IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41270
Summary Calendar

RONALD CARPENTER,

Plaintiff-Appellant,

versus

C. TODD, CO III and
J. W. SHAW, Senior Warden
of the Texas Department of
Criminal Justice, Coffield Unit,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:94-CV-481)

(April 4, 1995)

Before JOHNSON, JOLLY, and DAVIS, Circuit Judges.

JOHNSON, Circuit Judge:[1]

Ronald Carpenter ("Carpenter"), a Texas inmate proceeding pro se and in formal pauperis, filed this section 1983 suit against Officer C. Todd ("Officer Todd") and Warden J.W. Shaw ("Warden Shaw"). Carpenter bases his section 1983 action on his claim that

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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

Officer Todd violated Carpenter's right to be free from cruel and unusual punishment by unjustifiably attacking him. After a *Spears* hearing, the magistrate judge[2] dismissed Carpenter's complaint as frivolous. Carpenter now appeals that dismissal. Because we find that the magistrate judge did not abuse her discretion in dismissing Carpenter's action, we affirm.

I. Facts and Procedural History

Carpenter grounds his complaint on a use of force incident which occurred on January 2, 1994. On the day of the alleged attack, Carpenter had left his cell when he heard a co-inmate by the name of Hartfield calling for him. Carpenter claims that he turned toward Hartfield in response, but that Officer Todd told Carpenter to return to his cell. Carpenter claims that he looked at Officer Todd and then turned to return to his cell.[3] Carpenter testified that as he started back toward his cell, Officer Todd grabbed him from behind and attempted to throw him to the ground. However, Officer Todd himself fell to the ground with Carpenter left standing above him.

Carpenter stated that the whole incident was somewhat funny and that he could not help laughing at the circumstances. Medical records from the day of the incident indicate that Carpenter stated that he had suffered no injuries. Additionally, on the day of the incident Carpenter told the prison nurse that he had not been

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[2]All dispositive action in the district court took place before a magistrate judge because Carpenter voluntarily afforded the magistrate judge full authority over his section 1983 action.

[3]Carpenter stated that Officer Todd was acting belligerently and smelled of alcohol.

harmed. Nevertheless, Carpenter also stated that on the day of the incident he told the prison nurse that he had a scratch on his elbow and that his back was hurting. The nurse examined Carpenter's elbow and could not detect any scratch. Nothing was mentioned in the medical records regarding any back injury. Carpenter made no further medical complaints during the entire remainder of the month of January.

Subsequent to the incident, Carpenter was charged with failing to obey a prison officer. Carpenter has stated that the only reason that he has sued Warden Shaw was because Shaw was responsible for everything that happened on the unit.[4]

The magistrate judge found that Carpenter had failed to show more than a de minimis injury and that Todd's actions were not repugnant to the conscience of mankind so as to rise to the level of a constitutional violation. Therefore, the magistrate judge dismissed the suit with prejudice pursuant to 28 U.S.C. § 1915(d).

II. Discussion

A frivolous in forma pauperis complaint can be dismissed by the district court sua sponte. A complaint is "frivolous when it lacks an arguable basis either in law or in fact." *Denton v. Hernandez*, 112 S. Ct. 1728, 1733 (1992). This Court reviews a section 1915(d) dismissal for an abuse of discretion. *See Id.* at 1734.

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[4]Because of the disposition of Carpenter's claim against Officer Todd, Carpenter's claim against Warden Shaw also necessarily fails. *See Williams v. Luna*, 909 F.2d 121, 123 (5th Cir. 1990) (holding that a defendant cannot be liable solely because of his position of authority in a section 1983 action).

To obtain relief under 42 U.S.C. § 1983, a plaintiff must prove that he was deprived of a federal right, and that the person or persons depriving him of that right acted under color of state law. *Hernandez v. Maxwell*, 905 F.2d 94, 95 (5th Cir. 1990). When a prisoner alleges that a prison official has used excessive force in violation of the Eighth Amendment, the core judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992). Nonetheless, every malevolent touch by a prison guard does not give rise to a federal cause of action. *Id.* at 1000. The Eighth Amendment's prohibition of cruel and unusual punishment necessarily excludes from constitutional recognition a de minimis use of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind. *Id.*; *see Jackson v. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993) (holding that although a prisoner need not show a significant injury, he must have suffered at least some injury).

Considering the internal inconsistencies of Carpenter's complaints of injury, his expression that the incident was comical, and his characterization of the degree of force that was applied, the magistrate judge did not abuse her discretion in finding that Carpenter's allegations did not rise to the level of an Eighth Amendment violation.

III. Conclusion

Because the magistrate judge did not abuse her discretion in

finding that Carpenter failed to allege a section 1983 cause of action, we affirm.

AFFIRMED.