IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60482
Summary Calendar

MICHAEL GLENN TURNER,

Plaintiff-Appellant,

versus

J. A. LYNAUGH, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(89-CV-326)

(November 9, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

In this action arising under 42 U.S.C. § 1983, Plaintiff-Appellant Michael Glenn Turner appeals the district court's dismissal of the case as frivolous under § 1915(d). For reasons

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

set forth below, we conclude that the district court committed no reversible error in dismissing Turner's action and therefore affirm that court's dismissal.

I

FACTS AND PROCEEDINGS

While he was a state prisoner, Turner filed a civil rights action challenging the conditions of his confinement at the Ramsey Unit of the Texas Department of Corrections.[1] Turner named as defendants the department's then-Director James A. Lynaugh, and the Ramsey Unit III Warden, Arthur Valazquez, and Supervisor, John Hunt. Turner alleged that he was assigned by Hunt to work in a dangerous area without taking safety precautions. Turner claims that, as a result of that assignment, half of his right index finger was severed by a bean cutter; and that after the accident, he was placed in solitary confinement for fourteen days, was given 42 hours of extra work, and lost 45 days of commissary privileges. Turner sought injunctive relief and an award of compensatory and punitive damages.

The case was dismissed in May 1991 for failure to prosecute after Turner failed to respond to the magistrate judge's order requiring him to file a more definite statement of facts. In April 1993, after his release from prison, Turner wrote to the clerk of court requesting reinstatement of his lawsuit. In his letter Turner stated that he had given his response to the district

[1]The Texas Department of Corrections is now known as the Texas Department of Criminal Justice.

court's order to prison mail room personnel; that it was only upon receipt of the district court's order of dismissal that he concluded that his mail had been intercepted and diverted; and that he believed that it would be futile to attempt any further communication with the district court while incarcerated. Turner attached his response to this letter.

In his response, Turner alleged that the defendants had conspired to place him in a dangerous environment. He accused Hunt of acting with deliberate indifference to Turner's medical needs by making him wait for a prolonged period of time before he was given medical attention. Turner also alleged that (1) the defendants conspired to conceal the facts concerning his placement in the dangerous work environment; (2) in furtherance of this conspiracy, the defendants fabricated evidence necessary to bring a disciplinary proceeding against Turner by contending that he had intentionally injured himself; (3) the defendants also subjected him to degrading and excessive punishment for the disciplinary infraction; and (4) he was not given safety equipment or trained in safety procedures before he was assigned to the bean cutter. Construing Turner's letter as a motion under Fed. R. Civ. P. 60(b)(6), the magistrate judge issued an order reinstating the case.

The magistrate judge ordered Turner to file an amended complaint containing more complete responses to his previous interrogatories and providing factual allegations supporting his conclusional allegations of conspiracy. In his amended complaint,

Turner alleged that he gave his response to the magistrate judge's interrogatories to the "mail woman who reads everything thats [sic] going out whether its legal or not . . . ." Turner stated that he believed that Captain Castro, who was in charge of the trusty camp, conspired with the "mail woman" to prevent Turner's response from being mailed to the district court. Turner contended that the behavior of Castro and the "mail woman" violated federal laws prohibiting mail tampering. He also alleged that his parole date was extended in some manner because of the conspiracy and that the conspirators intended to keep him incarcerated until the statute of limitations ran on his civil rights action.

The magistrate judge convened a Spears hearing. See Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). At the hearing, Turner testified that he gave his response to the magistrate judge's interrogatories directly to the "mail woman." Turner conceded that he had no personal knowledge whether Castro was ever in physical possession of the letter and that the only reason he believed Castro was involved in diverting his legal mail was because Castro was the supervisor of the "mail woman."

After the Spears hearing, Turner filed a Notice of Acknowledgment in which he alleged that the "mail woman" was Castro's fiancée at the time and that they were later married. Although he was not always in the trusty camp after his mail was diverted, Turner could offer no reason, other than his loss of faith in the system, for his failure to attempt to re-open the litigation until April 1993, five months after he was transferred

to a halfway house. Warden Valazquez testified that there were four clerks working in the mail room who handled trusty mail; that only one woman goes to the trusty camp and brings the mail back to the main mail room; and that there were several persons who could have retrieved the mail from the trusty camp.

Regarding his injury, Turner asserted that Hunt should have provided him with safety training concerning the operation of the bean cutting machine and should have taken other precautions. After Warden Valazquez testified that Turner should have received safety training before being assigned to the bean cutting machine, Turner conceded that he was alleging only that Hunt had acted negligently by failing to take safety precautions.

After his accident, Turner was taken to the infirmary at the Ramsey Unit where he was given a shot. Thereafter, he was transferred by ambulance to John Sealy hospital where he had to wait for about three hours before being treated; however, Turner was examined by two doctors while he waited.

Turner was disciplined for disobeying an order because of his accident. Turner asserted that Hunt and Valazquez falsely charged that he had intentionally injured himself in the bean machine in an effort to conceal the truth about the accident. Turner was given notice of the disciplinary action prior to the hearing, and was given an opportunity to make a statement. As part of his punishment, Turner was required to pick up cigarette butts, and to wear leg restraints when he was taken to the showers. Turner insists that he felt humiliated and degraded, despite the fact that

other inmates housed in administrative segregation were required to wear leg restraints when they were taken to the showers.

Turner was passed over for parole three times. He admitted that he did not know what actions (if any) were taken by the defendants to delay his parole date, alleging only that he believed he received disparate treatment with regard to parole.

The district court adopted the magistrate judge's recommendation that the action be dismissed as frivolous. Turner timely appealed.

II

ANALYSIS

Turner has moved for leave to proceed in forma pauperis ("IFP") on appeal. We deny that motion as unnecessary because Turner's IFP status was never decertified by the district court.

An IFP complaint may be dismissed as frivolous pursuant to § 1915(d) if it has no arguable basis in law or in fact. Booker v. Koonce, 2 F.3d 114, 115 (5th Cir. 1993); see Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992). When making this determination, "a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations." Denton, 112 S.Ct. at 1733. Nevertheless, "the § 1915(d) frivolousness determination . . . cannot serve as a fact-finding process for the resolution of disputed facts." Id.

> [A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them.

> An in forma pauperis complaint may not be dismissed, however, simply because the court finds the plaintiff's allegations unlikely.

Id. Section 1915(d) dismissals are reviewed for abuse of discretion. Id. at 1734.

> In determining whether a district court has abused its discretion, the appellate court may consider whether (1) the plaintiff is proceeding pro se, (2) the court inappropriately resolved genuine issues of disputed fact, (3) the court applied erroneous legal conclusions, (4) the court has provided a statement of reasons which facilitates "intelligent appellate review," and (5) any factual frivolousness could have been remedied through a more specific pleading.

Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992) (footnote omitted). We consider in turn the various issues proffered by Turner.

Turner first contends that he did not receive due process at the disciplinary proceeding and that the punishment he received was cruel and unusual under the Eighth Amendment. The magistrate judge found that Turner had not been denied due process in connection with the disciplinary proceeding (citing Wolff v. McDonnell, 418 U.S. 539, 563-66, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)). As the sanction imposed in this case involved a change in the degree of Turner's confinement, and did not result in an increase in the length of Turner's confinement, the standard in Hewitt v. Helms, 459 U.S. 460, 476-77, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), applies in this case. See McDonald v. Boydston, No. 93-1912, slip op. at 5 n.1 (5th Cir. May 24, 1994) (question whether Wolff or Hewitt standard applies is determined by nature of sanction imposed) (copy attached). Under Hewitt, Turner was entitled only to a non-

adversary evidentiary review, notice, and an opportunity to make a statement. See Jackson v. Cain, 864 F.2d 1235, 1252 (5th Cir. 1989) (distinguishing Wolff and Hewitt). A review of the Spears transcript confirms that Turner's disciplinary hearing was in compliance with the Hewitt requirements.

Although Turner voiced several complaints regarding the nature of the punishment meted out in connection with the disciplinary violation, his main complaint on appeal pertains to the leg irons he was forced to wear while going to and from solitary confinement. Turner also complains that he felt humiliated and degraded because he was required to pick up cigarette butts while performing the extra work assigned in connection with the disciplinary proceeding. Turner argues that his pain and humiliation exacerbated the pain he was experiencing as a result of his injury.

Turner also argues that he should not have been required to wear leg irons because he was a model inmate and did not pose a security threat (citing Spain v. Procunier, 600 F.2d 189, 197-99 (9th Cir. 1979)). Turner has admitted, however, that other inmates housed in administrative segregation were also required to wear leg irons. "The use of shackles and handcuffs are restraints commonly used on inmates, even those of a preferred status." Jackson, 864 F.2d at 1244. Requiring similarly situated inmates to wear leg irons for security reasons does not violate the Eighth Amendment "unless great discomfort is occasioned deliberately as punishment or mindlessly, with indifference to the prisoner's humanity." Jackson, 864 F.2d at 1243 (citing Fulford v. King,

692 F.2d 11, 14-15 (5th Cir. 1982) (distinguishing Spain)).

Turner does not complain that the leg irons were painful, only that they were humiliating. Neither does Turner contend that he was singled out for punishment. On the contrary, Turner argues that he should have been singled out for leniency because he was a model prisoner and because he was suffering from a severe injury. "[T]he Eighth Amendment does not require `that the state use the best means available for confining its prisoners.'" Jackson, 864 F.2d at 1243 (quoting Fulford, 692 F.2d at 14 n.7).

"[T]he Eighth Amendment may afford protection against conditions of confinement which constitute health threats but not against those which cause mere discomfort or inconvenience." Wilson v. Lynaugh, 878 F.2d 846, 849 (5th Cir.), cert. denied, 493 U.S. 969 (1989). Accordingly, requiring a prisoner to do work that officers know will aggravate a serious medical condition may constitute cruel and unusual punishment under the Eighth Amendment. Jackson, 864 F.2d at 1245-46. Turner does not contend that his work assignment picking up cigarette butts aggravated his medical condition, only that it was humiliating.

"[P]rison officials must have broad discretion, free from judicial intervention, in classifying prisoners in terms of their custodial status." McCord v. Maggio, 910 F.2d 1248, 1250 (5th Cir. 1990) (internal quotations omitted). Ordinarily, therefore, the Eighth Amendment is not violated by placing a prisoner in solitary confinement and by restricting his commissary privileges. See id. at 1251 ("Prison officials should be accorded the widest possible

deference in the application of policies and practices designed to maintain security and preserve internal order."). Turner has failed to allege a colorable Eighth Amendment violation.

Turner next contends that prison mail personnel intercepted his legal mail. His mail tampering claim implicates the Sixth Amendment right to counsel and the First Amendment right to freedom of speech. See Walker v. Navarro County Jail, 4 F.3d 410, 413 (5th Cir. 1993); Brewer v. Wilkinson, 3 F.3d 816, 825-26 (5th Cir. 1993), cert. denied, 114 S.Ct. 1081 (1994). The district court held that this claim is time-barred. As there is no federal statute of limitations for actions brought pursuant to 42 U.S.C. § 1983, federal courts borrow the forum state's general personal injury limitations period. Owens v. Okure, 488 U.S. 235, 249-50, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); Ali v. Higgs, 892 F.2d 438, 439 (5th Cir. 1990). In Texas, the applicable period is two years. Tex. Civ. Prac. & Rem. Code § 16.003(a) (West 1986); Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989).

Federal law determines when a cause of action under § 1983 accrues for the purpose of applying the statute of limitations. Id. "Under federal law, a cause of action accrues the moment the plaintiff knows or has reason to know of the injury," Helton v. Clements, 832 F.2d 332, 334 (5th Cir. 1987), or when "the plaintiff is in possession of the `critical facts' that he has been hurt and the defendant is involved." Freeze v. Griffith, 849 F.2d 172, 175 (5th Cir. 1988) (quoting Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir. 1980)). Turner knew or had reason to know no later than

May 10, 1991, of the alleged diversion of his legal mail. That was the date when he received notice from the district court that his action had been dismissed for failure to prosecute.

Even though Turner's Rule 60(b) motion (in which he urged that tampering with his legal mail was cause for reinstating his lawsuit) was filed on April 26, 1993, less than two years after the statute of limitations began to run on the mail tampering claim, his amended complaint (alleging mail tampering as an independent cause of action) was not filed until December 1, 1993. It is at least arguable that Turner's amended complaint should be regarded as timely under Fed. R. Civ. P. 15(c).

"Federal Rule of Civil Procedure 15(c) is a procedural provision to allow a party to amend an operative pleading despite an applicable statute of limitations in situations where the parties to litigation have been sufficiently put on notice of facts and claims which may give rise to future, related claims." Kansa Reinsurance Co. v. Congressional Mortgage Corp., 20 F.3d 1362, 1366 (5th Cir. 1994). "[T]he best touchstone for determining when an amended pleading relates back to the original pleading is the language of Rule 15(c): whether the claim asserted in the amended pleading arises `out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.'" FDIC v. Conner, 20 F.3d 1376, 1386 (5th Cir. 1994).

The factual situation upon which Turner's mail tampering claim depends is distinct from the factual situation alleged in Turner's original pleading. See FDIC v. Bennett, 898 F.2d 477, 480

(5th Cir. 1990). Turner's amended complaint thus does not relate back under Rule 15(c), so the district court properly dismissed the mail tampering claim as frivolous because it is time-barred.

In the district court Turner also raised a personal injury claim for damages related to his accident, and civil rights claims related to (1) an alleged conspiracy to delay his parole date until the limitations period on his civil rights claim had expired, and (2) the defendants' alleged deliberate indifference to Turner's serious medical needs. As Turner has raised no issue on appeal with respect to these claims, however, they are abandoned. See Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987).

III

CONCLUSION

As noted above, we deny as unnecessary Turner's motion to proceed IFP, given that his IFP status in the district court never terminated and thus continues on this appeal. Nevertheless, as Turner has failed to demonstrate that any of his asserted claims have a reasonable basis in fact or law, the district court's dismissal of his complaint as frivolous, pursuant to § 1915(d), is AFFIRMED.