

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3478
Conference Calendar

GEORGE WILLIAMS,

Plaintiff-Appellant,

versus

WAYNE MCWILLIAMS ET AL,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. CA-92-186-A-M1
- - - - -
(March 22, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

The district court dismissed George Williams's civil rights complaint for failure to state a claim upon which relief can be granted. This Court reviews the Fed. R. Civ. P. 12(b)(6) dismissal de novo. Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993). A Rule 12(b)(6) dismissal is appropriate when, accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff, the plaintiff can prove no set of facts that would entitle him to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

relief. McCartney v. First City Bank, 970 F.2d 45, 47 (5th Cir. 1992).

Williams argues that he was denied due process because Sergeant McWilliams falsely accused him of attacking McWilliams and threatened to charge him with battery of a correctional officer. There is no due process violation if a prisoner is falsely accused of charges if the prisoner is given an adequate state procedural remedy to challenge the accusations. Collins, 743 F.2d at 253-54; see Freeman v. Rideout, 808 F.2d 949, 951 (2d Cir. 1986) ("The prison inmate has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest."), cert. denied, 485 U.S. 982 (1988). Williams does not allege that he was charged with the offense or that he did not have an adequate opportunity to defend against the charges. He has failed to state a cognizable due process claim.

Williams argues that his Eighth Amendment rights were violated because he was forced to endure the foul odor caused by an incontinent prisoner in his housing unit. This Court reviews a prisoner's allegations challenging the conditions of confinement under the "deliberate indifference" standard. Wilson v. Seiter, ___ U.S. ___, 111 S.Ct. 2321, 2326-27, 115 L.Ed.2d 271 (1991). "To the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). Conditions of confinement which do not lead to deprivations of

essential food, medical care, or sanitation do not amount to an Eighth Amendment violation. Id. at 348.

Although Williams alleges that the foul odor was unpleasant he does not allege that it posed a medical or sanitation hazard. Therefore, accepting as true his allegations that the incontinent prisoner caused a foul odor, he has not alleged a cognizable Eighth Amendment claim.

Williams also argues that the district court prematurely dismissed his complaint without giving him an opportunity to amend his complaint. This Court reviews the district court's denial of a motion for leave to amend for an abuse of discretion. Ashe v. Corley, 992 F.2d 540, 542 (5th Cir. 1993). Leave to amend should be freely given when justice so requires, but leave to amend is not automatic. Id.

Williams did not request leave to amend his complaint until he filed a motion for reconsideration after the district court entered the order dismissing his complaint. In his proposed amendment Williams alleged new facts and raised a new claim of excessive force, but did not allege any facts which would have cured the defects in his original complaint. He contends that the district court misconstrued his complaint to allege that the officers had filed a false disciplinary charge against him, but a review of the original complaint supports the district court's interpretation of his allegations. The district court did not abuse its discretion by denying the motion to amend.

For the first time on appeal Williams argues that he was beaten without provocation in violation of the Eighth Amendment.

An issue raised for the first time on appeal will not be addressed unless it involves a purely legal issue and failure to consider it will result in manifest injustice. First United Financial Corp. v. Specialty Oil Co., Inc. --I, 5 F.3d 944, 948 (5th Cir. 1993). This issue involves the resolution of factual questions and therefore this Court will not address it. The judgment of the district court is AFFIRMED.

Williams's motion to recuse Magistrate Judge Riedlinger from further proceedings in this case is DENIED as moot. His motion for appointment of counsel on appeal is also DENIED because he has adequately presented the factual and legal basis of his claims, and this case does not present such exceptional circumstances warranting appointment of counsel. See Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982).