UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5148
Summary Calendar

CHARLES EARL BAKER, and all other similar situated inmates,

Plaintiff-Appellant,

VERSUS

CARL WHITE, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Texas (92-CV-488)

(July 15, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Charles Earl Baker, a Texas prisoner, raises numerous challenges, all frivolous, to an adverse judgment in his 42 U.S.C. § 1983 action against various Texas Department of Corrections (TDC) officials. This appeal is a classic example of the judicial resources wasted on frivolous prisoner actions. Needless to say, we **AFFIRM.**

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.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

Baker alleged that the defendants: (1) failed to provide proper medical care; (2) denied him access to the courts by opening a letter from his lawyer; and (3) denied him access to a videotape necessary for an appeal from denial of habeas relief. An amended complaint added the claim that the defendants conspired to retaliate against him for assisting other inmates in their legal affairs, and elaborated about other medical problems.

After the case was referred to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B), a ***Spears***[2] hearing was held at the prison, at which Baker, Dr. Ford (a prison physician), and Warden Crow testified. Ford testified about Baker's prison medical records; Crow, about some TDC procedures. After the hearing, the magistrate judge ordered "an expanded evidentiary hearing" in her courtroom, at which all of Baker's claims, except for medical care, would be addressed.

Baker requested a number of witnesses be subpoenaed. The magistrate judge ordered the State to produce three inmate witnesses, but denied Baker's request for others, reasoning that their testimony would be irrelevant and/or cumulative, or that the witnesses were outside of the court's subpoena power.

A number of witnesses testified at the second hearing. After it, the magistrate judge prepared a 25-page report, recommending that the medical care and retaliation (conspiracy) claims be dismissed under Fed. R. Civ. P. 12(h)(3), because those "claims are

---

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

so insubstantial and attenuated as to be absolutely devoid of merit ... and should be dismissed for want of jurisdiction"; and that *in forma pauperis* status be conferred on Baker for his videotape and mail claims. In fact, the magistrate judge conferred IFP status, and ordered the remaining defendants to answer the remaining claims.

The district court adopted the findings and conclusions of the magistrate judge, and ordered the dismissal of all claims except concerning the videotape and mail.

Meanwhile, the magistrate judge ordered another "expanded evidentiary hearing", after which she issued another report and recommendation, concluding that the defendants did not deny Baker access to the courts, and that the defendants were entitled to qualified immunity, and recommending that the motion to dismiss for failure to state a claim be granted.

The district court agreed, but did not rule on qualified immunity. It dismissed the action with prejudice.

II.

A.

Baker raises several challenges to the dismissal of his medical claim.[3] His first claim is that he was not permitted to

[3] As discussed, the district court dismissed the medical claims for want of jurisdiction. "Generally, if it appears from the face of the complaint that a federal claim is without merit, the court should dismiss for failure to state a claim, and not on jurisdictional grounds." ***Sarmiento v. Texas Bd. of Veterinary Medical Examiners***, 939 F.2d 1242, 1245 (5th Cir. 1991) (citation omitted). Nevertheless, the Supreme Court "has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and

cross-examine Dr. Ford at the ***Spears*** hearing. But, he never attempted to do so. In any event, Ford only testified as to what was shown in the prison medical records, and Baker testified regarding their accuracy. (Baker also maintains that Ford was not sworn prior to testifying. The hearing transcript reveals otherwise.)

Baker complains that he was not allowed to call Dr. Presley, a physician who treated his hemorrhoid condition, to rebut Ford's testimony. But, Baker did not refer to Dr. Presley at the hearing, much less request that he be present.

Baker complains also that unauthenticated medical records were introduced into evidence. The magistrate judge stated that Dr. Ford possessed Baker's original records, and those submitted were

---

insubstantial as to be absolutely devoid of merit." ***Hagans v. Lavine***, 415 U.S. 528, 536 (1974) (citation and internal quotation omitted); ***Neitzke v. Williams***, 490 U.S. 319, 327 n.6 ("A patently insubstantial complaint may be dismissed, for example, for want of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).") (citing, *inter alia*, ***Hagans***); *see also* ***Sarmiento***, 939 F.2d at 1245 ("dismissal for want of jurisdiction is appropriate if the federal claim is frivolous or a mere matter of form"). "A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." ***Hagans***, 415 U.S. at 538 (citations and internal quotation omitted).

We express no view on dismissing Baker's medical claims on this jurisdictional ground, because Baker does not challenge the dismissal on this ground. We do note, however, that the dismissal of Baker's medical claim before service of process and after a ***Spears*** hearing might be construed as a dismissal pursuant to § 1915(d). *See* ***Rourke v. Thompson***, 11 F.3d 47, 49 (5th Cir. 1993); *see also* ***Bickford v. International Speedway Corp.***, 654 F.2d 1028, 1031 (5th Cir. 1981) (recognizing that court may affirm district court on different ground).

certified by a prison records supervisor and possessed sufficient indicia of reliability.

Baker contends that additional witnesses should have been called, and raises several medical complaints, one being that he was bleeding and in severe pain for eight months because a doctor refused to treat his hemorrhoids. The magistrate judge and district court found that the medical records contradicted his claims. After reviewing the ***Spears*** transcript, we see no reason to disturb their conclusions; the magistrate judge noted accurately that Baker's claim, at most, amounted to "one of disagreement and dissatisfaction with the medical treatment received." Such disagreement does not raise a § 1983 claim; deliberate indifference to serious medical needs must be proven. ***Varnado v. Lynaugh***, 920 F.2d 320, 321 (5th Cir. 1991). The ***Spears*** hearing does not disclose any arguable basis in fact for finding deliberate indifference. If anything, it reflects that prison officials have been infinitely patient with a prisoner who seems afflicted with innumerable maladies -- including a fear that he would "eventually catch cancer".[4]

[4] In any event, Baker's failure to file timely objections to the report recommending dismissal of the medical claim means that he cannot attack "on appeal factual findings accepted or adopted by the district court except upon grounds of plain error or manifest injustice". ***Nettles v. Wainwright***, 677 F.2d 404, 410 (5th Cir. Unit B 1982) (en banc).

B.

Baker contends that he was denied access to the courts by the defendants' precluding him from viewing a videotape of the crime for which he was convicted. According to Baker, his criminal conviction was affirmed solely because he was unable to view the tape.

The magistrate judge, after the third hearing, found that prison officials offered Baker the opportunity to review the tape, but that he declined.[5] Thus, the magistrate judge concluded that Baker has no basis for asserting a right of access violation. The district court adopted this finding.[6]

---

[5] Apparently, this court ordered that the clerk's office forward to Baker a copy of the tape that was introduced at his trial. According to Baker, the mailroom would not release the tape to him, and Warden White denied his grievance, contending that the tape was contraband to be returned to the Attorney General. But, by Baker's own admission, he was permitted to send the tape to a mother of another inmate, who then forwarded it to Baker's sister.

Warden White testified at the third hearing that, although the tape was initially categorized as contraband, the prison subsequently received a letter from an assistant attorney general advising them of Baker's right of access to the tape. He testified that arrangements were made to show the tape to Baker. According to White and another witness, Officer Stewart, Baker requested instead that the tape be mailed to an expert.

[6] Baker's challenge goes to the fact-finding of the district court, and the threshold question we confront is the appropriate standard of review. As discussed, the magistrate judge recommended that this claim be dismissed for failure to state a claim, and the district court agreed. The magistrate judge's report and recommendation followed the third evidentiary hearing, which was sweeping in scope: witnesses were subpoenaed; cross-examination occurred; and the district court made credibility determinations. Accordingly, although the magistrate judge and district court spoke of granting a motion to dismiss, it seems more accurate to describe the last hearing as a non-jury trial before the magistrate, and the resulting ruling should be recognized as one on the merits.

A district court's findings of fact are reviewed only for clear error. Fed. R. Civ. P. 52(a). "If the district court's findings are plausible in light of the record viewed in its entirety, we must accept them, even though we might have weighed the evidence differently if we had been sitting as a trier of fact." ***Price v. Austin. Indep. School Dist.***, 945 F.2d 1307, 1312 (5th Cir. 1991) (citations and internal quotation omitted). Of course, the findings receive particular deference when credibility determinations are involved. *See* ***id.*** ("We therefore must apply the clear error standard with particular care in cases involving demeanor testimony.") (citations omitted); *see also* Fed. R. Civ. P. 52(a) ("due regard shall be given to the opportunity of the trial court to judge [] the credibility of the witnesses").

The magistrate judge, in addressing the testimony at the third hearing, found the testimony of the defense witnesses (Warden White and Officer Stewart) to be more credible than that of Baker and one of his witnesses. The finding that Baker was given the opportunity

---

Here, there was a referral to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B). Under § 636(b)(1)(B), so long as a district court remains "free to look behind the magistrate's recommendation in order to revisit the record de novo", a magistrate judge's evidentiary hearing may "expand[] to a full nonjury trial, covering all issues presented". *See* ***Ford v. Estelle***, 740 F.2d 374, 380 (5th Cir. 1984); *see also* ***Jackson v. Cain***, 864 F.2d 1235, 1242 (5th Cir. 1989) (apparently upholding non-jury trial before magistrate judge of prisoner complaint where "ultimate decision-making authority was retained by district court"; plaintiff had waived right to trial by jury); ***Orpiano v. Johnson***, 687 F.2d 44, 45-48 (4th Cir. 1982) (endorsing sweeping evidentiary hearing of prisoner case by magistrate judge when district court retains power of de novo review). *But see* ***Hill v. Jenkins***, 603 F.2d 1256, 1258-59 (7th Cir. 1979) (full non-jury trial requires consent). In any event, Baker does not raise this as an issue.

to view the tape is supported by the testimony of defense witnesses; the district court did not clearly err in finding that Baker had the opportunity to view the tape.[7]

Moreover, even if the district court had found that Baker was not given the opportunity to view the tape, Baker still could not prevail. He testified that he required the tape to prepare his appeal from the denial of habeas relief, and that he intended to argue that he was entitled to have an expert witness appointed to examine the tape. In fact, Baker stated that he made this argument on appeal; he has not shown how his legal position was prejudiced by a failure to view the tape personally. And, as noted, the evidence showed that Baker was able to send the tape from the prison; thus, we are at a loss to explain how the defendants impeded his ability to obtain an outside expert to examine it. *See* ***Henthorn v. Swinson***, 955 F.2d 351, 354 (5th Cir.) (denial of access claim requires showing of prejudice), *cert. denied*, 112 S. Ct. 2974 (1992).

---

[7] As a side issue, Baker bases error on the denial of a continuance so that he could produce four inmate witnesses who, allegedly, would have testified that Officer Stewart wanted to harm Baker. We review only for abuse of discretion. ***United States v. Shaw***, 920 F.2d 1225, 1230 (5th Cir.), *cert. denied*, 111 S. Ct. 2038 (1991); ***Fontenot v. Upjohn Co.***, 780 F.2d 1190, 1193 (5th Cir. 1986) ("`an abuse of discretion' ... standard is used to describe a wide variety of different measures of latitude. When the question for the trial court is ... whether a continuance should be granted, the judgment range is exceedingly wide") (footnotes omitted). We find none. Baker did not seek a continuance until he was cross-examining Officer Stewart, the last witness in the case.

C.

Concerning the alleged mail interference, Baker asserts that the district court erred in failing to subpoena several witnesses. One was an attorney, who apparently would have testified that a letter he sent to Baker had been opened and returned. The substance of this testimony was before the district court, because a letter from the attorney to Baker describing what had happened was in the record. Baker also wanted to subpoena another attorney, to whom Baker claims he sent a letter that was never received. Again, Baker was not prejudiced, because a letter from that attorney was introduced that apparently stated that his office had not received a letter allegedly sent by Baker.[8]

Finally, Baker contends that the district court should have subpoenaed a newspaper reporter, because she would have testified that she did not receive some letters from Baker. During the third evidentiary hearing, Baker introduced a prison correspondence denial form which showed that he would not be permitted to send a letter to the reporter because the correspondence did not meet the criteria for "media" mail. The mailroom supervisor explained this denial, noting that such mail could only be sent to the editor of the paper. Baker never alleged that there was any other correspondence which he mailed to her which was not received. *See also* ***Richardson***, 841 F.2d at 122 (isolated incident of mail

[8] And, even were we to assume that this testimony would have buttressed Baker's allegations, he cannot demonstrate prejudice because he never claims that the alleged mail-tampering interfered with his ability to file legal documents. *See* ***Richardson v. McDonnell***, 841 F.2d 120, 122 (5th Cir. 1988).

tampering not interfering with legal proceedings does not give rise to constitutional violation).

D.

Finally, Baker asserts that the defendants conspired against him in retaliation for his legal work for other inmates.[9] But, it is difficult to divine the assignment of error, even with the benefit of our liberal construction of *pro se* prisoners' complaints. The claim amounts to a combination of Baker's other complaints -- he discusses the videotape and his medical care -- wrapped in the cloak of a conspiracy. Baker testified at the ***Spears*** hearing that he believed there must be a conspiracy to get him: "all of the doctors and the officers work together for TDC because this is one big administration, and they can simply get on the telephone and call from one unit to the other one." Obviously, this falls far short of alleging a non-frivolous conspiracy claim.

Further reflecting the incredible nature of the claim is Baker's allegation of the goal of this conspiracy -- his murder. Baker's fear apparently stems from his transfer form the Michael Unit to the Ellis I Unit; according to Baker:

> [T]he fact that the conditions on the Ellis I Unit are hazardous and because you have the -- in my state of health. The conditions on the Ellis I Unit, the water, the silicous [sic] coming from the bus barn, the pollen coming from the trees, and all these things would turn my sentence eventually into a sentence of death.

---

[9] Like his medical claim, this claim was dismissed for want of subject matter jurisdiction for insubstantiality. Again, Baker does not challenge the basis of the dismissal. As with the dismissal of the medical care claim, we could find it appropriate under § 1915(d).

Other allegations fall far short.[10]

III.

For the foregoing reasons, the judgment is

AFFIRMED.

---

[10] For example, the alleged ringleader of the conspiracy was Warden White of the Michael Unit. According to Baker, White told him that "I [Baker] need to put my typewriter down because I might need to use it and wouldn't be able to." This statement, according to Baker, was a threat on his life. And, from this, Baker infers that White had him transferred to the Ellis I unit so that he could be killed (although Baker testified that he requested a transfer because he had enemies at Michael Unit, and Warden White testified that the Bureau of Classification decided the transfer site).

As another example, Baker contends that the district court erred in denying his request for an expert to determine whether the signature on the response to his grievance concerning the denial of access to the videotape was Warden White's. He urges that he could have proved his conspiracy claim if he could have shown that White denied him access. Such appointment is discretionary. *See* ***Fugitt v. Jones***, 549 F.2d 1001, 1006 (5th Cir. 1977). The warden acknowledged that the grievance reflected that Baker was *initially* denied access to the tape because it was considered contraband. Therefore, whether the warden or another official signed it seems to be, at best, of marginal relevance.