IN THE UNITED STATES COURT OF APPEALS

for the Fifth Circuit

No. 94-60530
(Summary Calendar)

RAUL GOMEZ, ET AL.,

Plaintiffs,

ERIC G. CHACHERE,

Plaintiff-Appellant,

versus

W. WARNER, SENIOR WARDEN, ET AL.,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas
(C.A. C-93-115)

(October 20, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Eric Chachere, a Texas state prison inmate, appeals from the district court's dismissal of his § 1983 complaint pursuant to 28 U.S.C. § 1915(d). Finding an abuse of discretion in the dismissal of one of Chachere's two claims, we affirm in part and reverse in part. We deny plaintiffs' motion for leave to proceed in forma pauperis as unnecessary.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

Raul Gomez, Eric Chachere, Reyes Reyes, II, and Tony Marthini are inmates at the Texas Department of Criminal Justice - Institutional Division's McConnell Unit in Beeville, Texas. On March 26, 1993, the inmates filed, pro se and in forma pauperis, a 42 U.S.C. § 1983 complaint against certain prison officials alleging that (1) the prison's handling and storage procedures for communal razor blades pose a risk of transmission of infectious diseases, including human immunodeficiency virus (HIV) and hepatitis, and (2) the prison's allocation of only two coats (to be shared by unit inmates during outside recreation) is hazardous to inmates' health because of the exposure to "sweat and lice and other germs and diseases." Plaintiffs also moved the court for appointment of counsel. In an "Order For More Definite Statement," the magistrate judge propounded eight interrogatories to develop more fully the factual basis for the inmates' claims. In their responses, Chachere and Gomez admitted that they had not experienced a serious medical problem from using the razor blades, but argued that the failure to disinfect, the commingling during storage, the random daily assignment and the reuse of the razor blades nonetheless created serious health risks because they sometimes found hair, skin, and blood on the blades and "therefore its [sic] possible for one to become infected with an unknown skin infection and or possibly the [Acquired Immune Deficiency Syndrome] virus."

On June 13, 1994, the district court denied the motion for appointment of counsel as premature and dismissed Reyes and Marthini from the action because they failed to comply with the court's order to submit a more definite statement. In its opinion dismissing the action under 28 U.S.C. § 1915(d), the district court noted that the "[p]laintiffs' responses show that their theory of liability is based on the possibility of the spread of infectious disease through razor blades resulting from negligence by correctional officers. The only harm claimed from the razor blade usage is inflammation of the hair follicles and minor bumps." Dismissal was appropriate, the district court reasoned, because, under Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the "[t]he standard in analyzing a claim of inadequate medical care is whether the prisoner has suffered `deliberate indifference to serious medical needs,'" and "[t]o the extent plaintiffs are asserting a medical care claim there is no indication of deliberate indifference to a serious medical condition." From the judgment ordering dismissal, only Chachere noticed an appeal.

STANDARD OF REVIEW

Under § 1915(d), federal courts may dismiss claims filed in forma pauperis if the allegations of poverty are untrue or "if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d). "A claim is frivolous under § 1915(d) only if it lacks an arguable basis either in law or in fact." Parker v.

Fort Worth Police Dept., 980 F.2d 1023, 1024 (5th Cir. 1993) (internal quotation and citation omitted).

This Court reviews § 1915(d) dismissals for abuse of discretion. Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1734, 118 L.Ed.2d 340 (1992). To determine whether a district court has abused its discretion, Denton instructs appellate courts to 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) (internal quotations and citations omitted). A complaint may be dismissed as factually frivolous

> only if the facts alleged are clearly baseless, a category encompassing allegations that are fanciful, fantastic, and delusional. As those words suggest, 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. (internal quotations and citations omitted).

ANALYSIS

Razor-swapping claim

Relying on DeGidio v. Pung, 920 F.2d 525, 533 (8th Cir. 1990), Chachere argues that an inmate does not have to suffer

irreparable damage by <u>contracting</u> AIDS, hepatitis, or another serious infectious disease in order to demonstrate a violation of the Eighth Amendment. Thus, he argues that the <u>risk</u> of the possible spread of infectious diseases such as HIV, AIDS, and hepatitis through razor-swapping in the prison, as described in his complaint, constitutes a sufficient allegation of an Eighth Amendment violation to preclude a § 1915(d) dismissal. We agree.

In <u>Helling v. McKinney</u>, ___ U.S. ___, 113 S.Ct. 2475, 2479, 120 L.Ed.2d 896 (1993), in the context of a prisoner's § 1983 suit, the court rejected the contention that "only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment," and held that the plaintiff had stated a cause of action by alleging that prison officials, with deliberate indifference, exposed the prisoner to levels of environmental tobacco smoke (ETS), <u>see</u> 133 S.Ct. at 2481, that "pose an unreasonable risk of serious damage to his future health," and affirmed the appellate court's remand to provide the prisoner with an opportunity to prove the subjective and objective elements necessary to show an Eighth Amendment violation. <u>Id.</u> at 2480-81.

The district court, relying solely on <u>Estelle v. Gamble</u>, <u>supra</u>, and without citing <u>Helling v. McKinney</u>, <u>supra</u>, determined that dismissal under § 1915(d) was appropriate because the "plaintiffs' claims lack an arguable basis in law," reasoning that "[t]o the extent plaintiffs are asserting a medical care claim there is no indication of deliberate indifference to a

serious medical condition." We conclude that the district erred in dismissing Chachere's complaint for failure to allege deliberate indifference to a serious medical condition. Under Helling v. McKinney, supra, a prisoner's Eighth Amendment claim can be based upon possible future harm to health, as well as present harm.

Application of the Denton criteria to the district court's finding of legal frivolousness reveals that (1) the plaintiffs are proceeding pro se; (2) the district court implicitly resolved several potentially disputed factual issues which were not fanciful, fantastic, or delusional (including whether blood and skin on a razor blade can facilitate the transmission of infectious diseases), and (3) there was an erroneous legal conclusion by the district court that there can be no violation of the Eighth Amendment unless the prisoner can prove that he currently suffers a serious medical problem arising from the deliberate indifference of prison officials. Because the district court abused its discretion, reversal of its § 1915(d) dismissal is appropriate. See Moore v. Mabus, 976 F.2d at 271.

Given the terrible suffering caused by AIDS, its terminal nature, and the real possibility that HIV/AIDS infection may be transmitted via the blood of an infected person, it is hardly delusional, fanciful or fantastic for inmates to challenge a prison procedure which might place them at a very real risk of catching the disease. The process of shaving necessarily and inevitably results in advertent nicks and cuts sooner or later.

Because the sharing of razors among inmates might result in the unnecessary and tragic spread of HIV, AIDS or other disease, Chachere's allegations have an arguable basis in law. Thus, Chachere's allegations are hardly delusional, fanciful, or fantastic. We reverse the § 1915(d) dismissal and remand to the district court to provide an opportunity for Chachere to prove his allegations, which will require him to prove both the subjective and objective elements necessary to prove an Eighth Amendment violation, in accordance with Helling v. McKinney, supra.

Coat-sharing claim

With respect to Chachere's coat-sharing claim, we reach a different conclusion. The district court's dismissal was not an abuse of discretion because Chachere's argument that a serious medical condition (the transmission of hepatitis or other infectious diseases) could be contracted from sharing coats worn over other clothing rises to the level of "wholly irrational," and accordingly, factually frivolous. Moore v. Mabus, 976 F.2d at 270.

Motion for Leave to Proceed *in forma pauperis*

Chachere also moves this Court for leave to proceed in forma pauperis. Because Chachere was proceeding in forma pauperis in the district court and the district court did not decertify that status for purposes of the appeal, Chachere may proceed on appeal in forma pauperis without further authorization. See Fed.

R. App. P. 24(a). Thus, the motion for leave to proceed in forma pauperis is denied as necessary.

CONCLUSION

The district court's § 1915(d) dismissal of Chachere's claim concerning the dissemination of razors in the prison is REVERSED and REMANDED as to Chachere only for further proceedings consistent with this opinion. The district court's § 1915(d) dismissal of Chachere's claim concerning the sharing of coats in the prison is AFFIRMED. Chachere's motion for leave to proceed in forma pauperis is DENIED as unnecessary.