IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10692
Summary Calendar

TIMOTHY WAYNE CARTER,

Plaintiff-Appellant,

versus

POTTER COUNTY SHERIFF, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas
(2:93-CV-339)

(January 12, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Timothy Wayne Carter, an inmate in the Potter County, Texas Correctional Center, was housed in protective custody in that facility on November 23, 1993. Carter was housed in cell 69. He asked Officer Dowdy if he could go to cell 97 to speak with another

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

inmate about legal problems. Officer Dowdy allowed Carter to leave his cell and go to cell 97. As Carter was talking to the inmate in cell 97, he was attacked by two inmates who were working as trustees on the hallway. The other inmates, Angel Martinez and Pete Reys, attacked Carter with mop handles and a telephone receiver. As a result of the attack, Carter received stitches to his head.

On December 23, 1993, Carter filed a civil rights action pursuant to 42 U.S.C. § 1983 against the Potter County Sheriff's Department, Sergeant Lancaster, and the two inmates that attacked him, Martinez and Reys. The magistrate judge held a Spears hearing in this matter on February 2, 1994. At the Spears hearing, Carter testified that he was suing Sergeant Lancaster because Lancaster had failed to protect him even though Lancaster knew that Carter's life was in danger from other inmates. Carter named the other inmates in his lawsuit because he wanted criminal charges brought against them. (On appeal, he has abandoned his claims against the inmates.)

The magistrate judge issued his report and recommendation that Carter's suit be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d). Carter filed no objections to this recommendation and the district court adopted it. The report and recommendation were entered on May 24, 1994, and the district court dismissed Carter's suit on June 28, 1994. Carter filed objections to the magistrate

judge's report and recommendation on July 1, 1994, and a timely notice of appeal on July 26, 1994.

To establish a violation of the Eighth Amendment[1] stemming from prison officials' deliberate indifference to conditions of confinement, a plaintiff must allege that the officials acted or failed to act in a wanton fashion. See Wilson v. Seiter, 501 U.S. 294, 296-305, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). To prove deliberate indifference in an Eighth Amendment case, a

> claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm . . . . Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, . . . and a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Farmer v. Brennan, ___ U.S. ___, 114 S.Ct. 1970, 1981, 128 L.Ed.2d. 811 (1994) (failure-to-protect case).[2]

On appeal, Carter argues that Sergeant Lancaster and other unnamed officials at the Potter County jail knew that he was in

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[1]The record does not show whether Carter is a convict or a pretrial detainee. If a pretrial detainee, he is protected from punishment by the due process clause of the Fourteenth Amendment. As "jail conditions which amount to 'cruel and unusual punishment' under the Eighth Amendment surely amount to 'punishment' under the Fourteenth Amendment[,]" we have analyzed this case under the Eighth Amendment standard. Harris v. Angelina County, Tex., 31 F.3d 331, 334 (5th Cir. 1994).

[2]The magistrate judge entered his recommendation that Carter's suit should be dismissed before the Farmer decision was issued.

danger of attack from other inmates as was evidenced by his being placed in protective custody. Carter asserts that he informed Sergeant Lancaster through the grievance procedure that another inmate had offered $50 to have Carter attacked. Carter contends that Lancaster and other unnamed officials of Potter County were deliberately indifferent to his safety needs by allowing prison trustees, specifically Reys and Martinez, to work as trustees in that portion of the prison designated as protective custody. At the Spears hearing, Carter recounted to the magistrate judge the incidents involving other prisoners that had resulted in his protective custody status.

In Farmer, the Supreme Court gave the following example:

> [I]f an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus `must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."

Farmer, 114 S.Ct. at 1981-82 (citation omitted). In this case, Carter has alleged well-documented evidence showing a substantial risk of inmate attacks. Although Carter's claims may ultimately be found to be without merit, it is arguable in law and fact under the language of Farmer; consequently, the district court erred in dismissing the claims as frivolous at the Spears hearing stage of the case.

As we have earlier noted, Carter has abandoned his claims against Martinez and Reys. The portion of the district court's judgment dismissing the claims against them as frivolous is AFFIRMED. The remainder of the judgment of dismissal is VACATED and the case is REMANDED for additional proceedings.

AFFIRMED in part; VACATED and REMANDED in part.