UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4087
Summary Calendar

CURTIS ANTONIO DAVIS,

Plaintiff-Appellant,

versus

ROBERT NAPPER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas
(91-CV-95)

(October 6, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant Curtis Antonio Davis (Davis) is an inmate in the Texas Department of Criminal Justice, Institutional Division (TDCJ), serving a life sentence for murder. In this civil rights action, he alleges that prison officials violated his Eighth Amendment rights by their deliberate indifference to his serious

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

medical needs and by the use of excessive force against him. Upon the report and recommendation of a magistrate judge following a *Spears* hearing,[1] the district court dismissed Davis's medical claim as frivolous pursuant to 28 U.S.C. § 1915(d). The parties consented to a bench trial before the magistrate judge on the excessive force claim. The magistrate judge ruled for the defendants and entered final judgment against Davis.

Facts and Proceedings Below

Davis suffers from asthma and allergic rhinitis, a condition which causes a stopped-up nose, sneezing, and reddened eyes; on at least two occasions he has broken out in allergic whelps, or hives. Prior to his incarceration, Davis received treatment for his allergies at a local Veteran's Hospital. Specialists at the hospital proposed tests to determine the cause of his allergies, but Davis was imprisoned before the tests could be administered. Although Davis has received treatment for his allergic condition while an inmate in TDCJ, he bases his medical claim on the fact that the cause of his allergies has not been identified.[2] Davis

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[1] *Spears v. McCotter*, 766 F.2d 179, 182 (5th Cir. 1985).

[2] Dr. Kuykendall, a physician for TDCJ, testified before the magistrate judge at the *Spears* hearing that Davis had been "a very frequent visitor" to the health facilities at TDCJ and had been to the Ear, Nose, and Throat Clinic and the Allergy Clinic at the University of Texas Medical Branch in Galveston, Texas, on "multiple occasions." Doctors at the Ear, Nose, and Throat Clinic had operated on Davis's sinuses. Dr. Kuykendall stated that the clinics at the medical branch in Galveston were well-equipped and capable of doing any allergy testing that was deemed necessary. Although Davis had been to the Allergy Clinic six or seven times since December 1987, no allergy testing had been recommended. Davis had refused to go to the clinic on four other occasions.

Davis did not dispute that he had received the described

told the magistrate judge at the *Spears* hearing that prison officials had not performed the tests recommended by the Veteran's Hospital to ascertain the cause of his allergies and were merely treating the symptoms of the allergy rather than the cause itself.

Davis's excessive force claim arises out of an incident in the shower room of the Coffield Unit of TDCJ on October 18, 1990.[3] Davis had been assigned to medical showers for his allergic

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treatment; his only complaint was that the treatment was inadequate because the cause of his allergies remained unknown. Indeed, at the *Spears* hearing he was forthright about the efforts the TDCJ doctors made to ease his condition:

> "On other occasions there was no need to file a grievance, period, simply because [the doctors] . . . kept trying to work with me and I allowed them to try to work with me in order to try to find something that would help. Even with Dr. Ford, him [sic] and I started a series of experiments. I stopped drinking milk for a while under his suggestions to try and see if maybe that would help. It didn't. I stopped eating any type of wheat, you know, bread and pastries, all this kind of stuff for a while to see if this here helped. It didn't. You know, everything that they tried to suggest to me to do I was willing and I did it, you know, to try and get help for my problem but nothing helped."

At the *Spears* hearing, Davis claimed, however, that the doctors gave up their attempts:

> "When I continued to tell [the doctors] that these things wasn't [sic] working, instead of me becoming frustrated they became frustrated and they simply told me there was nothing more they could do and then after [the excessive force incident] and then being placed in [administrative segregation] I knew I was at lost hope [sic]. I knew there was nothing that was going to be done for me unless I could get, you know, this court to force them to do it."

[3] The parties presented quite different versions of the events in the shower. Our presentation of the facts is based primarily upon the findings of the magistrate judge following the bench trial on Davis's excessive force claim.

condition.[4] On October 18, Sergeant John Zimmerman and Correctional Officer Baron Stinson roused the inmates for the medical showers early in the morning. Officer Stinson announced that the inmates had three minutes for their showers. He gave them two warnings to rinse off, the first with thirty seconds left and the second fifteen seconds later. Davis ignored both warnings and continued to lather himself. Officer Stinson waited thirty seconds more before turning off the water. The other inmates had observed his warnings and had rinsed off and left the shower area to dress. Davis was still covered with soap when the water was turned off.

Sergeant Zimmerman would not honor Davis's request that he turn the water back on, telling him to wipe the soap off in his cell. Davis threatened to file a grievance against Zimmerman and called both officers abusive names. Zimmerman attempted to calm Davis, but Davis turned his back and refused to stop upon his order. When Zimmerman placed his left hand on Davis's left arm to stop him, Davis swung around and struck him in the face. Davis swung at Sergeant Zimmerman again but hit Officer Stinson, who had come to Zimmerman's aid. Zimmerman struck Davis in the face at

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[4] Davis testified that his allergic symptoms were aggravated when he showered, particularly if the water was not hot. Davis complained that, unless he could shower with hot water and expose his skin to steam to open his pores before drying off and dressing, his skin would itch severely. Davis was allowed to attend the medical showers because of this condition.

Generally, the medical showers differed from general inmate population showers because fewer inmates were present; the medical showers were not necessarily longer or hotter than normal showers. In some instances, medical showers were restricted to inmates with broken limbs or older inmates; in these cases, the showers were longer to allow sufficient time. It is apparent from Davis's testimony that the administration of medical showers varied among the different TDCJ units.

least once during the ensuing struggle. Correctional Officer Christopher Cassell arrived in response to the situation. The officers were able to get Davis down onto the ground and handcuff him, but Davis continued to kick Zimmerman until Officer Cassell managed to place leg restraints on him. Davis was taken to the infirmary where he was examined and treated for a minor abrasion on his arm. Sergeant Zimmerman was treated for cuts and bruises on his face; Officer Stinson had sustained a jammed hand when Davis fell to the ground during the incident.

Davis filed his original complaint in 1988 but did not pursue any further action until December 1990, when he submitted an amended complaint. The amended complaint was filed in February 1991 when Davis paid a $5 partial filing fee as ordered by the district court. The district court referred the case to Magistrate Judge Judith K. Guthrie, who held a *Spears* hearing in May 1991 to evaluate the validity of Davis's claims. The magistrate judge found that Davis had not exhausted his administrative remedies and ordered a ninety-day continuance to allow Davis to pursue relief through TDCJ grievance procedures.

On January 30, 1992, the magistrate judge filed her report and recommendation, recommending that the district court dismiss Davis's complaint as frivolous pursuant to 28 U.S.C. § 1915(d). Davis objected to the report, in part because the magistrate judge had not addressed the excessive force element of his complaint. In a supplemental report filed on February 26, the magistrate judge again recommended that Davis's medical claim be dismissed under section 1915(d). She proposed that the excessive force claim be

dismissed with prejudice for failure to exhaust administrative remedies. Davis again filed objections to the report. On March 26, the magistrate judge withdrew the portion of her supplemental report and recommendation dealing with Davis's excessive force claim.

On April 9, 1992, the district court entered a partial order of dismissal, dismissing Davis's medical claim pursuant to section 1915(d) as recommended by the magistrate judge.[5] On June 5, the parties consented to try the excessive force claim before the magistrate judge. A bench trial was held November 16, 1992. The magistrate judge filed her memorandum opinion on January 13, 1993, finding that the force used against Davis was necessary to restore order and did not constitute an Eighth Amendment violation and that Sergeant Zimmerman had not acted with intent to retaliate against Davis for threatening to file a grievance against him. The magistrate judge entered final judgment dismissing Davis's complaint.

Davis timely appealed.

Discussion

I. Dismissal of Medical Claim

On appeal, Davis contends that the district court erred by dismissing as frivolous his claim that TDCJ officials were deliberately indifferent to his allergic condition. We have held that it is improper for a district court to dismiss a complaint as

[5] Davis attempted to appeal the dismissal of his medical claim, but this Court dismissed his appeal as interlocutory in July 1992. The magistrate judge later denied Davis's request to certify the section 1915(d) dismissal for appeal.

frivolous pursuant to 28 U.S.C. § 1915(d) where the plaintiff has paid a partial filing fee. *Grissom v. Scott*, 934 F.2d 656, 657 (5th Cir. 1991). Because Davis paid the $5 partial filing fee ordered by the district court, section 1915(d) was not a proper basis for the dismissal of his medical claim.

The defendants concede that section 1915(d) was not an appropriate basis for dismissal, but argue that the error was harmless because Davis's complaint could and should have been dismissed for failure to state a claim under FED. R. CIV. P. 12(b)(6). The Assistant Attorney General representing the defendants at the *Spears* hearing argued that the case should be dismissed because Davis had not alleged facts constituting deliberate indifference to his medical needs on the part of prison officials and thus had failed to state a claim upon which relief could be granted. Although the district court ultimately dismissed the medical claim under section 1915(d), the magistrate judge's supplemental report and recommendation suggests that Davis had not stated a redressable claim.[6]

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[6] The magistrate judge did not expressly suggest Rule 12(b)(6) as grounds for dismissal, but her discussion of the medical claim clearly supports such an inference:

> "Plaintiff apparently does not understand that in order to state a cognizable claim, he must show the Defendants possessed a culpable state of mind. But the Defendants herein have endeavored to solve his medical problems. They have not acted wantonly towards him. They do not have a culpable state of mind. They have not been deliberately indifferent. The crux of Plaintiff's objections is that the medical care provided has not eliminated his problems, but that simply does not amount to deliberate indifference." (Citations omitted.)

The record reflects that the Attorney General had notice of the *Spears* hearing, from which we infer that the defendants were served before the district court dismissed Davis's medical claims. Therefore, the district court could have dismissed the claims upon grounds other than section 1915(d), such as Rule 12(b)(6). *Irving v. Thigpen*, 732 F.2d 1215, 1216 n.2 (5th Cir. 1984).

We have affirmed the dismissal of a complaint where, although the original 12(b)(6) dismissal was procedurally improper, remand would not have changed the result. *Tyler v. Mmes. Pasqua & Toloso*, 748 F.2d 283, 287 (5th Cir. 1984), *overruled on other grounds by Victorian v. Miller*, 813 F.2d 718, 724 (5th Cir. 1987) (*en banc*). In *Tyler*, the district court *sua sponte* dismissed a plaintiff's action to enforce expedited food stamp service for failure to state a claim before the defendants answered (and raised the defense) and without allowing the plaintiff to attempt to cure the defect by amending his complaint. Although we disapproved of the summary nature of the district court's action, we nonetheless affirmed the dismissal of the plaintiff's claims. The defendant had indicated that it would pursue a motion to dismiss in the event of a remand, and the plaintiff had not suggested any amendment which would save his complaint. *Id*.

Similarly, here, nothing would be gained by reversing the district court's dismissal of Davis's medical claims.

The standard for evaluating an inmate's claim that his Eighth Amendment rights have been violated by the denial of medical care is whether the inmate has alleged "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical

needs." *Estelle v. Gamble*, 97 S.Ct. 285, 292 (1976). Deliberate indifference may be shown by evidence of "wanton" actions on the part of the defendants. *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985). The Eighth Amendment is not implicated by unsuccessful medical treatment or mere negligence, neglect, or medical malpractice. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (citations omitted).

Davis has pursued this action before the district court, as well as on appeal, *pro se*, and therefore his complaint must be accorded a liberal construction. *Haines v. Kerner*, 92 S.Ct. 594, 596 (1972); *Wesson v. Oglesby*, 910 F.2d 278, 281 (5th Cir. 1990). Dismissal of a *pro se* complaint is improper unless the plaintiff can prove no set of facts which would entitle him to relief. *Moawad v. Childs*, 673 F.2d 850, 851 (5th Cir. 1982).

Davis concedes that he has received treatment for his allergic condition. His complaint rests on his perception that prison officials failed to pinpoint the cause of his allergies and to treat that cause, thereby, presumably, relieving him of his discomfort.[7] This claim amounts to nothing more than an allegation

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[7] Davis's allegations against individual defendants included complaints that he was given a medical shower pass rather than a more effective treatment; an assistant warden denied him a grievance claim based on allergy treatment; a physician's assistant told him TDCJ would not pay for allergy testing; and TDCJ doctors failed to respond when he complained of the ineffectiveness of his treatment.

Davis claimed that Sergeant Zimmerman and Officer Stinson were deliberately indifferent to his allergies during the shower incident. He conceded, however, that the physical exertion of the struggle caused his body temperature to rise and prevented a serious allergic reaction to the shower. This admission calls into question Davis's claim that the officers ignored a serious medical need.

of ineffective medical treatment. Because the defendants' alleged conduct did not constitute deliberate indifference to Davis's medical needs, the district court could properly have dismissed the medical claim under Rule 12(b)(6).[8]

II. Other Alleged Errors

Davis's other contentions on appeal concern a variety of alleged procedural errors in the treatment of his claims. These contentions primarily concern the magistrate judge's handling of the trial of his excessive force claims against Sergeant Zimmerman and Officer Stinson.[9]

A. Discovery Rulings

The trial court has broad discretion in discovery matters, and we will reverse its rulings only on an abuse of that discretion. *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989). Errors in discovery rulings may be subject to harmless-error analysis. *See Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d

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[8] Furthermore, Davis's claims against several individual defendants should also be dismissed on other grounds. Davis sued former TDCJ Director James Lynaugh, Deputy Director Charles Alexander, Regional Director Marshall Herklotz, and Warden Jimmy Alford solely because of their supervisorial positions. A defendant cannot be held liable under section 1983 on a theory of respondeat superior. *Baskin v. Parker*, 602 F.2d 1205, 1207-08 (5th Cir. 1979).

Davis sued Correctional Officers Pate, Washington, and Bridges for failure to obtain care for him in February 1988. His complaint filed three years later in February 1991, was facially barred by the Texas two-year limitations period for section 1983 actions. *Owens v. Okure*, 109 S.Ct. 573, 582 (1989) (state personal-injury limitations periods apply to section 1983 actions); *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989) (Texas two-year period applies).

[9] Zimmerman and Stinson were the only remaining defendants following the dismissal of Davis's medical claims.

129, 136 (5th Cir. 1987).

1. Denial of discovery requests

Davis argues that the magistrate judge denied him adequate discovery on his claims. Specifically, he mentions three pieces of evidence that might have aided him in developing his case: information concerning medical showers at TDCJ; the names of other inmates in the shower; and a list of inmates working in the shower at the time of the excessive force incident.

Although the magistrate judge denied Davis's motion for discovery of the medical shower information and the lists of inmates, she later ordered the defendants to provide him with copies of the relevant internal affairs and disciplinary hearing reports. Davis asserted at trial that he had not received the discovery from the defendants; counsel for the defendants disputed this claim. The magistrate judge did not resolve the dispute but instead permitted Davis one-half hour to review the documentary evidence brought to trial by the defendants.

Davis argues that the information on the medical showers was relevant to his claim that Sergeant Zimmerman and Officer Stinson were deliberately indifferent to his medical needs. As discussed above, see note seven, *supra*, Davis failed to state a claim against the officers on these grounds. Moreover, there is no showing of what relevance this requested information would have. The magistrate judge did not abuse her discretion in denying discovery about the medical showers.

The magistrate judge questioned Davis concerning the inmates who were present in the showers around the time of the use of force

incident. Her interpretation of his response was that he would not call as witnesses the inmates who had provided statements for TDCJ and that all other inmates were out of the shower area at the time of the struggle.[10] This understanding of Davis's response is not unreasonable. Davis may have been entitled to lists of inmates present during the shower incident, but he has not alleged that any inmates were present other than those from whom the defendants received statements (whom Davis did not desire to call). Thus any error in the failure to provide the lists is harmless.

2. Denial of motion for default judgment

Davis moved for entry of default judgment based upon his allegation that the defendants had failed to provide him with discovery. Davis claimed that he had not received any discovery

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[10] The conversation was as follows:

> "Q. [by the court] And the other inmates that might have been witnesses for you were already taken out of the shower by the time the fight started, is that right?
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> "A. They witnessed the major setting of the incident. I mean, their testimony would be crucial in showing what brought about the incident, the mental state, maybe even of myself, you know, of each of us, and it would give the -- you know, the foundation. I mean it would show what transpired right before the incident, you know, which is really relevant, you know, and *as far as the major use-of-force incident itself, those statements are simply the ones of the inmates who they was [sic] able to coerce into giving favorable testimony for them.* I was wondering who else might have been in there who wouldn't give testimony for them who I might be able to locate and would surely like to call as a witness for myself if they would be willing to come, but I have no way of learning who they are or learning if their testimony would be beneficial or any other, you know, favorable investigative materials that they might be able to give, because I have no way of, you know, learning who they are." (Emphasis added.)

materials; the defendants maintained, however, that they had sent Davis copies of his medical, disciplinary, and hearing records and the use-of-force report. Davis alleged that the defendants informed him that there was no internal affairs report concerning the incident. Whether or not his claim is true, the internal affairs report was among the materials provided by the defendants at the trial. Davis was allowed to review those materials prior to the trial and to use the materials in the presentation of his case and in his cross-examination of defense witnesses.

3. Failure to continue the bench trial

Davis argues that the magistrate judge should have continued the trial on the excessive force claim upon Davis's claim that he had not received discovery from the defendants. Davis did not move for a continuance at the time.

The magistrate judge seems to have believed that Davis had received the discovery; there was evidence to support this belief. In any event, the magistrate judge allowed ample time for Davis to review the defendants' file, which consisted of the relevant medical and disciplinary records, the use-of-force report, the internal affairs report, and photographs and a videotape of Davis taken immediately after the use of force. These materials were neither voluminous nor complex. Davis's cross-examination of the defense witnesses was competent.

4. Motion for relief from judgment

Davis requests that we construe his response to the magistrate judge's instruction to prepare a pleading detailing prejudice resulting from lack of discovery as a motion under FED. R. CIV. P.

60 for relief from judgment. Davis filed his response before the magistrate judge issued her memorandum opinion or final judgment; the magistrate judge did not mention Davis's response in her opinion. Davis raised the same contentions in his response as he raises in this appeal. Even were we to regard Davis's response as a Rule 59 motion for relief, *Britt v. Whitmire*, 956 F.2d 509, 515 (5th Cir. 1992), it would not have been reversible error for the magistrate judge to have denied a new trial because, as we conclude here, the grounds asserted do not entitle Davis to relief.

B. Lack of Written Findings

Next, Davis maintains that the magistrate judge erred by disposing of his complaint without written findings on his claim that Sergeant Zimmerman and Officer Stinson were deliberately indifferent to his allergic condition. Davis included these officers in his medical claim for forcing him to leave the medical shower before he could rinse off. By his own admission, however, his body temperature rose during the physical confrontation that followed, precluding a more severe allergic reaction. Davis did not allege deliberate indifference to serious medical needs.

C. Evidentiary Rulings

We review evidentiary rulings under an abuse of discretion standard and will reverse a judgment on the basis of evidentiary rulings only if a substantial right of the party is affected. *Southern Pacific Transp. Co. v. Chabert*, 973 F.2d 441, 448 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1585 (1993). This standard is even more deferential in the case of a bench trial: reversal is warranted only if the evidence is insufficient to support the

judgment, or if it affirmatively appears that the challenged evidence induced the court to make an essential finding which it otherwise would not have made. *Id*.

1. Evidence of Davis's conviction

Davis argues that the magistrate judge improperly admitted and considered evidence that he had been convicted of murder. On cross-examination, Davis testified that he was serving a life sentence for murder. He questioned the relevance of the inquiry but did not formally object. The magistrate judge directed him to answer the question, but commented that his conviction did not make any difference to her. Because Davis's conviction was admissible for impeachment purposes, FED. R. EVID. 609(a)(1), the magistrate judge did not err by allowing the evidence.

2. Statements of witnesses not present

The use-of-force report admitted at the bench trial contains the statements of witnesses who were not present at the trial, including those of a TDCJ lieutenant, a corrections officer, and four inmates. Davis did not object on hearsay grounds, but he did inform the magistrate judge that he would have liked to cross-examine those witnesses. He now contends that the admission of the report and the statements it contains violated his rights to confrontation and cross-examination.

Any error in the admission of the report is harmless. The magistrate judge did not rely on the statements in her opinion.[11] Moreover, the statements are cumulative of the defendants'

[11] Indeed, she did not even mention the statements.

testimony at the bench trial. Davis was allowed a full opportunity to test their story on cross-examination.

3. Surprise witnesses

Davis also argues that the magistrate judge deprived him of his Sixth Amendment rights to confrontation and cross-examination by allowing surprise witnesses without providing him with adequate opportunity to prepare for trial. Davis alleged that he had not received the defendants' pretrial order until after the trial because it had been sent to an incorrect address. He further claimed that some witnesses were not identified as potential witnesses before the trial began.

Assuming, *arguendo*, that Davis's allegations are correct, his claim does not merit relief. He did not object to any witness as a surprise witness. All but one witness had been involved in the excessive force incident or in the succeeding medical examination of Davis. He therefore should have anticipated that they might be called to testify at the trial. Only Dr. Kuykendall, who was called to testify about Davis's medical records and the injuries he sustained during the shower incident, was not involved in the events underlying Davis's claim. Finally, Davis had the TDCJ records available for his use in cross-examination; he cross-examined all witnesses except Officer Pickett, who had merely accompanied him during his time at the infirmary.

D. Appointment of Counsel

Davis's final contention is that the magistrate judge abused her discretion by not appointing counsel to represent him in the district court. A plaintiff in a section 1983 case does not have

an automatic right to the appointment of counsel. *Cupit v. Jones*, 835 F.2d 82, 86 (5th Cir. 1987). The district court is not required to appoint counsel absent exceptional circumstances based on factors such as the complexity of the case and the capabilities of the plaintiff. *Id*. Davis has not shown an abuse of discretion under this standard. His claims are neither unusual nor complex, and he was able adequately to present his claims and cross-examine the defendants' witnesses. The magistrate judge did not abuse her discretion in denying his motion for appointment of counsel.

Conclusion

Davis failed to state an Eighth Amendment claim for deliberate indifference to his serious medical needs. The magistrate judge's rulings during the trial of Davis's excessive force claim do not constitute reversible error, if error at all. The final judgment dismissing Davis's complaint is

AFFIRMED.