UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-50014

DAVID FLINT,

Plaintiff-Appellant,

VERSUS

SHERIFF ED RICHARDS, in his official capacity as Sheriff of Williamson County, and DEPUTY PANUAGUA,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas

(A-93-CA-54)

April 19, 1996

Before SMITH, WIENER, and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:[*]

David Flint brought this 42 U.S.C. § 1983 suit against the sheriff and several officers of the jail in Williamson County, Texas where he was being detained prior to trial. Flint alleged that the defendants violated his civil rights by beating him, denying him medical care, then retaliating against him for attempting to redress those wrongs. The district court dismissed

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[*] Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

the suit for failure to state a claim upon which relief could be granted. FED. R. CIV. P. 12(b)(6). We affirm in part and vacate and remand in part the district court's judgment.

We review the district court's Rule 12(b)(6) dismissal *de novo*, accepting all well-pleaded facts as true and viewing them in the light most favorable to Flint, the non-movant. **Eason v. Holt**, 73 F.3d 600, 601 (5th Cir. 1996). Dismissal at such an early stage of the litigation is proper when it appears certain that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. **Fee v. Herndon**, 900 F.2d 804, 807 (5th Cir.), cert. denied, 111 S. Ct. 279 (1990). The pleadings and briefs of *pro se* litigants are liberally construed. **Hulsey v. Owens**, 63 F.3d 354, 355 n.1 (5th Cir. 1995).

FACTS

Flint's complaint states that in December 1992 several law enforcement officers beat him while he was being detained at the Williamson County jail. The incident started when Officer Panuagua, who was delivering prisoner mail, deliberately destroyed a Christmas card addressed to Flint and then taunted Flint by laughing. When Flint asked to see a sergeant, Officer Panuagua removed Flint from his cell, handcuffed him, and attempted to place him in a "rubber room." Flint resisted and again asked to see a sergeant. At that point five or six officers jumped on him and started beating him.

Flint claims that *after* he was subdued and lying on the floor, Panuagua stepped on Flint's neck, choking him and injuring his

face. Panuagua then stooped down and grabbed Flint's thumbs, bending them backwards almost to the point of breaking. Finally, a sergeant arrived and instructed Panuagua to take the handcuffs off Flint. The sergeant told Flint and Panuagua that the incident was over and ordered the two men to shake hands.

Flint immediately complained that he was experiencing pain and swelling in his face, neck, stomach, back and thumbs, and that he was spitting up blood. Later that day medics took Flint to the infirmary for observation, but he was not examined by a doctor. Two days later, Flint was returned to the general jail population without having received any medical care. Flint's injuries were independently documented by a reporter from the Austin American Statesman newspaper, an agent from the Federal Bureau of Investigation and an attorney from the American Civil Liberties Union. Both the reporter and the F.B.I. agent took photographs of Flint's injuries. The ACLU attorney wrote the jail on Flint's behalf, requesting that Flint receive medical care for his injuries, which posed serious health problems for Mr. Flint. Nonetheless, Flint states that he did not receive any medical care.

Flint further claims that jail officials retaliated against him after his altercation with Officer Panuagua. Flint supports that claim with the following facts. Flint alleges that officers took him to a "rubber room" where he was threatened with physical violence because his attempts to obtain redress for the assault and lack of medical care were perceived to be causing trouble in the jail. The same officers attempted to incite Flint to violence by

making vile comments about Flint's family. Flint was warned not to file any lawsuits relating to the beating. Flint further alleges that he was subjected to a second assault by unidentified officers on February 3, 1992, that he was denied visitation with his parents on one occasion, that he was falsely accused of disciplinary violations, and that his mail was disrupted after the jail received the letter from the ACLU attorney.

Subsequently, Flint, who is white, was moved to an all-black holding tank and identified as a racist. Flint claims the officers invited the black prisoners to "take care of" Flint. Flint also states that the officers returned periodically to see whether he had been assaulted.

PROCEDURAL HISTORY

Flint brought a § 1983 action against Jim Boutwell, who was then the sheriff of Willamson County, Officer Panuagua, and unidentified officers, seeking injunctive relief and monetary damages.[1] Construing Flint's pleadings liberally, we discern that Flint attempts to raise the following claims: (1) use of excessive force; (2) denial of medical care; (3) interruption of mail privileges; (4) harassment or retaliation based on his attempts to obtain redress; and (5) various state law claims.

The defendants moved to dismiss the action for failure to state a claim. Flint responded to the motion and amended his complaint. After the dismissal motion was referred to a magistrate

[1] Ed Richards, who is named in the style of this appeal, is the present sheriff of Williamson County.

judge, Flint's motions for a **Spears**[2] hearing and appointment of counsel were denied. The magistrate judge then issued a report and recommendation concluding that (1) Flint did not state a claim upon which relief could be granted, (2) the defendants were entitled to qualified immunity from suit, and (3) Flint's various state law claims were not cognizable under § 1983.

Reviewing Flint's claims *de novo*, the district court determined that Flint had failed to state an excessive force claim for reasons different than those expressed by the magistrate judge, but adopted in all other respects the magistrate judge's report and recommendation.[3] Accordingly, the district court dismissed Flint's complaint. Flint filed a timely notice of appeal.[4]

DISCUSSION

I. Claims Made Against Officials in their Official Capacity

The district court correctly dismissed Flint's claims against Boutwell. Flint names Boutwell as a defendant only because Boutwell was the sheriff of Williamson County at the time of the

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

[3] Flint did not file timely objections to the magistrate judge's report and recommendation, although he was warned that failure to object within ten days would forfeit his right to raise further objections in the district court or on appeal. Our usual forfeiture rule is inapplicable, however, because the district court expressly stated that it had undertaken a *de novo* review of Flint's claims. See **Douglass v. United States Automobile Ass'n**, No. 95-50007, 1996 WL 140173 at *13 (5th Cir. Mar. 28, 1996).

[4] Flint's briefs do not present any argument that the district court erred by dismissing his state law claims. Given Flint's waiver of that issue on appeal, the dismissal of those claims will be affirmed.

beating. Flint does not allege any personal participation or other wrongful conduct by Boutwell that contributed to the violation of his constitutional rights. There is no respondeat superior liability in § 1983 actions. **Thompkins v. Belt**, 828 F.2d 298, 303 (5th Cir. 1987). We thus conclude that Flint is suing Boutwell only in his official capacity. A suit against an official in his official capacity is essentially a suit against the governmental entity. **Kentucky v. Graham**, 105 S. Ct. 3099 (1985). Williamson County can only be held liable under § 1983 if the violation of Flint's constitutional rights was caused by a set policy or well-established practice of the County as carried out by the prison officials. **Monell v. Dep't of Social Serv.**, 98 S. Ct. 2018, 2035-36 (1978). Flint's pleadings do not identify any policy or practice that contributed to the violation of his civil rights. We conclude that the district court properly dismissed Flint's claims against Boutwell and any other claims construed to be made against Williamson County officials in an official capacity.

II. Claims Made Against the Defendants in their Individual Capacity

The district court concluded that Flint's pleadings did not state viable claims for excessive force, denial of medical care, retaliation or harassment, and interruption of mail privileges. The district court further held that because Flint failed to allege any violation of clearly established law, all of the defendants were entitled to qualified immunity from suit.[5] Either rationale

[5] Flint is no longer being detained in the Williamson County jail. Therefore, his claims for injunctive relief are moot and the

requires that we first examine the sufficiency of Flint's pleadings.

Flint claims that his mail was "not getting out" after the ACLU attorney wrote the jail concerning Flint's medical condition. Flint does not, however, allege that any particular item of outgoing mail was halted or examined. Likewise, Flint does not allege that he suffered any harm from the deprivation of his mail privileges. Although this Court has repeatedly acknowledged "a prisoner's right to be free from completely arbitrary censorship of his outgoing mail," **Brewer v. Wilkinson**, 3 F.3d 816, 826 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994), we nonetheless conclude that Flint failed to state a claim for violation of either his First and Fourteenth Amendment right to free speech or his due process right of access to the courts. See **id**. at 820-21 (explaining constitutional basis for claims alleging interference with prisoner mail). The district court's dismissal of Flint's claim relating to the interruption of his mail privileges was proper.

On appeal Flint complains that his claims for excessive force and denial of medical care were measured by Eighth Amendment standards applicable to convicted prisoners, instead of by Fourteenth Amendment due process standards applicable to pretrial detainees. Although the district court may have incorrectly labeled Flint's claims, **Baker v. Putnal**, 75 F.3d 190, 198-99 (5th

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defendants' entitlement to qualified immunity potentially justifies dismissal of Flint's complaint in its entirety.

Cir. 1996) (Eighth Amendment does not apply to pretrial detainees), the proper standard was applied.

The protection afforded pretrial detainees and convicted prisoners is the same when the claim involves excessive force used to restore institutional order. **Rankin v. Klevenhagen**, 5 F.3d 103, 106 (5th Cir. 1993). Likewise, "the State owes the same duty under the Due Process Clause and the Eighth Amendment to provide both pretrial detainees and convicted inmates with basic human needs, including medical care and protection from harm, during their confinement." **Hare v. City of Corinth**, 74 F.3d 633, 650 (5th Cir. 1996) (en banc). The district court correctly identified the applicable standards.

When state officials are accused of using excessive force to squelch a disturbance in a prison or jail, the core judicial inquiry is whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. The district court held that Flint's pleadings did not suggest that force was applied sadistically and maliciously. We disagree. Flint alleges that he was beaten and injured *after* he was subdued and lying handcuffed on the jail floor. At that point there was no need to restore discipline. Thus we conclude that Flint's pleadings adequately set forth a viable claim of excessive force.

Flint alleges that jail officials denied him appropriate medical care despite their actual knowledge that he was in pain and spitting up blood. Jail officials were made aware that failure to

administer medical care could cause Flint serious medical consequences by both Flint and the ACLU attorney who intervened on his behalf. See **Hare v. City of Corinth**, 74 F.3d at 650 ("a state jail official's liability for episodic acts or omissions cannot attach unless the official had subjective knowledge of a substantial risk of serious harm to a pretrial detainee but responded with deliberate indifference to that risk"). The district court adopted the magistrate judge's conclusion that the defendants did not act with deliberate indifference because Flint's injuries were not of a severe or lasting nature.

We disagree. The severity of a detainee's injury, while obviously material on the issue of whether medical care was necessary, is not necessarily dispositive on the issue of whether jail officials were deliberately indifferent. Flint's injuries were severe enough to capture the attention of several outsiders, including a reporter, an F.B.I. agent and an ACLU attorney. His claim that jail officials were actually aware that he had suffered a substantial injury and required medical care is supported by allegations that can be easily verified in a **Spears** hearing or at trial in the district court. We conclude that Flint stated a viable claim for violation of his Fourteenth Amendment right to medical care during detention.

Flint alleges that he was retaliated against and subjected to harassment because he attempted to assert his right to be free from excessive force and to obtain medical care by filing a grievance, contacting the media and filing this lawsuit. See **Hilliard v.**

Board of Pardons and Paroles, 759 F.2d 1190 (5th Cir. 1985). The district court adopted the magistrate judge's conclusion that Flint's claim was without sufficient factual support. We disagree. Flint states details relating to several incidents of retaliation, providing names and dates that are susceptible to corroboration in a **Spears** hearing or at trial. Jail officials may not "punish" pretrial detainees by creating racially charged environments in order to subject the detainee to violence, or by threatening the detainee with physical violence and trumped up disciplinary charges to prevent the detainee from exercising his constitutional right to avail himself of judicial remedies. Thus, Flint's pleadings contain facts relating to his claim of harassment or retaliation based upon which relief could be granted.

Our decision that the district court's dismissal of Flint's claims alleging excessive force, denial of medical care and harassment or retaliation was erroneous is informed in part by the fact that the district court denied Flint's motion to call witnesses and conduct a **Spears** hearing, and did not otherwise afford Flint the opportunity to offer additional factual support. Although we express no opinion on the ultimate merits of Flint's claims, the facts alleged require further development. The district court abused its discretion by dismissing those claims without giving Flint the opportunity to offer additional evidence through a **Spears** hearing. See **Eason v. Thaler**, 14 F.3d 8 (5th Cir. 1994) (reversing dismissal of § 1983 action as frivolous under 42 U.S.C. § 1915(d) and remanding for further factual development).

Nor is the district court's dismissal of Flint's claims of excessive force, denial of medical care, and harassment or retaliation justified on the basis that the defendants are entitled to qualified immunity. Assessing qualified immunity is a two-step process. First, we determine whether a plaintiff alleged violation of a constitutional right that is clearly established under current law. **Al-Ra'Id v. Ingle**, 69 F.3d 28, 31 (5th Cir. 1995). Second, if the plaintiff alleges such a violation, we must still determine whether the defendant's conduct was nonetheless objectively reasonable as measured by the law existing when the conduct occurred. **Id**. at 31; **Rankin v. Klevenhagen**, 5 F.3d 103, 105 (5th Cir. 1993).

We have already determined that Flint adequately stated violations of his clearly established constitutional rights to be free from the use of excessive force, to be afforded medical care while being detained, and to be free from harassment or retaliation motivated by his attempts to exercise constitutional rights. Flint alleges he was seriously injured while he was handcuffed and not posing any threat to prison security. He claims that he was subsequently denied medical care even though the prison officials had actual knowledge that he had sustained substantial injuries which were independently observed by outside parties. Finally, Flint claims that he was again beaten and punished for attempting to remedy the earlier violations of his civil rights. Flint's allegations do not rely upon the theory of negligence, but instead involve intentional violation of clearly established rights about

which reasonable jail officials were aware. Based upon the facts in the pleadings, the conduct alleged by Flint cannot be said to be objectively reasonable. Whatever the ultimate merits of Flint's allegations may be, and this Court expresses no opinion on that point, the facts alleged in Flint's pleadings are sufficient to overcome the defendant's invocation of the qualified immunity defense.[6]

CONCLUSION

Flint does not challenge any policy or practice of Williamson County. Therefore, Flint's claims against Sheriff Boutwell, and his successor Ed Richards were properly dismissed. The district court's dismissal of Flint's claims against those parties is

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[6] We note for purposes of remand that it appears the district court used the heightened pleading standard enunciated in **Elliott v. Perez**, 751 F.2d 1472 (5th Cir. 1985) to determine that the defendants were entitled to qualified immunity. The **Elliott** heightened pleading standard was essentially a requirement that the plaintiff specially plead the issue of qualified immunity. **Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit**, 113 S. Ct. 1160, 1162 (1993); **Elliott**, 751 F.2d at 1473. In **Schultea v. Wood**, 47 F.3d 1427 (5th Cir. 1995) (en banc), which was decided after the district court's disposition of this case, we clarified that the **Elliott** standard for pleading facts to defeat qualified immunity survived **Leatherman**'s holding that heightened pleading could not be required in § 1983 suits against municipalities. **Schultea** altered the standard, however, by clarifying that plaintiffs were no longer required to fully anticipate the qualified immunity defense in the initial complaint to avoid dismissal under Rule 12(b)(6). To accommodate the uneasy balance between the plaintiff's right to challenge lawless governmental action and the public official's right to be free from the burden of suit, we crafted an amendment to the **Elliott** rule, placing special emphasis on the district court's powers to require a reply to an answer pleading qualified immunity. **Schultea**, 47 F.3d at 1433-34. "Vindicating the immunity doctrine will ordinarily require such a reply, and a district court's discretion not to do so is narrow indeed when greater detail might assist." **Id**. at 1434.

AFFIRMED. Flint does not challenge on appeal the district court's dismissal of his state law claims. Because Flint waived that issue, the district court's dismissal of Flint's state law claims is AFFIRMED. Flint failed to state a claim upon which relief can be granted based upon interference with his mail privileges. The district court's dismissal of that claim is AFFIRMED.

Flint did state viable claims against Officer Panuagua and the unidentified officers based on the use of excessive force, the denial of medical care, and retaliation in violation of the Fourteenth Amendment. The district court's judgment dismissing those claims is VACATED and the cause REMANDED for further proceedings consistent with this opinion.