

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41271
Summary Calendar

BERNARD M. CLARK,

Plaintiff-Appellant,

versus

STATE OF TEXAS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas
(6:93-CV-717)

(June 19, 1995)

Before POLITZ, Chief Judge, GARWOOD and PARKER, Circuit Judges.

POLITZ, Chief Judge:*

Bernard M. Clark, an inmate in the Institutional Division of the Texas Department of Criminal Justice, appeals the dismissal of his *pro se in forma pauperis* civil rights action against various officials and prison employees. For the reasons assigned, we affirm.

Background

On April 22, 1993 Clark was transported by van from the TDCJ

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Huntsville Unit to the Michael Unit for a **Spears**¹ hearing. Officers Joseph Young and William Tutor transported Clark. Upon arrival at the Michael Unit Young told Clark to step down. Clark, in handcuffs and leg irons joined by a short chain, replied that he could not do so because of the restraints and sought assistance from Sergeant John T. Riggle, who met the van. Clark claims that Riggle and Young then lifted him from the van, raised him into the air, and threw him to the ground. He maintains that he was subjected to this treatment because he complained that his restraints were too tight. The defendants counter that Clark fell while Riggle alone was helping him out of the van.

Riggle called for a video camera and a nurse and Clark was carried to a visitation cell. Nurse Molly Johnson arrived a few minutes later to examine Clark. Johnson recounts that Clark refused to cooperate with her, yelling repeatedly that he wanted to be examined by a doctor. Clark does not take issue, explaining that "[s]he asked me tell her the problem and I was steady telling her that I was hurting and I need to see a doctor." Within these limitations Johnson visually examined Clark, concluding that he had not suffered any physical injuries. She left the visitation cell, noting in Clark's medical record that he refused a medical exam.

Clark filed the instant complaint under 42 U.S.C. § 1983 against the State of Texas, Governor Ann Richards, and 13 employees of the Texas prison system. Clark claimed, *inter alia*, that he was: the victim of excessive use of force; denied medical care;

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

retaliated against for having filed prison grievances; and subjected to cruel and unusual conditions of confinement because of numerous broken windows in the Coeffield Unit during cold weather, and he requested a jury trial.

The district court referred the matter to a magistrate judge for certain pretrial matters and to conduct evidentiary hearings and submit proposed findings of fact and disposition recommendations. The magistrate judge recommended the dismissal of various claims and defendants. Clark made no objection and the district court adopted the magistrate judge's recommendations. The magistrate judge then set the case for an expanded evidentiary hearing, cognomened a **Flowers**² hearing, and thereafter recommended that the complaint be dismissed without prejudice. Clark filed no objections and the district court dismissed the case. Clark timely appealed.

Analysis

In conducting the **Flowers** hearing, the magistrate judge acted pursuant to the authority delegated by the district court under 28 U.S.C. § 636(b)(1)(B).³

²**Flowers v. Phelps**, 956 F.2d 488 (5th Cir.), modified in part on other grounds, 964 F.2d 400 (5th Cir. 1992).

³28 U.S.C. § 636(b)(1)(B) provides in pertinent part:

[A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

We review the dismissal of the several claims and find no reversible error.⁴ First, the allegations of retaliation are without merit. There is no evidence, merely Clark's conclusory assertions, to support the claim that Riggle, Tutor, and Johnson retaliated against him.⁵ Similarly unfounded is Clark's allegation that he was denied medical care by Johnson. The allegation that Johnson showed no concern and did not give him a fair chance is insufficient to support a determination that there was an excessive medical risk to Clark's safety that Johnson knew of and disregarded.⁶ Clark's complaint falls far short of the deliberate indifference which must be pled and proven.

Dismissal of Clark's conditions of confinement claim was also proper. Clark alleges that beginning on November 24, 1992 he and other inmates were exposed to subfreezing temperatures for five days because of the failure to repair broken windows. Clark concedes that there was no ice in his cell, offering nothing to support the contention that temperatures were subfreezing.⁷ Further, he admits that prisoners were given blankets for warmth

⁴Clark did not object to the magistrate judge's findings and we review only for plain error. **National Ass'n of Gov't Emp. v. City Pub. Serv. Bd. of San Antonio, Tex.**, 40 F.3d 698 (5th Cir. 1994); **Nettles v. Wainwright**, 677 F.2d 404 (5th Cir. Unit B 1982).

⁵**Whittington v. Lynaugh**, 842 F.2d 818 (5th Cir.), cert. denied, 488 U.S. 840 (1988); **Hillard v. Board of Pardons and Paroles**, 759 F.2d 1190 (5th Cir. 1985).

⁶**Farmer v. Brennan**, 114 S.Ct. 1970 (1994); **Estelle v. Gamble**, 429 U.S. 97 (1976).

⁷Coeffield personnel testified that on November 24, 1992 the temperature ranged from 49-62 degrees.

and suggests no basis for a finding that the cold temperatures rendered the jail conditions cruel and unusual or that they contravened contemporary standards of decency.⁸

Further, we find no merit to Clark's appeal of the dismissal of defendant James Collins, director of the TDCJ. Clark has alleged no facts from which it can be found that Collins was personally involved in the alleged constitutional deprivations, or which demonstrate a causal connection between Collins' conduct and the deprivations.⁹ Nor has he produced any evidence that Collins knew that any jail policy or procedure was so deficient that it would expose prisoners to significant harm.¹⁰

Finally, we address the issue of the use of excessive force, a claim which the court *a` quo* found without merit. A close look at Clark's testimony, viewed through a **Spears** prism, persuades that this claim fails to pass 28 U.S.C. § 1915(d) muster. As such it, along with the other claims, is to be dismissed as frivolous, thus rendering the jury trial request moot.

For these reasons the judgment of the district court is AFFIRMED.

⁸**Rhodes v. Chapman**, 452 U.S. 337 (1981); compare with **Foulds v. Corley**, 833 F.2d 52 (5th Cir. 1987) (finding that conditions of confinement would be cruel and unusual if proven that inmate was forced to sleep on floor of extremely cold solitary confinement cell with rats crawling over him).

⁹**Thompkins v. Belt**, 828 F.2d 298 (5th Cir. 1987).

¹⁰**Id.**