IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30019

Summary Calendar

CHARLES JOSEPH, JR.,

Plaintiff-Appellant,

v.

CHARLES C. FOTI, JR., Criminal Sheriff, Orleans Parish and CAPT. SHORT,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 93-2486 F)

(September 26, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

Charles Joseph, Jr., proceeding pro se and in forma pauperis (IFP), filed a complaint pursuant to 42 U.S.C. § 1983 against Orleans Parish Criminal Sheriff, Charles C. Foti, Jr., and Captain Short. Joseph alleged that Captain Short allowed

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

sandblasting on the fifth floor of the House of Detention (HOD) in the presence of the inmates, causing Joseph to breathe old paint particles and become ill. The district court dismissed Joseph's complaint as frivolous pursuant to 28 U.S.C. § 1915(d). We affirm.

I. FACTS AND PROCEDURAL HISTORY

Joseph alleged that Captain Short allowed sandblasting on the fifth floor of the HOD from June 15, 1993, to June 21, 1993, in the presence of the inmates, causing Joseph to breathe old paint particles which probably contained lead and which resulted in his experiencing stomach cramps, nausea, vomiting, and eye irritation. Joseph also alleged that he did not receive his morning medication on June 20, 1993, and for the three days following his transfer from the HOD. He further alleged that he did not receive evening meals on July 6 and July 7, 1993, and that deputies leave the floor for up to four hours at a time. Joseph sought $16,000 in damages and requested that he be treated by a poison specialist.

After a Spears[1] hearing, the magistrate recommended dismissing Joseph's claims as frivolous because they lacked an arguable basis in law and fact and otherwise lacked a "realistic chance of ultimate success," relying on Pugh v. Parish of St. Tammany, 875 F.2d 436, 438 (5th Cir. 1989).[2] The magistrate

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

[2] A chance of "ultimate success" is no longer an appropriate standard for dismissing claims as frivolous pursuant to § 1915(d). See Denton v. Hernandez, 112 S. Ct. 1728, 1733

recommended denying Joseph's request to see a poison specialist because Joseph had stated in his complaint that he was examined by a physician and was awaiting a prescription and had thus received "reasonable" medical care, thereby satisfying the requirement of Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987). The magistrate further stated that, assuming Joseph's medical symptoms were caused by the sandblasting, Captain Short, in permitting the work, was merely negligent and did not intend to injure Joseph. Citing Daniels v. Williams, 474 U.S. 327, 328 (1986), the magistrate concluded that the Due Process Clause is not implicated by a negligent act.

Joseph filed an objection to the magistrate's report. The district court determined that the magistrate correctly analyzed Joseph's request to see a poison specialist, but found that Daniels left open the question whether conduct less than intentional, but greater than negligent, triggers the Due Process Clause. Thus, the court remanded the case to the magistrate for further proceedings to determine whether any factual basis existed for the claim that Captain Short was recklessly indifferent to Joseph's health when he allowed sandblasting.

The magistrate conducted an evidentiary hearing and provided the following summary of the testimony in his findings and fact

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(1992) (noting that a case can be dismissed as factually frivolous only if it is "clearly baseless"); Booker v. Koonce, 2 F.3d 114, 116 (5th Cir. 1993) (pointing out that Denton precludes dismissals as frivolous when there is "some chance" of ultimate success).

and conclusions of law which were read into the record.[3] The magistrate summarized Joseph's testimony as follows. While Joseph was at HOD, inmates complained about the renovation work. In response, Captain Short of the Orleans Parish Prison (OPP) officials, took the inmates to "the yard" and placed visqueen and fans in the hallway between the inmates' cells and the area where the renovation was being conducted. Prior to going to the yard, however, residue had built up from the renovation work which affected Joseph's eyes, nose, and mouth, and which caused him to feel dizzy. Joseph's symptoms lasted for two weeks and on and off for several months. Joseph received medical treatment the first day after the sandblasting, or possibly the second.

The magistrate summarized Captain Short's testimony as follows. The renovation work was being conducted on the opposite side of the HOD complex from where Joseph was housed. When Short received the inmates' complaints about fumes, he ordered them moved to the yard and that fans and visqueen be used to block the air flow between the work area and the inmates' cells. Short believed these measures afforded the most protection for the inmates. The inmates did not further complain after they returned from the yard and the visqueen and fans were installed. Moreover, deputies were working closer than inmates to the renovation and they did not complain about fumes or dust. Short

[3] The testimony at the evidentiary hearing was not transcribed. Joseph did not file a motion for production of the transcript, nor has he objected to the magistrate's summary of the testimony.

denied that renovation work was done on the inmates' side of the building while they were confined to their cells.

Joseph called as witnesses inmates Hager and Hawthorne who were with him during the renovation. Hager testified that he recalled Joseph complaining about his eyes, dizziness, nausea, and vomiting but that Joseph experienced the symptoms for only a day. Hager also confirmed that the renovation work was being conducted on the central lock-up side, away from the inmates' cells where he, Joseph, and Hawthorne were confined. Hawthorne also experienced the same problems as Joseph. Hawthorne remembers that Joseph vomited, but only once. Joseph, however, continued to report to Hawthorne that he felt poorly.

Nurse Creppel testified about Joseph's medical records, which indicated that Joseph complained about being exposed to paint fumes and about experiencing nausea, dizziness, and vomiting. Joseph's records further show that prior to June 1993, Joseph had a history of hypertension and took medication that produced side effects including some of the conditions about which he complained.

After hearing this testimony the magistrate determined that Captain Short did not act with deliberate indifference[4] to Joseph's health. Thus, he recommended that Joseph's claims

[4] It should be noted that the Supreme Court recently clarified the standard to be used to determine deliberate indifference. See Farmer v. Brennan, 114 S. Ct. 1970, 1974 (1994) (holding that deliberate indifference requires a showing of subjective awareness of the risk). However, Farmer does not change our disposition of the case at bar.

against the remaining defendants be dismissed. The district court adopted the magistrate's recommendation and dismissed the suit.

II. DISCUSSION

Joseph argues that the district court erred when it dismissed as frivolous his claim that his civil rights were violated because he was forced to breathe paint dust and experienced health problems.[5]

A. STANDARD OF REVIEW

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; Booker, 2 F.3d at 116. A "finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible." Denton, 112 S. Ct. at 1733.

We review a district court's § 1915(d) dismissal for abuse of discretion. Id. at 1734; Booker, 2 F.3d at 115. District courts are vested "with especially broad discretion in making the determination of whether an IFP proceeding is frivolous." Cay v. Estelle, 789 F.2d 318, 325 (5th Cir. 1986). District courts have this discretion because prisoners filing IFP claims do not have an economic incentive to refrain from filing frivolous suits and

[5] Although Joseph stated in his complaint that he did not receive medication on certain dates, that he was denied meals on two evenings, and that deputies left the floor for four hours at a time, he argues none of these claims on appeal. Issues not raised on appeal are abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

because district courts, which are "all too familiar" with factually frivolous claims, are in the best position to determine what is frivolous. Denton, 112 S. Ct. at 1733-34 (citing Neitzke v. Williams, 490 U.S. 319, 328 (1989)).

B. PRETRIAL DETAINEE STATUS

Joseph was a pretrial detainee. Pretrial detainees "are those individuals who have been charged with a crime but who have not yet been tried on the charge." Cupit, 835 F.2d at 84 (citing Bell v. Wolfish, 441 U.S. 520, 523 (1979)). Pretrial detainees are protected by the Fourteenth Amendment's Due Process Clause. Bell, 441 U.S. at 536; Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1186 (5th Cir. 1986).[6]

The proper inquiry under the Due Process Clause is whether conditions accompanying pretrial detention are imposed on the detainee for the purpose of punishment, inasmuch as the Due Process Clause does not permit punishment prior to an adjudication of guilt. Bell, 441 U.S. at 535-36; see also Cupit, 835 F.2d at 85 (holding that "pretrial detainees are entitled to protection from adverse conditions of confinement created by prison officials for a punitive purpose or with punitive intent"). "A pretrial detainee . . . has a Fourteenth Amendment right to be free from punishment altogether." Colle v. Brazos

[6] On the other hand, convicted prisoners are protected by the Eighth Amendment's prohibition of cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); Partridge, 791 F.2d at 1186. For example, the Eighth Amendment prohibits deliberate indifference to a prisoner's serious medical needs. Gamble, 429 U.S. at 106; Partridge, 791 F.2d at 1186.

County, 981 F.2d 237, 244 (5th Cir. 1993). "[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to `punishment.'" Bell, 441 U.S. at 539; accord Partridge, 791 F.2d at 1186.

C. THE DISTRICT COURT'S DISMISSAL

The magistrate's summary of the testimony indicates that Captain Short took measures to alleviate the conditions causing the inmates to complain shortly after they voiced their complaints. The measures, which included moving the inmates to another area and installing visqueen and fans, according to both of Joseph's own witnesses, in fact alleviated the problem. Moreover, OPP officials stationed close to the renovation work did not complain of health problems, thereby mitigating any inference that prison officials were using the sandblasting to impose punishment. The renovation of the facility clearly had a legitimate objective not related to punishment. Consequently, the trial court did not abuse its broad discretion in determining that Joseph's claim lacks an arguable basis in fact and therefore dismissing the claim as frivolous under § 1915(d).[7]

[7] In evaluating the frivolousness of Joseph's claims, the magistrate applied the deliberate indifference standard, which applies to prisoners, instead of the "no punishment" standard, which applies to pretrial detainees. Nevertheless, for the reasons set forth above, "we conclude that despite the fact that the magistrate applied the wrong standard, the district court properly . . . dismissed [the] . . . claim." Cupit, 835 F.2d at 85; see also Booker, 2 F.3d at 116 (noting that "[w]hen the judgment of the district court is correct, it may be affirmed on appeal for other reasons than those asserted or relied on below") (quoting Wooten v. Pumpkin Air, Inc., 869 F.2d 848, 850 n.1 (5th

It should be noted that the magistrate did not use the Spears hearing to decide the case on its merits. When the plaintiff alleges plausible and internally consistent facts, the district court may not dismiss under § 1915(d) by electing to credit the defendant's account of events. Pedraza v. Meyer, 919 F.2d 317, 319 (5th Cir. 1990). However, credibility may be a factor to the extent that there are substantial conflicts between the testimony of the plaintiff's supporting witnesses. Pedraza, 919 F.2d at 319; cf. Wesson v. Oglesby, 910 F.2d 278, 282 (5th Cir. 1990) (noting that credibility is not an issue if the plaintiff's story is "inherently plausible and internally consistent").

Joseph's witnesses supplied testimony which conflicted with Joseph's allegations, thus rendering Joseph's testimony and allegations internally inconsistent. As the magistrate noted, "Mr. Joseph believes Captain Short should have remedied the [sandblasting] problem entirely once he found out that the inmates were complaining or had problems." The magistrate went on to note that Captain Short believed that he remedied the problem, that the Sheriff's witnesses testified that the inmates did not further complain after the visqueen and fans were set up, and that "[e]ven according to one of the plaintiff's own witnesses, Mr. Hager, there were no problems or complaints about the renovation work after the visqueen and fans were set up." The magistrate added that Joseph's other witness, Hawthorne, also

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Cir. 1989)).

testified that the problem was not as bad once the fans were up. Thus, even without considering the conflicting testimony of the defendants, § 1915(d) dismissal was not an abuse of discretion.

III. CONCLUSION

For the forgoing reasons, we AFFIRM the judgment of the district court.