UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8059
Summary Calendar

JAMES WASHINGTON, JR.,

Plaintiff-Appellant,

VERSUS

FNU DODD, Officer Co. III
and CRAIG W. MANNINS, Capt.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W 92 CV 200)

(September 23, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellant, a Texas state prisoner, proceeding pro se and in forma pauperis, sued under 42 U.S.C. § 1983 asserting several claims against prison officials. Following a hearing pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), the district court dismissed his claims as frivolous under 28 U.S.C. § 1915(d). Washington appeals. We affirm.

Appellant claims deliberate indifference to a serious medical

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

need because a guard took away his walking cane. The Spears evidence showed Appellant did not need the cane for short distances, and did not regularly use it; that he threatened guards and other inmates with it; and that it was found medically unnecessary only a few days after the incident of which he complained. There is no basis in law or fact for this claim. No serious medical need has been shown.

Next, Appellant claims his cane was taken from him in retaliation against him for having testified against the guard in a misconduct hearing. He does not show that taking the cane limited his access to the courts or his right to file a grievance. He does not offer any evidence to show that the taking was indeed in retaliation for anything. No constitutional violation has been shown.

Washington also alleges that, when his cane was taken, the officer who took it directed another officer to write up a disciplinary report against Appellant. He claims this was retaliatory. Appellant has not shown, however, that the write-up ever occurred. There is, therefore, no arguable basis in fact for a retaliation claim.

Washington's claim that the district court did not afford him a de novo review of the magistrate judge's report and recommendation fails because he is not entitled to such review since he failed to object to the report and recommendation within the ten-day period prescribed by 28 U.S.C. § 636(b)(1)(C); Cay v. Estelle, 789 F.2d 318, 321 (5th Cir. 1986).

Appellant also contends that the Defendant's alleged actions violated his rights under Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980), affirmed in part and reversed in part, 679 F.2d 1115, amended in part and vacated in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). This assertion is insufficient in law to establish a § 1983 claim. Green v. McKaskle, 788 F.2d 1116, 1122-24 (5th Cir. 1986).

Finally, Appellant alleges that the district court made an improper credibility assessment by relying on a tape recording of a prison disciplinary hearing to refute his medical claim. This contention lacks any arguable basis in fact. There is in this record no reference to any tape.

AFFIRMED.