

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7008
Summary Calendar

DAVID DARRELL MOORE,

Plaintiff-Appellant,

VERSUS

J. D. McADORY, ET. AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

(J89-0621(B))

(January 27, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

David Darrell Moore filed a complaint pursuant to 42 U.S.C. § 1983 against Hinds County Sheriff J.D. McAdory, Hinds County Detention Center (HCDC) Jailer Bobby Gallagher, and Dr. Leslie Bear. Moore alleged that his due process rights and his Eighth

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Amendment right against cruel and unusual punishment were violated because conditions at the HCDC caused him to have "dry eyes" and sinus problems.

The district court dismissed Moore's suit against Dr. Bear without prejudice pursuant to Fed. R. Civ. P. 12(b)(6) after it determined that Bear did not act under color of state law and that Moore had failed to allege any causal connection between Dr. Bear's actions and his alleged injuries. Both Moore and Defendants McAdory and Gallagher filed motions for summary judgment. A magistrate judge recommended granting summary judgment for the remaining defendants, which the district court did after reviewing Moore's objections to the recommendation. The district court also denied Moore's motion for continuance and appointment of expert witnesses, as well as his motion for the appointment of counsel.

OPINION

Moore contends the district court erred when it granted summary judgment for the defendants and when it denied his motion for summary judgment. Moore argues that a genuine issue of material fact exists whether HCDC's lighting and ventilation systems caused his "dry eyes" and sinus problems.

This Court reviews the grant of summary judgment de novo. Reese v. Anderson, 926 F.2d 494, 498 (5th Cir. 1991). "For summary judgment to be granted, the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, must demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

as a matter of law." L & B Hosp. Ventures, Inc. v. Healthcare Intern., Inc., 894 F.2d 150, 151 (5th Cir.), cert. denied, 498 U.S. 815 (1990). See Fed. R. Civ. P. 56(c).

Affidavits supplied by Defendants McAdory and Gallagher attest to the following. Moore was incarcerated at the HCDC jail for varying intervals between 1982 and 1988, when he was transferred to the Mississippi Department of Corrections (MDOC). Moore first complained about eye problems in 1985 and complained about sinus problems in 1986. On January 30, 1985, Moore was transferred from the MDOC to HCDC to stand trial. The affidavits are unclear regarding when Moore was found guilty. He was released from HCDC on March 25, 1985, to the custody of the MDOC. Moore was incarcerated in the HCDC on December 20, 1985, as a result of a forgery charge. He was found guilty of that charge on July 11, 1986, and was sentenced to ten years of imprisonment. On July 13, 1988, Moore was released from the HCDC to the custody of the MDOC.

Although the defendants' summary judgment evidence indicates that Moore was both a pretrial detainee and a convicted prisoner during the relevant time, when Moore became a convicted prisoner is unclear. Nevertheless, the defendants are entitled to summary judgment as a matter of law under the standards applicable to both pretrial detainees and convicted prisoners.

Pretrial detainees are protected by the Due Process Clause of the Fourteenth Amendment, rather than by the Cruel and Unusual Punishment Clause of the Eighth. Morrow v. Harwell, 768 F.2d 619, 625-26 (5th Cir. 1985). Thus, the proper inquiry for determining

whether the constitutional rights of a pretrial detainee have been violated "is whether conditions accompanying pretrial detention are imposed upon detainees for the purpose of punishment, as the due process clause does not permit punishment prior to an adjudication of guilt." Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987). If an adverse condition is not reasonably related to a legitimate governmental goal, that is, if it is arbitrary or purposeless, a court may infer that it is punitive. To prevail on his Eighth Amendment claim, Moore would have to show that prison officials were deliberately indifferent to prison conditions. Wilson v. Seiter, ___ U.S. ___, 111 S.Ct. 2321, 2327, 115 L.Ed.2d 271 (1991).

Defendants McAdory and Gallagher filed affidavits by professional engineers who attested that the HCDC's ventilation rate varies between 30 to 37 cubic feet of air per minute, which is "equal to or greater than the rates" for the Sheriff's offices, and that the lighting system is adequate as defined by engineering standards. Affidavits of the physicians who treated Moore indicated that none of the doctors attributed Moore's eye or sinus problems to conditions at the HCDC. Moore has presented no medical evidence to contradict these affidavits. Thus, no genuine issue of material fact exists whether the HCDC's ventilation and lighting systems were punitive or that the prison officials were deliberately indifferent to the alleged adverse conditions. Defendants McAdory and Gallagher are, therefore, entitled to summary judgment as a matter of law.

Moore argues that the district court erred when it dismissed Dr. Bear from the suit because Bear acted under color of state law. In reviewing a Rule 12(b)(6) dismissal, this Court accepts "all well pleaded averments as true and view[s] them in the light most favorable to the plaintiff." Rankin v. City of Wichita Fall, Tex., 762 F.2d 444, 446 (5th Cir. 1985). The dismissal will not be upheld "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id.

Moore's complaint states that after he complained of eye problems, prison officials referred Moore to Dr. Bear, who is a private physician. Moore's only specific allegations against Dr. Bear are that the drops and ointment he prescribed were "no cure" but provide some "comfort." Section 1983 provides a cause of action against any person who, under color of state law, deprives another of rights secured by the Constitution. Collins v. City of Harker Heights, ___ U.S. ___, 112 S.Ct. 1061, 1066, 117 L.Ed.2d 261 (1992).

Although the district court determined that Dr. Bear did not act under color of state law, this Court need not reach that issue. Even if Dr. Bear had acted under color of state law, Moore's allegations against him do not constitute a deprivation of a Constitutional right. A pretrial detainee is entitled to "reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective." Cupit, 835 F.2d at 85. Prescribing ointment and drops which were in

Moore's opinion only, "no cure" but which provided "some comfort" does not rise to unreasonable medical care. If Dr. Bear was Moore's treating physician when he was a convicted prisoner, Moore must allege acts or omissions sufficiently harmful to evidence a deliberate indifference to serious medical needs to state a claim cognizable under § 1983. Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Unsuccessful medical treatment, negligence, neglect, and even medical malpractice do not state a claim of deliberate indifference. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Moore's allegations indicate that he cannot prove a set of facts which would entitle him to relief. The district court's dismissal of Dr. Bear should be upheld.

Moore asserts that the district court erred because it denied his motion for a continuance and to appoint expert witnesses to rebut the defendants' motion for summary judgment under Fed. R. Civ. P. 56(f) and Fed. R. Evid. 706(A). Moore maintains that the district court violated his constitutional rights by not appointing expert witnesses to support his contention that the HCDC's ventilation and lighting system caused damage to his eyes because he was entitled to the same under the Criminal Justice Act.

Moore's § 1983 complaint does not fall within the purview of the Criminal Justice Act. See 18 U.S.C. § 3006A. Rule 56(f) allows a plaintiff to request a continuance to conduct discovery if necessary to withstand a motion for summary judgment. The plaintiff is not automatically entitled to a continuance, however, but must specify the factual allegations which discovery will

assist him in proving. Washington v. Allstate Ins. Co., 901 F.2d 1281, 1285 (5th Cir. 1990). This Court reviews the district court's denial of a plaintiff's Rule 56(f) motion for abuse of discretion. Id. at 1285-86.

As the district court noted, Moore's motion requesting the appointment of experts simply stated that it would be prejudicial to allow the defendants to submit the affidavits of experts without appointing experts to testify on his behalf. Moore did not specify to the district court, nor does he specify on appeal, what facts the expert witnesses would prove. The district court did not abuse its discretion when it denied his motion for continuance.

Moore complains that the district court erred when it denied his motion for appointment of counsel. A trial court is not required to appoint counsel for an indigent plaintiff asserting a claim under § 1983 unless there are exceptional circumstances. Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). The district court has the discretion to appoint counsel for a plaintiff proceeding pro se if doing so would advance the proper administration of justice. 28 U.S.C. § 1915(d). Among the factors used to determine whether exceptional circumstances warrant appointment of counsel in a civil rights suit, the court should consider: (1) the type and complexity of the case; (2) whether the indigent was capable of adequately presenting the case; (3) whether the indigent was in the position to investigate the case adequately; and (4) whether the evidence would consist in large part of conflicting testimony requiring skill in the presentation

of evidence and in cross-examination. Ulmer, 691 F.2d at 213. The standard of review for the denial of a motion to appoint counsel is whether the district court abused its discretion. Id.

Moore's complaint is straightforward. His claim is based on records which are before the Court. He did not need legal skills or training to inform the district court adequately of his allegations. See Feist v. Jefferson County Com'rs Court, 778 F.2d 250, 253 (5th Cir. 1985). The district court did not abuse its discretion by failing to appoint counsel in this case.

AFFIRMED.