medical treatment. It also alleges that Henderson suffered cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments, due to unsanitary living conditions and inadequate food. Because we construe Henderson's "memorandum" as a motion to amend his pleadings and the district court's subsequent dismissal of Henderson's complaint with prejudice as a denial of Henderson's

motion to amend, we review the district court's denial of Henderson's motion to amend for abuse of discretion. Ashe v. Corley, 992 F.2d 540, 542 (5th Cir. 1993); Whitaker v. City of Houston, 963 F.2d 831, 836 (5th Cir. 1992).

Serious deprivations of basic human needs by prison officials constitute cruel and unusual punishment and therefore violate the Eighth Amendment. Rhodes v. Chapman, 452 U.S. 337, 347 (1981). The Eighth Amendment also forbids deprivation of the basic elements of hygiene. Daiqre v. Maggio, 719 F.2d 1310, 1312 (5th Cir. 1983); see Green, 801 F.2d at 770 n.5, 771. Further, inmates must be provided with adequate food. George v. King, 837 F.2d 705, 707 (5th Cir. 1988); see Green, 801 F.2d at 770.

Henderson's additional claims raised in his "memorandum," i.e., that he received inadequate food and was exposed to unsanitary living conditions in the Montgomery County jail, are arguable in law. Necessary factual details can be obtained through more specific pleading in the form of a response to the district court's order for a more definite statement. The district court thus abused its discretion by failing to consider Henderson's "memorandum" as a motion to amend and not allowing the amendment.

IV.

For the foregoing reasons, we VACATE the judgment of the district court and REMAND for further proceedings consistent with this opinion.