

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-60573

(Summary Calendar)

DON RICHARD PENDERGRASS and
PENDERGRASS ELECTRONICS,

Plaintiffs-Appellants,

versus

CITY OF MCALLEN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(M-93-CA-099)

(April 17, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Don Richard Pendergrass appeals the district court's dismissal of his civil rights suit, see 42 U.S.C. § 1983 (1988), against the City of McAllen, Police Chief Alex Longoria, the McAllen Police Department, Police Officer Reynaldo Galindo, and "other unknown police officers" ("McAllen defendants"). We affirm.

I

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Pendergrass sued the McAllen defendants for allegedly failing to either investigate burglaries of his business or prosecute the perpetrators. In his amended complaint, Pendergrass alleged that the McAllen defendants failed to investigate the burglaries, intimidated witnesses to the burglaries, and impeded Pendergrass' own efforts to investigate the crimes.

The district court dismissed all pre-January 15, 1991, claims as time-barred and dismissed the substantive due process claims for failure to state a claim upon which relief could be granted. Later, the district court granted the McAllen defendants' motion for summary judgment on the remaining equal-protection and state-law claims.

II

Pendergrass appeals only the dismissal of his substantive due process claim. We review a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure de novo. *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 189, 130 L. Ed. 2d 122 (1994). We confine our review to the pleadings, take all well-pleaded facts therein as true, and view the alleged facts in the light most favorable to the plaintiff. *Id.* We will not affirm a Rule 12(b)(6) dismissal unless the allegations in the pleadings do not support relief under any possible theory. *Id.*

"To state a claim under § 1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was

committed by a person acting under color of state law." *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994). Our first inquiry is whether the plaintiff has alleged a violation of a constitutional right at all. *Id.*; see also *Siegert v. Gilley*, 500 U.S. 226, ___, 111 S. Ct. 1789, 1793, 114 L. Ed. 2d 277 (1991) (establishing in qualified immunity context that first inquiry is existence of constitutional violation).¹

Pendergrass alleges that the McAllen defendants' failure to investigate and prosecute the burglaries violated his substantive due process rights. Even if these allegations are true, a failure to prosecute does not constitute a violation because a person does not have a constitutional right to have someone criminally prosecuted. *Oliver v. Collins*, 914 F.2d 56, 60 (5th Cir. 1990). However, Pendergrass alleges also that by failing to investigate and prosecute the burglaries, the McAllen defendants' failed to protect him against harm to his business.

Generally, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195, 109 S. Ct. 998, 1003, 103 L. Ed. 2d 249 (1989).² While "it is

¹ Because we dispose of this case on the issue of the existence of a constitutional violation, we do not address issues of municipal policy or qualified immunity.

² See also *Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995) (en banc) ("The Due Process Clause confers protection to the general public against unwarranted governmental interference, but it does not confer an entitlement to *governmental aid* as may be necessary to realize the advantages of liberty guaranteed by the Clause.").

true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals," *DeShaney*, 489 U.S. at 198, 109 S. Ct. at 1004, Pendergrass must show that his situation fits those "certain limited circumstances." In *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992), this Court explained that *DeShaney*'s "limited circumstances" included at most two situations. *Salas*, 980 F.2d at 307. "First, a procedural or substantive due process violation could occur if a state official causes injury by arbitrarily abusing governmental power. Second, a substantive due process violation could occur if uncommon circumstances create a duty for the state to protect a particular person." *Id.*

Courts have analyzed the first *Salas*-type situation under a "state-created danger" theory. While this Court has not affirmatively held this theory is a valid exception to the *DeShaney* rule, see *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 200 (5th Cir. 1994) (explaining uncertainty of theory's validity), *cert. denied*, 63 U.S.L.W. 3583 (U.S. Mar. 20, 1995), it has addressed what a plaintiff must demonstrate to qualify for relief under this theory. Under cases addressing the "state-created danger" theory, "[w]hen state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct" *Id.*

Even under the rationale of the cases recognizing a state-created danger theory of § 1983 liability, it is not enough to show that the state increased the danger of

harm from third persons; the § 1983 plaintiff must also show that the state acted with the requisite culpability in failing to protect the plaintiff from that danger to make out a constitutional violation.

Leffall, 28 F.3d at 530-31. The requisite culpability is deliberate indifference. See *id.* at 531 ("[T]he [state-created danger] cases consistently require a § 1983 plaintiff relying on substantive due process to show that the state actors are guilty of 'deliberate indifference' towards the victim of the deprivation."). Deliberate indifference requires the following: "[T]he environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Johnson*, 38 F.3d at 201.

In this case, Pendergrass alleges that the McAllen defendants failed to investigate and prosecute the burglaries of his business. He alleges in one circumstance that the same perpetrators returned and robbed his store a second time. Pendergrass thus appears to contend that by failing to apprehend and prosecute these perpetrators the first time, the McAllen defendants allowed the perpetrators to repeat their crime.³ Assuming that these allegations, if true, do satisfy the requirement that the state actor create a danger to the plaintiff, Pendergrass must allege also the culpability of the state actors who created that danger. Nowhere in the pleadings does Pendergrass allege that, when they failed to prosecute the alleged perpetrators the first time, the

³ Indeed, this is the only arguable "opportunity" created by the McAllen defendants' alleged conduct "that would not otherwise have existed."

McAllen defendants were aware of a substantial risk that the perpetrators would repeat their crime.⁴ At most, Pendergrass alleges negligence on this culpability element. Negligence, however, is not enough. See *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677 (1986) ("The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials."); *Salas*, 980 F.2d at 306 ("The due process clause is not implicated by a negligent act of an official which causes unintended loss of or injury to life, liberty, or property." (citing *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 663, 88 L. Ed. 2d 662 (1986))). Consequently, Pendergrass has not successfully demonstrated that the alleged state-created danger violated his constitutional rights. See *Johnson*, 38 F.3d at 201 ("Even if the state-created danger theory is constitutionally sound, the pleadings in this case fall far short of the demanding standard for constitutional liability.").

Pendergrass argues also that his situation falls under the second circumstance we identified in *Salas*) that is, that the McAllen defendants' actions created a "special relationship" which

⁴ Nor is the risk so obvious that we infer such an awareness. Cf. *Johnson*, 38 F.3d at 202 (finding state's conduct insufficiently culpable because "[n]o state actor placed [the plaintiff] in a 'unique, confrontational encounter' with a violent criminal." (quoting *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), cert. denied, 494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990))); *Salas*, 980 F.2d at 307-08 (giving examples of obvious risks, such as officer willingly directing traffic away from burning car in order to prevent passersby from saving occupants of car, or officer preventing civilians, firefighters and police from attempting to save boy submerged in lake because policy allegedly required fire department divers to conduct rescues).

obligated the McAllen defendants to protect him.⁵ This exception to the *DeShaney* rule arises only when the state sufficiently limits an individual's liberty. See *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005-06 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act."). In *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995) (en banc), this court held that:

[A] "special relationship" arises between a person and the state only when this person is involuntarily confined against his will through the affirmative exercise of state power. Absent this "special relationship," the state has no duty to protect nor liability from failing to protect a person under the due process clause of the Fourteenth Amendment from violence at the hands of a private actor.

Id. at 1306. Pendergrass has not alleged any such confinement; therefore, the McAllen defendants' actions did not create a special relationship.

In summary, Pendergrass has failed to allege facts that would support relief under any possible theory of recovery.⁶

⁵ The rationale behind the "special relationship" exception is as follows:

[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs))e.g., food, clothing, shelter, medical care, and reasonable safety))it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. *DeShaney*, 489 U.S. at 200, 109 S. Ct. at 1005.

⁶ While the allegations of his pleadings may constitute a tort under state law, they do not rise to the level of a constitutional violation. See *DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1006 (explaining that Due Process Clause does not constitutionalize "every tort committed by a state actor"); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450 (5th Cir.) (en banc) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." (quoting *Baker v. McCollan*, 443 U.S. 137, 146, 99 S. Ct. 2689, 2695, 61 L. Ed. 2d 433 (1979))),

Accordingly, the district court did not err in dismissing Pendergrass' substantive due process claim under Rule 12(b)(6).

III

For the foregoing reasons, we AFFIRM the dismissal of Pendergrass' substantive due process claim.

cert. denied, ___ U.S. ___, 115 S. Ct. 70, 130 L. Ed. 2d 25 (1994).