

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10976  
Conference Calendar

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RICHARD O. HESTER,

Plaintiff-Appellant,

versus

WILLIAM B. DONAHOO, SHERIFF,  
ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 6:94-CV-050  
- - - - -

(January 26, 1995)

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS,  
Circuit Judges.

PER CURIAM:\*

The record does not indicate whether Richard O. Hester was a convicted prisoner or a pretrial detainee at the time of an alleged delay and denial of medical care by jail officers. If he was a convicted prisoner, he must allege deliberate indifference to his serious medical needs constituting an unnecessary and wanton infliction of pain in violation of the Eighth Amendment. Wilson v. Seiter, 501 U.S. 294, 296-97, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991); Estelle v. Gamble, 429 U.S. 97, 104-05, 97 S.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Ct. 285, 50 L. Ed. 2d 251 (1976). Under the Due Process Clause of the Fourteenth Amendment, "pretrial detainees are entitled to reasonable medical care unless the failure to supply it is reasonably related to a legitimate government objective." Fields v. City of South Houston, 922 F.2d 1183, 1191 (5th Cir. 1991) (quoting Jones v. Diamond, 636 F.2d 1364, 1378 (5th Cir.) (en banc), cert. dismissed, 453 U.S. 950 (1981)).

Hester alleges that a jail officer made a telephone call to the doctor, who prescribed treatment. The defendants carried out the doctor's instructions. Nothing indicates that the doctor, whom Hester did not sue, determined that any follow-up was necessary. The jail officers' deference to the doctor's diagnosis by telephone and their execution of the doctor's instructions are not evidence of deliberate indifference or unreasonableness.

Hester also alleged that the defendants delayed several days before calling the doctor. Delay that results in substantial harm is evidence of deliberate indifference. Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993). As Hester did not allege that his condition worsened during the delay, an Eighth Amendment claim on this point is not stated. Additionally, we can surmise from the doctor's apparent determination that seeing Hester was unnecessary and from Hester's making no allegation of worsening of the condition during the delay that the delay was not unreasonable.

Nothing in Hester's brief indicates that a hearing or a questionnaire would have developed a viable claim. See Spears v.

McCotter, 766 F.2d 179 (5th Cir. 1985). We have not considered facts that Hester alleges for the first time on appeal. See Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). We hold that the district court did not abuse its discretion in dismissing Hester's complaint as frivolous. 28 U.S.C. § 1915(d); Booker v. Koonce, 2 F.3d 114, 115 (5th Cir. 1993).

AFFIRMED.