

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-50036  
Summary Calendar

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JOHN LEE COOK,

Plaintiff-Appellant,

VERSUS

GARY PAINTER,  
Sheriff of Midland County, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
(M0-93-CV-74)

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(July 14, 1994)

Before GARWOOD, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

John Cook appeals an unfavorable judgment following a bench trial in his prisoner's civil rights action brought pursuant to 42 U.S.C. § 1983. Finding no error, we affirm.

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\* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Cook, an inmate at the Midland County Detention Center (MCDC) in Midland, Texas, named, as defendants, Midland County Sheriff Gary Painter, Midland County Attorney Mark Dettman, Lieutenant Baggs, who receives inmate law library requests, and Lieutenant Galloway, who is in charge of transferring Texas Department of Criminal Justice (TDCJ) inmates from the detention center to prison facilities. The magistrate judge held a hearing pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), to develop Cook's claims. Cook alleged that MCDC was unconstitutionally holding him, where he is not entitled to certain privileges, such as good-time credit, job training, and educational benefits, that he would receive if he were serving his sentence in a TDCJ facility. He also alleged that he was denied meaningful access to the courts by being denied access to the law library and that the defendants were seriously indifferent to his medical needs by requiring him to pay for doctors' visits and medical supplies.

The parties consented to proceed before the magistrate judge. Following a bench trial, in analyzing Cook's deliberate-indifference-to-serious-medical-needs claim, the magistrate judge found that MCDC had instituted a policy, resulting from relevant Texas law, whereby prisoners are required to pay for medical services when able. However, no prisoner is denied medical care because of an inability to pay. The magistrate judge also found that Cook had never complained of a serious medical problem. The magistrate judge concluded that Cook had failed to demonstrate that

the MCDC's policy of charging medical fees against an indigent inmate's prison account had resulted in deliberate indifference to a serious medical need.

The magistrate judge also analyzed Cook's claim that he was denied access to the courts because he was denied a visit to the county law library on November 5, 1993. The magistrate judge found that Cook had been granted a previous request to visit the law library on October 30, 1993. Cook used one hour and forty-five minutes of his allotted time of three hours. He did not indicate that his research was incomplete or that the three-hour time frame was insufficient. Cook's November 5 request was denied because it was thought that Cook had already been to the law library. The magistrate judge found that Cook's denial-of-access-to-the-courts claim was not valid because his position had not been prejudiced.

In analyzing Cook's loss-of-TDCJ-privileges claim, the magistrate judge found that Cook preferred to serve his sentence in a TDCJ facility so that he would have access to privileges and programs not otherwise available to him and would obtain parole earlier. The magistrate judge concluded, however, that Cook had no constitutional right to choose where he would serve his sentence. The magistrate judge also found that Cook participated in a Parole in Absentia (PIA) program whereby his name was submitted for parole by MCDC officials. The parole board, not MCDC officials, made the decision to deny Cook parole. The magistrate judge concluded that, although some penal institutions might be more desirable than others, Cook had failed to prove that the programs disparity

between MCDC and the TDCJ facilities violated a federal constitutional or statutory right. The magistrate judge then rendered judgment in favor of the defendants.

## II.

Cook contends that Painter retaliates against inmates who file § 1983 complaints by removing their names from the TDCJ transfer list, causing them to remain in MCDC. This contention is presented for the first time on appeal. An issue presented for the first time on appeal is not addressed by this court unless it involves purely legal questions and failure to consider it would result in manifest injustice. First United Financial Corp. v. Specialty Oil Co., 5 F.3d 944, 948 (5th Cir. 1993). Cook's claim involves resolutions of fact questions, so his retaliation claim raised for the first time on appeal is unreviewable.

On appeal from a bench trial, we review the magistrate judge's factual findings for clear error and the issues of law de novo. Odom v. Frank, 3 F.3d 839, 843 (5th Cir. 1993). Cook does not challenge the magistrate judge's findings of fact; rather, he argues that the magistrate judge erred in concluding that the defendants had not violated any federal rights regarding his claims of denial of access to the courts, deliberate indifference to serious medical needs, and transfer to a TDCJ facility.

## III.

Cook argues that he was denied access to the courts when the

defendants denied his right to access to the law library. He testified at trial that his November 5, 1993, request to go to the law library was denied.

Prisoners have a constitutional right of access to the courts that requires prison authorities "to assist inmates in the preparation and filing of meaningful legal papers . . . ." Bounds v. Smith, 430 U.S. 817, 828 (1977). A prisoner may establish a violation of this right by showing that he was not provided with the means to file a legally sufficient claim. Mann v. Smith, 796 F.2d 79, 84 (5th Cir. 1986). A denial-of-access-to-the-courts claim is not valid if a litigant's position is not prejudiced by the alleged violation. Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir.), cert. denied, 112 S. Ct. 2974 (1992).

Cook acknowledged that on November 5 he wanted to go to the law library to do some general research in reference to this lawsuit. Cook stated that he was prejudiced by the denial to allow him to visit the law library because he did not have enough time to research his case properly and present new issues. Cook stated that the reason he left the library early on October 30 was because his ankles hurt. Officer Dennis Long, who accompanied Cook to the law library, testified that Cook did not indicate that he needed more time. Captain Richard Sexton testified that he denied the November 5 request because he thought that since Cook had already made a trip to the law library, the request was moot.

Cook acknowledged that relatives had provided him with copies of cases and that he had used civil rights books owned by inmates

in the jail. Cook also testified that he had filed a couple of lawsuits and an appellate brief to this court. Within the brief he gave a course of the proceedings in the district court, a statement of facts, and an argument citing cases of which he was aware of the holdings. Cook has also filed an adequate appellate brief in this case.

Cook cannot demonstrate any prejudice by the denial of his November 5 law library request. See Henthorn, 955 F.2d at 354. Consequently, the district court did not err in determining that the defendants had not denied Cook access to the courts.

#### IV.

Cook argues that the defendants were deliberately indifferent to his serious medical needs regarding his need for new eyeglasses, relief from his bursitis, and tooth extractions by their policy of requiring inmates to pay for needed medical treatment and supplies. Prison officials violate the constitutional proscription against cruel and unusual punishment when they demonstrate deliberate indifference to a prisoner's serious medical needs, constituting an unnecessary and wanton infliction of pain. Wilson v. Seiter, 501 U.S. 294, 303-04 (1991). The facts underlying a claim of deliberate indifference must clearly evince the medical need in question and the alleged official dereliction. The legal conclusion of deliberate indifference must rest on facts clearly evincing wanton actions on the part of the defendants. Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985).

Captain Sexton testified that in response to recent legislation<sup>1</sup> MCDC has instituted a policy whereby prisoners are required to pay a nominal fee for medical and dental (extraction or filling, only) services. The fee is to assist in the cost of the services. If an inmate does not have the money to pay the fee, he is not denied in-house medical services or any outside medical service if the doctor states it is necessary. The nominal fee is usually charged as a negative balance on the inmate's prison account. Many inmates have left MCDC with sizable negative medical balances. MCDC does not try to collect those balances from the inmates. MCDC does not provide eye exams or eyeglasses as a matter of policy, but if it is considered necessary, MCDC will provide it.

Medical Supervisor Virginia Strickland testified that MCDC employs three nurses and several paramedics to see to the inmates' medical needs. MCDC also has contracted with two doctors who hold sick call twice a week. No inmate is denied the right to go to sick call. An inmate need only fill out a sick call slip. Strickland further testified that Cook had never requested to see a doctor and had only requested over-the-counter medication such as

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<sup>1</sup> Tex. Code Crim. P. § 104.002(d) states that:

[a] person who is a prisoner in a county jail and received medical, dental, or health related services from a county or hospital district shall be required to pay for such services when they are rendered. If such prisoner is an eligible county resident as defined in Section 61.002, Health and Safety Code, the county or hospital district providing services has a right of subrogation to the prisoner's right or recovery for any source, limited to the cost of services provided. A prisoner, unless the prisoner fully pays for the cost of services received, shall remain obligated to reimburse the county or hospital district for any medical, dental, or health services provided, and the county or hospital . . . .

ibuprofen, antacids, and sinus medication. He had never complained that his eyeglasses did not work. As far as she knew, Cook had never been denied medical treatment by any person with the Midland County sheriff's department. Strickland also explained that as of the date of the trial, Cook had spent as much as \$300 from his account.

The above evidence demonstrates that the district court did not err in determining that the defendants' policy did not result in a denial of necessary care for a serious medical need. Necessary medical and dental services are provided to all inmates, regardless of their ability to pay. Cook never communicated a medical need to the defendants, beyond his need for over-the-counter medications. Consequently, Cook's contention is without merit.

v.

Cook argues that the district court erred in determining that the defendants did not engage in an unconstitutional policy that kept him in the MCDC rather than being transferred to a TDCJ prison. "[I]n the absence of an appropriate state regulation a prisoner has no liberty interest in residence in one prison or another." Jackson v. Cain, 864 F.2d 1235, 1250 (5th Cir. 1989). "That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules." Id.

In his § 1983 complaint, Cooper does not contend that he



should choose the institution in which he will serve his sentence, but he does argue that he should enjoy the same privileges as the inmates housed at TDCJ. Cook's attempt to base a § 1983 claim upon the fact that he is housed in a county jail and not a state correctional facility has no merit.

To bring an action under § 1983, a claimant must identify a protected life, liberty, or property interest, then prove that government action resulted in a deprivation of that interest. See San Jacinto Sav. & Loan Ass'n v. Kacal, 928 F.2d 697, 700 (5th Cir. 1991). Section 1983 does not create substantive rights but provides a remedy instead for rights created elsewhere. Id.

Jackson v. Cain provides that two considerations demonstrate a liberty interest: (1) Particularized standards guide the state decisionmakers, and (2) these criteria are mandatory in nature. 864 F.2d at 1250. The Texas Penal Code and caselaw distinguish penal institutions and county jails as follows: A "penal institution is a place designated by law for confinement of persons arrested for, charged with, or convicted of an offense[;]" "a county jail is defined as . . . any jail, lockup, or other facility that is operated by or for a county for the confinement of persons accused or convicted of an offense." See Legg v. State, 594 S.W.2d 429, 432 (Tex. Crim. App. 1980). We are aware of no state regulation that provides a constitutional liberty interest in the placement of a prisoner in a particular institution. Since a state regulation that provides inmates a liberty interest does not exist, relief under § 1983 for Cook's confinement in the county jail does

not exist either.

Cook also argues that he was denied equal protection because convicted prisoners in TDCJ facilities have more privileges than he receives as a convicted prisoner in MCDC. To establish an equal protection violation, Cook must demonstrate, inter alia, that similarly situated individuals were treated differently. Muhammad v. Lynaugh, 966 F.2d 901, 903 (5th Cir. 1992). All of the inmates similarly situated are those state prisoners housed in county jails. In Texas, county jails house convicted state prisoners serving their sentence, as do the TDCJ facilities. See Legg v. State, 594 S.W.2d at 432. Nothing indicates that the state prisoners at the county jail are, for purposes of an equal protection analysis, similarly situated to inmates in the TDCJ facilities. See Muhammad, 966 F.2d at 903 (a prisoner in one prison unit was not "similarly situated" to a prisoner housed in another unit). Therefore, Cook cannot establish an equal protection violation. Id.

AFFIRMED.