

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

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No. 94-41128  
Summary Calendar

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BOBBY J. MURPHY,  
Plaintiff-Appellant,

versus

LISA KELLY, ET AL.,  
Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(3:92-CV-25)

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(April 20, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:\*

The plaintiff appeals the district court's dismissal of his civil rights complaint under 28 U.S.C. § 1915 (d). We affirm.

I.

Bobby J. Murphy, a Texas state prisoner, filed a civil rights complaint against the administrator of the Fannin County Jail, Lisa Kelly, and the Fannin County Sheriff, Talmadge Moore. He argues that the defendants were deliberately indifferent to serious medical needs because he was not examined by a psychiatrist or dispensed psychotropic medication.

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 Pursuant to this rule, the Court has determined that this opinion should not be published.

The matter was referred to a magistrate judge before whom the parties consented to proceed. The magistrate judge conducted an evidentiary hearing pursuant to *Spears v. McCotter*, 766 F.2d 179, 181 (5th Cir. 1985), following which he determined that the case was frivolous under § 1915 (d) and dismissed the case with prejudice because Murphy's claim lacked an arguable basis in law. Final judgment was entered accordingly.

## II.

Affording Murphy's brief the most liberal of constructions, he asserts only that he has received inadequate medical treatment regarding his desire to receive psychotropic drugs. An *in forma pauperis* complaint may be dismissed as frivolous under § 1915(d) if it lacks an arguable basis in law or in fact. *Denton v. Hernandez*, 504 U.S. 25, 29 (1992). This court reviews a section 1915 (d) dismissal under the abuse-of-discretion standard. *Id.* at 29. The district court correctly determined that Murphy's claim lacks an arguable basis in law.

At the *Spears* hearing, Murphy testified that he was confined in the Jail from December 1991 through April or May 1992, at which time he was released but subsequently reincarcerated when arrested on a parole revocation warrant on or about June 1992. He requested that defendant Kelly send him to a psychiatrist so he could receive the psychotropic medications he allegedly received while previously incarcerated in TDC.

Murphy's prison records corroborate that he requested to see a psychiatrist, Dr. Tooley, to reorder medication, stating that

he had "been taking Thorzine [sic] and Mellorill [sic]." The request was undated although Kelly responded on January 20, 1992, that she had contacted Dr. Patton, Director of Mental Health Mental Retardation (MHMR), and ascertained that Dr. Tooley had not treated Murphy since June 1989. Approximately two months hence, Murphy filed a grievance seeking an appointment with a psychiatrist and the psychotropic medication previously requested.

Kelly corroborated that Murphy requested to see a psychiatrist, Dr. Tooley. She testified that she contacted Dr. Patton who informed her that Murphy had not been seen at MHMR since June 1989 and thus, he could not prescribe the psychotropic medication. Kelly informed Murphy of Dr. Patton's decision and then offered Murphy an appointment with Dr. Skolnick, the Jail doctor. Kelly further testified that Jail policy required inmates to see Dr. Skolnick before being referred to other specialists; Murphy would need to be examined by Skolnick prior to seeing a psychiatrist. Kelly explained this to Murphy but Murphy declined to see Dr. Skolnick.

Defendant Moore testified that he spoke with Murphy on numerous occasions but that Murphy never requested permission to see a psychiatrist from Moore. Dr. Patton testified that he had never treated Murphy, that MHMR received a telephone call from the Jail on January 20, 1992, inquiring about Dr. Tooley and his treatment of Murphy, and that Murphy was not an active client at MHMR.

As a convicted prisoner, Murphy must allege deliberate indifference to his serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Deliberate indifference is a legal conclusion which must rest on facts evincing wanton actions on the part of the defendant. *Walker v. Butler*, 967 F.2d 176, 178 (5th Cir. 1992). Unsuccessful medical treatment, negligence, neglect, and even medical malpractice do not state a claim under § 1983. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). A prison official acts with deliberate indifference under the Eighth Amendment "only if he knows that inmates face a substantial risk of serious harm and [he] disregards that risk by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 114 S. Ct. 1970, 1984 (1994); see *Reeves v. Collins*, 27 F.3d 174, 176-77 (5th Cir. 1994) (applying the *Farmer* standard in the context of a denial-of-medical-care claim).

Murphy has neither alleged nor submitted evidence indicating that the defendants acted unreasonably, or knew Murphy faced a substantial risk of serious harm if he did not receive psychotropic medication. The record is devoid of any evidence pointing toward unreasonableness or deliberate indifference. At best, it indicates nothing more than a disagreement with the procedure for receiving medical treatment. Murphy's request was processed, MHMR was contacted, and Murphy was offered an appointment with the Jail doctor, a requisite to obtaining an

appointment with a psychiatrist. He declined the appointment. Thus, it is clear Murphy's claim lacked an arguable legal basis.

To the extent Murphy's brief can be construed to raise a due process claim and a claim for specific monetary damages, those claims were not raised in the district court. This court need not address issues not considered by the district court.

### III.

For the reasons given above, the order of the district court dismissing plaintiff's claims as frivolous is affirmed.