

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10103

Summary Calendar

WESLEY EUBANKS,

Plaintiff-Appellant,

v.

JAMES O. MULLEN, State District
Judge, ET AL.,

Defendants,

BEN E. WHITEMAN, JR., Sheriff,
Parker County, Texas,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CV-180-A)

(December 14, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

Wesley Eubanks ("Eubanks"), proceeding pro se and in forma pauperis (IFP), filed this 42 U.S.C. § 1983 complaint against a state court judge, the district attorney, and Sheriff Whiteman.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

After a Spears¹ hearing, the trial court dismissed Eubanks's claims as frivolous under 28 U.S.C. § 1915(d). Eubanks appeals. We affirm in part and reverse and remand in part.

I. FACTS AND PROCEDURAL HISTORY

Eubanks filed this § 1983 complaint as a class action and alleged that the state court judge and the district attorney were involved in a conspiracy to deprive Eubanks of the opportunity to post a bond in his criminal case. Eubanks further alleged that the defendant Sheriff Whiteman, who operates the Parker County Jail, has a policy of precluding inmates from using the jail law library and of depriving inmates of legal materials.

Eubanks additionally claims he was denied requested medical care while incarcerated at the Parker County Jail. All medical complaints are addressed by the local doctor, Dr. Ripley, who, according to Eubanks, does not examine the prisoners or perform any tests. Although Eubanks requested the removal of a "trakeostomy" [sic] from his throat on numerous occasions, it remained in his throat for seven weeks before it was removed. Eubanks also complained of various other medical problems, including narcotics withdrawal symptoms.

In addition to his medical claims, Eubanks alleged that the sheriff's policies pertaining to the jail menu and haircuts, the lack of facilities for handicapped prisoners, and the operation of the commissary, the telephone system, the mail system, and the inmate trust fund were unconstitutional.

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

The district court, prior to service, dismissed the claims against the state court judge and the district attorney as frivolous based on prosecutorial immunity and the failure to exhaust habeas remedies. Eubanks does not contest the dismissal of those claims on appeal.

The district court then ordered that the sheriff be served with the complaint and scheduled a Spears hearing. Eubanks filed several motions on the day of the Spears hearing, and the district court denied each of them. Following the hearing, the district court determined that Eubanks was not an adequate class representative and that the court would consider only the claims personal to Eubanks. The district court concluded that Eubanks had failed to allege claims personal to him that had any arguable basis in law or fact and dismissed the complaint as frivolous.

II. STANDARD OF REVIEW

We review a district court's § 1915(d) dismissal for abuse of discretion. Denton v. Hernandez, 112 S. Ct. 1728, 1734 (1992); Reeves v. Collins, 27 F.3d 174, 176 (5th Cir. 1994). A district court may dismiss an IFP complaint as frivolous only if it lacks an arguable basis in either law or fact. Denton, 112 S. Ct. at 1733; Reeves, 27 F.3d at 176. While the district court may not dismiss under § 1915(d) by simply electing to credit the defendant's account of events, the district court may conclude that the plaintiff is not credible if the plaintiff's account of the events is internally inconsistent. Pedraza v. Meyer, 919

F.2d 317, 319 (5th Cir. 1990); Wesson v. Oglesby, 910 F.2d 278, 282 (5th Cir. 1990).

III. ISSUES ON APPEAL

A. MEDICAL CARE

Eubanks argues that the district court erred in dismissing his claim of inadequate medical treatment as frivolous because 1) he was denied medical attention for his endocarditis from November 1992 through June 1993; 2) he was denied treatment for improper blood circulation and arthritis pain; 3) officials refused and delayed the removal of a tube from his trachea; and 4) he was denied medical care despite complaints of pain in connection with his narcotic withdrawal from June 26 through July 2, 1992. Eubanks further asserts that the district court was not entitled to make credibility findings during the Spears hearing and that it did so by believing the defendant's documentary evidence over his testimony.

1. Applicable Law

During a portion of the time in which the alleged acts occurred, Eubanks was a pretrial detainee.² Pretrial detainees are protected by the Fourteenth Amendment's Due Process Clause.

² Eubanks's records reflect that he was arrested on June 26, 1992 for burglary and then released on bond on July 2. Eubanks was arrested again for bail jumping on November 4, 1992, and convicted of burglary on February 3, 1993. Pretrial detainees "are those individuals who have been charged with a crime but who have not yet been tried on the charge." Cupit v. Jones, 835 F.2d 82, 84 (5th Cir. 1987) (citing Bell v. Wolfish, 441 U.S. 520, 523 (1979)). As such, Eubanks was a pretrial detainee at least during the time from June 26 through July 2, 1992.

Bell, 441 U.S. at 536; Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1186 (5th Cir. 1986). As we have previously held, "pretrial detainees are 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. The relevant inquiry "is whether the denial of medical care was objectively reasonable in light of the Fourteenth Amendment's guarantee of reasonable medical care and prohibition on punishment of pretrial detainees." Fields v. City of South Houston, 922 F.2d 1183, 1191 (5th Cir. 1991) (citation and internal quotations omitted). A detainee's medical care could be classified as unreasonable if the detainee advised jail officials of the need for medication or treatment and "they did not have him examined or otherwise adequately respond to his requests." Thomas v. Kippermann, 846 F.2d 1009, 1011 (5th Cir. 1988). However, the Due Process Clause is not implicated by mere negligence. Daniels v. Williams, 474 U.S. 327, 328 (1986).

During the remainder of the time in which the alleged acts occurred, Eubanks was a prisoner. Prisoners are protected from cruel and unusual punishment by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); Partridge, 791 F.2d at 1186. Prison officials violate the Eighth Amendment when they demonstrate deliberate indifference to a prisoner's serious medical needs, which constitutes an unnecessary and wanton infliction of pain. Wilson v. Seiter, 501 U.S. 294, 297, 302-05 (1991); Reeves, 27 F.3d at 176.

The Supreme Court has recently adopted a subjective recklessness standard in the definition of deliberate indifference under the Eighth Amendment. Reeves, 27 F.3d at 176 (quoting Farmer v. Brennan, 114 S. Ct. 1970, 1979-80 (1994)). A prison official is not deliberately indifferent "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 114 S. Ct. at 1979. Neither a prisoner's disagreement with his medical treatment nor medical malpractice will support a § 1983 claim. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

2. Discussion

Eubanks initially testified that he did not receive any medical care during his confinement. During the Spears hearing, however, Eubanks admitted to several facts that contradict this assertion. Eubanks admitted that when he requested to see a physician, he was eventually given an opportunity to go to a clinic. Eubanks visited a physician several times during his confinement and was administered a vitamin B-12 shot, was prescribed a dietary supplement to help him regain weight lost during his illness, had his lungs x-rayed two times, was given several hours of emergency treatment, and was prescribed an antibiotic that cured his symptoms.

The district court determined, based on Eubanks's own testimony at the Spears hearing, that Eubanks's complaint was limited to a claim that the treatment provided by Dr. Ripley was inadequate. The district court labeled his complaints as claims of negligence, neglect, or medical malpractice which did not constitute deliberate indifference to serious medical needs. Mere negligence is insufficient to implicate either a prisoner's right under the Eight Amendment or a pretrial detainee's rights under the Fourteenth Amendment. Daniels, 474 U.S. at 328; Varnado, 920 F.2d at 321.

Because Eubanks's testimony was internally inconsistent and Eubanks admitted that he received a great deal of medical care while in confinement, the trial court did not abuse its discretion in dismissing Eubanks's medical care claims as to the first three of Eubanks's four previously enumerated complaints. However, as to Eubanks's fourth complaint, that he was denied medical care despite complaints of pain in connection with his narcotics withdrawal from June 26 through July 2, 1992 while he was a pretrial detainee, Eubanks did not contradict himself or admit to receiving care. According to our previous decision in Pedraza, the trial court abused its discretion in dismissing this complaint.

The defendant in Pedraza, also a pretrial detainee, brought a § 1983 claim, alleging that he complained of narcotics withdrawal symptoms but was not treated for five days and was told that because he was "nothin' but a drug addict" and the pain

had not killed him yet, he could wait a few more days. Pedraza, 919 F.2d at 318-19. The district court dismissed his complaint as frivolous under § 1915(d). We reversed, concluding that the trial court made an improper credibility determination because the defendant's story was a plausible and internally consistent § 1983 allegation. Id. at 319-20. Similarly, Eubanks testified at the Spears hearing that he complained of narcotics withdrawal symptoms and that the jail officials "absolutely refused" to treat him and responded to his requests by telling him "[t]hat's tough shit." In the face Pedraza, we cannot conclude that the trial court's dismissal of this portion of Eubanks's complaint was not an abuse of discretion. Therefore, we vacate the trial court's judgment dismissing Eubanks's claim as to his narcotics withdrawal symptoms only.

B. LAW LIBRARY ACCESS

Eubanks argues that the district court erred in dismissing his claim that he was denied access to the law library. According to Eubanks, the district court improperly determined that the defendant's version of the facts was more credible than Eubanks's version.

1. Applicable Law

It is well established that prisoners have a constitutional right of access to the courts. Bounds v. Smith, 430 U.S. 817, 821 (1977); Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993). Even though the exact boundaries remain unclear, "the Supreme Court has not extended this right to apply further than the

ability of an inmate to prepare and transmit a necessary legal document to a court." Brewer, 3 F.3d at 820; see also Bounds, 430 U.S. at 828 (describing the right of access to the courts as requiring prison officials to provide prisoners with adequate law libraries or assistance from trained legal personnel). A prisoner has no per se right to access to a law library but is entitled only to a "reasonable adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Bounds, 430 U.S. at 825. To prevail on a claim alleging denial of access to the courts, the claimant must show not only denial of access but also prejudice resulting from the denial. Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.) (citing Richardson v. McDonnell, 841 F.2d 120, 122 (5th Cir. 1988)), cert. denied, 112 S. Ct. 2974 (1992).

2. Discussion

Notwithstanding Eubanks's allegations that he was denied access to the law library, Eubanks testified at the Spears hearing that he was allowed to use the law library a minimum of seven times and possibly as many as ten times over an eight month period. Eubanks also admitted that on several occasions prison officials brought him copies of legal materials from the library, even though he claims some of them were for him to read "just out of interest."

Eubanks did not allege or testify at the Spears hearing that he was precluded from filing a particular pleading as a result of lack of access to the law library. Eubanks testified that his

initial request to do research for a habeas application was denied; however, Eubanks admits that he eventually filed the habeas application. Further, Eubanks has failed to allege facts demonstrating that any limitations on his library privileges resulted in prejudice to his legal position in a particular case.

Based on Eubanks's own testimony and his failure to assert or produce any evidence of prejudice to his legal position, Eubanks failed to allege an arguable claim of denial of access to the courts and the district court did not abuse its discretion in dismissing the claim as frivolous.

C. MAIL TAMPERING

Eubanks argues that the district court improperly made credibility determinations concerning his mail-tampering claim. During the Spears hearing, Eubanks testified that he sent a letter marked "privileged mail" to the district court in January 1993, and that when it was returned for insufficient postage, he saw that it was cut open. Eubanks testified that he also mailed a lawsuit to the district court on February 21 and learned three weeks later that it had not been received by the court. Eubanks claimed that the lawsuit was mailed only after he requested an investigation by prison officials.

A prison official's tampering with a prisoner's mail may violate two separate rights: the right to access to the courts and the First Amendment right to free speech. Brewer, 3 F.3d at 820. The district court did not abuse its discretion in determining that neither of these rights was violated.

Mere delay of legal mail is an inadequate basis for a § 1983 complaint. Eubanks must show that the delay of legal mail was both intentional and damaging to his legal status. Richardson, 841 F.2d at 122. Because Eubanks has not even asserted that the delay was intentional or "that his position as a litigant was prejudiced by the [alleged] mail tampering," Walker v. Navarro County Jail, 4 F.3d 410, 413 (5th Cir. 1993), his right of access to the courts has not been implicated. Furthermore, Eubanks has not alleged that his mail was in any way censored. Because prison officials have a legitimate security interest in inspecting for contraband, Eubanks's allegations that his "legal mail was opened . . . but not censored does not rise to the level of a constitutional [free speech] violation." Id.

Eubanks's testimony reflected, at best, two separate instances of possible legal mail tampering which did not interfere with Eubanks's ultimate ability to file the documents. The district court determined that these isolated incidents of opened mail did not give rise to a constitutional violation in the absence of an improper motive or the denial of access to the courts. We conclude that the district court did not abuse its discretion in dismissing as frivolous Eubanks's mail tampering claims.

D. PRE-SPEARS MOTIONS

Eubanks argues that the district court erred in not granting his motions filed on the day of the Spears hearing. Eubanks contends that according to Federal Rule of Civil Procedure 15(a),

his motions should have been granted as amendments to his pleadings because the defendant had not filed responsive pleadings at that time of the hearing.

On the day of the Spears hearing, Eubanks filed a motion for a physical examination by a cardiac specialist to determine whether Eubanks had any residual problems as a result of his heart-valve problem. The district court noted that it was uncontested that Eubanks had physical problems and denied the motion after determining that the results of the examination would not be relevant to the disposition of Eubanks's claims. Even if the trial court erred by not granting this motion, it was harmless error because the results of the medical exam would not have helped Eubanks's legal position. See FED. R. CIV. P. 61.

Additionally, Eubanks filed a motion to permissively join Patricia Bennington as a plaintiff. Neither Ms. Bennington nor Eubanks, however, signed the motion. The district court did not abuse its discretion in refusing to grant an unsigned motion.

Finally, Eubanks filed a motion to amend his complaint to name Dr. Ripley as a defendant. The district court determined that Eubanks had not shown a basis for naming Dr. Ripley as a defendant and denied the motion. Federal Rule of Civil Procedure 15(a) provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." The district court was technically in error in not allowing Eubanks to file the amendment because the defendant had not yet filed an answer. However, the error was

harmless because Eubanks testified about his complaint against the doctor at the Spears hearing, and the district court specifically determined that Eubanks's claims against Ripley were limited to his dissatisfaction with the adequacy of the treatment provided by the doctor. See FED. R. CIV. P. 61. Such a claim does not provide an arguable basis for a § 1983 claim against the doctor. See Varnado, 920 F.2d at 321.

E. OTHER CLAIMS

Eubanks argues that the district court erred in dismissing his claims regarding the general conditions of confinement at the jail, including the absence of jail medical staff, disbursement of controlled substances by non-licensed personnel, excessive rates charged for telephone calls and at the inmate commissary, inadequate handicapped facilities, and overcrowded conditions requiring inmates to sleep on the floor.

Eubanks did not brief these issues and, therefore, they are deemed abandoned. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993) (holding that the appellant's brief, even in a pro se proceeding, must contain the reasons for the requested relief and citation to the legal authorities and portions of the record relied upon).

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the trial court's judgment in all respects except for the claim of failure to treat withdrawal symptoms, for which we REVERSE and REMAND for further proceedings consistent with this opinion.