UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-30723
Summary Calendar

BRYAN K. HONSHUL,

Plaintiff-Appellant,

VERSUS

CHARLES C. FOTI, JR., Sheriff,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

(CA 94 3363 N (1))

March 30, 1995

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Bryan K. Honshul, a state prisoner, filed a civil rights complaint challenging the conditions of his confinement at the Orleans Parish Prison. Honshul alleged: (1) that the prison has no correctional or rehabilitation service; (2) that he had been denied adequate mental and physical exercise; (3) that he had been denied

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

writing materials and postage because of his indigency; (4) that he had been denied adequate access to legal materials; and (5) that the quality of the food was poor. Honshul suggested that it will be unnecessary for him to pursue his complaint if he is returned to the custody of the Louisiana Department of Corrections. Honshul was permitted to proceed in forma pauperis.

The magistrate judge recommended that the complaint be dismissed as frivolous. The magistrate judge found that Honshul had no constitutional right to be imprisoned in a particular institution. The magistrate judge further found that Honshul's conditions of confinement claims did not state a constitutional deprivation. Honshul did not file a timely objection to the report and recommendation. The district court adopted the report and recommendation and entered judgment dismissing the complaint without prejudice. Honshul appealed.

OPINION

In the document which the district court clerk treated as a notice of appeal, Honshul wrote, "[i]f the court will still accept my appeal or objections, I would like to state why I believe the court should accept my complaint." Honshul then argued the merits of his case. "A document filed in the period prescribed by Fed. R. App. P. 4(a)(1) for taking an appeal should be construed as a notice of appeal if the document clearly evinces the party's intent to appeal." Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987) (internal quotations omitted). Although Honshul argued the merits of his case in the document, he did not condition his desire for an

appeal upon the district court's denial of a request for reconsideration. Cf. id. The document clearly evinces Honshul's intent to appeal and adequately invokes the jurisdiction of this court.

Honshul has moved for appointment of counsel. Barring exceptional circumstances, a 42 U.S.C. § 1983 plaintiff has no right to appointed counsel. Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). Factors relevant to the determination whether a counsel should be appointed because a case is "exceptional" include the type and complexity of the case and the plaintiff's ability to investigate and present the case. Id. at 213. The issues presented in this case are not complex and Honshul has demonstrated an ability to present his issues in a comprehensible manner. The motion for appointed counsel is denied.

An in forma pauperis complaint may be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d) if it has no arguable basis in law or in fact. Booker v. Koonce, 2 F.3d 114, 115 (5th Cir. 1993); see Denton v. Hernandez, 504 U.S. 25, ___, 112 S. Ct. 1728, 1733 (1992). Section 1915(d) dismissals are reviewed for abuse of discretion. Id. at 1734.

Although a district court is not required to conduct a Spears[1] hearing before dismissing an IFP complaint as frivolous, Green v. McKaskle, 788 F.2d 1116, 1120 (5th Cir. 1986), a dismissal pursuant to § 1915(d) is inappropriate if the plaintiff's allegations may pass § 1915(d) muster with further factual development. Eason v.

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

Thaler, 14 F.3d 8, 9 (5th Cir. 1994). "Should it appear that insufficient factual allegations might be remedied by more specific pleading, [this court] must consider whether the district court abused its discretion by dismissing the complaint either with prejudice or without any effort to amend." Id. The question whether the district court abused its discretion is resolved by determining whether the petitioner's allegations, if developed further, "might have presented a nonfrivolous section 1983 claim." Id. If so, "further development . . . is required before a proper section 1915(d) dismissal may be imposed." Id.

"The Eighth Amendment . . . prohibits the infliction of `cruel and unusual punishments' on those convicted of crimes." Wilson v. Seiter, 501 U.S. 294, 296-97 (1991). "Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind" of prison officials. Id. at 302. The "deliberate indifference" standard is applied when determining whether a prisoner's conditions of confinement violate the Eighth Amendment. Id. at 303. The legal conclusion of deliberate indifference must rest on facts clearly evincing wanton actions on the part of the defendants. Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985). The Supreme Court recently explained the meaning of the term "deliberate indifference":

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement 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 v. Brennan, 114 S. Ct. 1970, 1979 (1994).

"[A] state has no constitutional obligation to provide basic educational or vocational training to prisoners." Beck v. Lynaugh, 842 F.2d 759, 762 (5th Cir. 1988). Therefore, Honshul's first claim with respect to the lack of rehabilitative services provided at the prison was properly dismissed as legally frivolous.

Honshul contends on appeal that he is not provided with adequate exercise. "Although deprivation of exercise is not per se cruel and unusual punishment, in particular circumstances a deprivation may constitute an impairment of health forbidden under the eighth amendment." Ruiz v. Estelle, 679 F.2d 1115, 1152 (5th Cir.) (internal quotations omitted), modified, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).

> Of particular importance in determining an inmate's need for regular exercise are the size of his cell, the amount of time the inmate spends locked in his cell each day, and the overall duration of his confinement. These together with the inmate's physical and other needs must be determined on the facts of each case and the evidence in each case should support the existence of any health hazard under the specific circumstances involved.

Id. at 1152 (internal footnotes omitted); see Green v. Ferrell, 801 F.2d 765, 771-72 (5th Cir. 1986); Wilkerson v. Maggio, 703 F.2d 909, 911-912 (5th Cir. 1983). Because Honshul might have been able to allege a non-frivolous § 1983 claim as to this issue, the judgment of the district court dismissing this claim is vacated and the case remanded for further development of this issue. See Eason, 14 F.3d at 9.

Honshul has failed to brief his third and fourth claims, pertaining to the alleged denial of access to writing materials and postage and denial of access to legal materials. Even if the appellant is pro se, claims not argued adequately in the body of the brief are abandoned on appeal. Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). Honshul does not argue on appeal that he should be returned to the custody of the Louisiana Department of Corrections. Therefore, this claim is also abandoned.

With respect to his fifth claim, Honshul concedes on appeal that the prison food is "adequate but very poor in nutrition and quantity." If the food is adequate, it does not present an "excessive risk to [Honshul's] health and safety." Farmer, 114 S. Ct. at 1979.

Honshul argues that he has been denied access to religious services. It is questionable whether this claim was raised adequately in the district court. Honshul's only allegation in the district court respecting religion pertained to the failure of prison authorities to provide him with a Bible. Although the Constitution requires that reasonable opportunities must be afforded to all prisoners to exercise religious freedom, Beck, 842 F.2d at 761, issues raised for the first time on appeal are reviewable only if they involve purely legal questions and failure to address them would result in manifest injustice. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Because this issue involves unresolved factual questions, the court concludes that this issue should also be remanded for further development because

Honshul might have been able to allege a non-frivolous § 1983 claim as to this issue. See Eason, 14 F.3d at 9. Because remand is necessary for development of the inadequate exercise claim, the district court is also instructed to permit further development of the religious access claim.

Honshul argues on appeal that noise at the prison is unconstitutionally excessive. This issue is unreviewable because it was not timely raised in the district court and because it involves unresolved factual questions. Honshul did argue that noise in the prison is excessive in his notice of appeal. In any event, the district court's dismissal of this claim is affirmed because excessive noise does not constitute an "excessive risk to inmate health and safety." Farmer, 114 S. Ct. at 1979. "To the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Rhodes v. Chapman, 452 U.S. 337, 347 (1981); see Lunsford v. Bennett, 17 F.3d 1574, 1580 (7th Cir. 1994) (a few hours of periodic loud noises that merely annoy, rather than injure, the prisoner does not state a constitutional claim).

AFFIRMED in part and VACATED and REMANDED in part.

E. GRADY JOLLY, Circuit Judge, dissenting:

Because there is no showing of a cognizable constitutional violation that is properly before us on appeal, I would affirm the district court. Therefore, I respectfully dissent.