

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**No. 94-40759  
Summary Calendar**

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**PAULO MARTINEZ DOMINGUEZ,**

**Plaintiff-Appellant,**

**versus**

**J. B. SMITH, ET AL.,**

**Defendants-Appellees.**

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**Appeal from the United States District Court  
for the Eastern District of Texas  
(6:93 CV 563)**

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November 6, 1995

Before JOLLY, JONES and STEWART, Circuit Judges.

PER CURIAM:\*

Paulo Martinez Dominguez appeals the district court's grant of summary judgment in favor of three defendants and its dismissal as frivolous of claims against all other defendants. Finding no reversible error, we affirm.

**BACKGROUND**

Proceeding *pro se* and *in forma pauperis* Paulo Martinez Dominguez, then a pretrial detainee confined in the Smith County, Texas jail, brought suit against J.B. Smith, the county sheriff, three county jail guards, Lt. Gary Pinkerton, Officer Kenneth Warren, and Officer Steven Chaney,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the East Texas Medical Center, Inmate Health Services, and three nurses at the county jail, Judy Taylor Lee, T.J. Williams, and Gail Fullen [MacEntire]. The parties consented to proceed before the magistrate judge to final judgment. The magistrate judge conducted a *Spears* hearing to develop the factual basis of Dominguez's complaint and additionally, with Dominguez's consent, admitted into evidence Dominguez's medical records from when he was detained in the county jail.

Dominguez alleges that on April 15, 1993, he slipped and fell from the top bunk bed, cutting his knee and hurting his back. Nurse Williams treated Dominguez by bandaging the knee, issuing Motrin tablets, an ice bag, and a blanket, and giving him a blue card in order to receive additional ice packs and bed rest for 24 hours. At approximately 1:00 a.m. on April 16th, Dominguez's cellblock was shaken down and placed on lock down. During the search of Dominguez's cell his Motrin tablets were confiscated by Williams, but they were later reissued to him on April 17th. Because of this incident, even though he was not personally involved, Dominguez sued Sheriff Smith because Smith was the head jailer, and Dominguez sued Williams because he claims that Williams maliciously confiscated the Motrin tablets on April 16th due to animosity toward him.

Dominguez also alleges that the cellblock in which he was housed was infested with parasites, such as lice, and that his tuberculosis was caused by the jail conditions. After Dominguez and others filed grievances about the unsanitary conditions, the detainees were sprayed for parasites and transferred to another cellblock. Dominguez sued Lt. Pinkerton because he claims that Pinkerton called him a "troublemaker" and made verbal threats because of his complaints about the conditions in his cellblock.

Additionally, Dominguez alleges that on August 9th an inmate housed in a different cellblock entered his cellblock and assaulted him, injuring his face and neck. He claims that an unidentified guard on control-picket duty was negligent for allowing the inmate to enter his cellblock. Dominguez was taken to the nurse who gave him Tylenol, an ice bag, and a blue card for additional ice bags.

On August 10th Dominguez claims he asked Officer Warren to obtain the ice bags authorized by the blue card. Warren told Dominguez that he was busy but that he would have someone obtain the ice bags. Later that morning, Warren ordered Dominguez and the other men in the cellblock to go to the roof for the required recreation period. Dominguez refused to go because of his injuries from the previous day. Dominguez alleges that Warren then gave him an ultimatum: either go to recreation or be placed in the drunk tank as punishment. When Dominguez refused to comply, he was escorted to the observation tank, the tank used for checking on detainees with medical complaints. Dominguez claims that he was not given his medicine or his personal property while in the observation tank, and that his request for a shower was ignored. Dominguez returned to a cellblock the next day and received his medicine and opportunity for showering. Dominguez sued Warren because he refused to issue ice bags and insisted that Dominguez attend outdoor recreation.

Almost unbelievably, Dominguez's complaints do not end here. On August 12th Dominguez claims he slipped and fell while showering and hurt his ribs and right arm. Officers wheeled Dominguez to an examination by nurse Gail MacEntire. MacEntire pressed on his ribs and told Dominguez that no bones were broken. MacEntire refused Dominguez's request to be sent to the hospital and she sent him to the observation tank. Dominguez sued MacEntire for failing to send him to the hospital.

Dominguez claims he then experienced difficulty trying to stand up in order to walk to the bathroom. Officer Miles observed this and summoned assistance. MacEntire and Officer Chaney arrived and when they saw that Miles had summoned help to assist Dominguez, Dominguez claims they laughed and told Miles that nothing was wrong with him and left. Dominguez sued MacEntire and Chaney for failing to assist him.

Last, Dominguez sued nurse Taylor Lee because she continued to tell him that there was nothing wrong with him, she refused to have x-rays taken, she refused his requests for pain

medication, and, despite his requests, she would not let a doctor examine him until twelve days after his fall in the shower. Dominguez sued Dr. Thomas for failing to x-ray his ribs.

The magistrate judge dismissed as frivolous Dominguez's claims against all defendants except Williams, Chaney, and MacEntire, who then filed motions for summary judgment. Dominguez failed to respond to these motions. The magistrate judge granted summary judgment and also concluded that these defendants would be qualifiedly immune. Dominguez was notified about possible sanctions for future suits.

## **DISCUSSION**

### **Summary Judgment**

Summary judgment is proper if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc); Fed. R. Civ. P. 56(c). “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2510 (1986).

The standard by which to judge the medical treatment received by Dominguez was set forth in *Cupit v. Jones*, 835 F.2d 82 (5th Cir. 1987). In *Cupit* the court provided that “pretrial detainees are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective. Furthermore, pretrial detainees are entitled to protection from adverse conditions of confinement created by prison officials for a punitive purpose or with punitive intent.” *Id.* at 85.

The summary judgment evidence reveals that Williams examined and treated Dominguez for a knee abrasion and some swelling after Dominguez's fall from the bunk bed on April 15th and that Motrin tablets were reissued to Dominguez on the 17th after the pills had been taken

during the shakedown on the 16th. Assuming as true Dominguez's allegation that Williams confiscated the Motrin tablets issued upon the initial treatment during the cellblock shakedown, the facts that medication was reissued the next day and that Dominguez's injury was minor do not equate to unreasonable medical care or punitive conditions. *Id.* Thus, Dominguez failed to meet his summary judgment burden in showing a constitutional violation by Williams. *Little*, 37 F.3d at 1075.

The summary judgment evidence reveals that Dominguez received medical care by nurses and a doctor after the August 9th assault, treatment which included issuance of pain medication. Dominguez's medical evaluation after his August 12th fall in the shower noted no swelling, no redness, no signs of pain, nor need for any treatment, although Dominguez received Tylenol later in the day and on the next day. MacEntire examined Dominguez after his fall and she detected no injuries. Even taking as true Dominguez's allegation that MacEntire and Chaney laughed and refused to assist Dominguez in his effort to stand subsequent to the examination from the fall, no constitutional violation occurred because the summary judgment evidence does not show a medical need or punitive treatment. *Cupit*, 835 F.2d at 85. Moreover, Dominguez's disagreement with MacEntire concerning the existence of an injury or the need for hospitalization is insufficient to support a claim because the treatment he received was reasonable. *Id.*, *Mayweather v. Foti*, 958 F.2d 91, 91 (5th Cir. 1992); *see also Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991)(mere negligence or medical malpractice does not give rise to § 1983 claim for prisoners). Judgment for these defendants was proper.

#### **Dismissal under § 1915(d)**

Dominguez challenges the dismissal, pursuant to 28 U.S.C. § 1915(d), of his claims against Smith, Warren, and Pinkerton by arguing that 1) Smith was present at the shakedown when Williams confiscated Dominguez's medicine and Dominguez was forced to sit handcuffed on the floor without attention to his medical needs; 2) Warren refused to issue ice bags for Dominguez on August 10th and insisted that he attend outdoor recreation or be sent to the drunk tank; and 3) Dominguez filed a grievance on August 20th concerning the denial of a physician's examination, and Pinkerton

subsequently scheduled a doctor's appointment for the 25th. An *in forma pauperis* complaint may be dismissed as frivolous if it lacks an arguable basis in law or fact. *Denton v. Hernandez*, 504 U.S. 25, 31, 112 S. Ct. 1728, 1733 (1992). This court reviews the dismissal for abuse of discretion. *Denton*, 504 U.S. at 33, 112 S. Ct. at 1734.

Dominguez's factual contention on appeal that Smith was physically present at the jail for the April 16th shakedown is contradicted by Dominguez's sworn assertions at the *Spears* hearing. Moreover, Dominguez does not provide another argument or contention concerning Smith's liability. Thus, his appellate argument is negated by the record.

Dominguez alleged under oath that after he requested the issuance of an ice bag, Warren told Dominguez that he would have someone bring him an ice bag. Although Warren gave Dominguez the ultimatum to attend recreation or be sent to the drunk tank, Warren subsequently escorted Dominguez to the observation tank for medical observation. Thus, Warren's actions did not amount to a punitive condition, *Cupit*, 835 F.2d at 85, and verbal threats do not amount to a constitutional violation. *Bender v. Brumley*, 1 F.3d 271, 274 n.4 (5th Cir. 1993).

As for the claim against Pinkerton, *i.e.* that Dominguez filed a grievance for a doctor and Pinkerton scheduled an appointment within a five-day period, Pinkerton's actions appear reasonable and do not amount to punishment of Dominguez. *Cupit*, 835 F.2d at 85. Therefore, the magistrate judge did not abuse his discretion in dismissing these claims.

### **Other Claims**

The magistrate judge's orders of dismissal and summary judgment analyzed Dominguez's various claims by reference to the defendant against whom suit was brought. To the extent that Dominguez fails to raise issues covering the magistrate judge's orders of dismissal, these issues are deemed abandoned on appeal. *Eason v. Thaler*, 14 F.3d 8, 9 n.1 (5th Cir. 1994). Dominguez raises certain arguments on appeal without reference to any particular defendant and which the orders of dismissal do not address expressly. To the extent that Dominguez raised these

claims in the district court through his complaint and the *Spears* hearing and they are not addressed above, they are addressed below.

Dominguez argues that medical personnel, particularly nurse Lee and Dr. Thomas, have denied his requests for x-rays and a head scan and that they did not provide the type of care he wanted. The record indicates that Dominguez has been denied his requested x-rays and brain scans because medical opinion did not believe they were necessary. Dominguez's disagreement with the medical opinion is not a basis for a claim considering that the treatment he received was reasonable. *Cupit*, 835 F.2d at 85.

Dominguez argues that his placement in the observation tank subsequent to his fall in the showers on August 12th amounted to punishment because he was denied his legal papers, he was denied his requests to use the library, and the tank's conditions were overcrowded and unsanitary. He further contends that his treatment in the tank was different from the treatment accorded others. To the extent that Dominguez attempts to raise a denial of access to the courts claim by his allegations concerning the denial of his legal papers and of his request to use the library, his attempt is unpersuasive because the record indicates that he had counsel, Curtis Stuckey, to represent him on the pending state charges and on problems with his confinement. *Brewer v. Wilkinson*, 3 F.3d 816, 821 (5th Cir. 1993), *cert. denied*, \_\_U.S.\_\_, 114 S. Ct. 1081 (1994); *Tarter v. Hury*, 646 F.2d 1010, 1014 (5th Cir. 1981). To the extent that Dominguez complained of the overcrowded and unsanitary conditions of the observation tank, the record indicates that Dominguez filed a grievance to which a response was made indicating that maintenance had been notified. Moreover, Dominguez's allegations indicate that his complaints concerning the conditions of another cellblock were answered by the use of disinfectant, insecticide, and transfer to another cellblock. As such, Dominguez's allegations concerning the conditions of his confinement do not amount to a constitutional violation. *Cupit*, 835 F.2d at 35.

Dominguez argues that he contracted tuberculosis in jail because he was diagnosed with the disease after five months of detention. Dominguez provided no evidence, outside of his nonmedical opinion, concerning the source of his tuberculosis. This claim is frivolous.

#### **Other Matters**

Dominguez argues that he was denied a fair hearing to explain his allegations because he was confused, caused by his alleged head injury. A *Spears* hearing is in the nature of a motion for a more definite statement. *Wilson v. Barrientos*, 926 F.2d 480, 482 (5th Cir. 1991). Given that Dominguez was given the opportunity to expand upon his allegations through the hearing, that he failed to respond to the summary judgment motions, and that his argument presumes the existence of a medical problem belied by the medical record, Dominguez's argument is without merit.

Dominguez also moves this court for leave to proceed on appeal *in forma pauperis*. Because Dominguez's *in forma pauperis* status has not been altered, the motion is denied as unnecessary. Fed. R. App. P. 24(a).

#### **CONCLUSION**

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.