IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60705
(Summary Calendar)

WAYMON HOWARD,

Plaintiff-Appellant,

versus

ARTHUR VALESQUEZ, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(94-CV-552)

(January 13, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Waymon Howard, a prisoner of the State of Texas, appeals the dismissal under 28 U.S.C. § 1915(d) of his pro se, in forma pauperis prisoner's action under 42 U.S.C. § 1983.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Concluding that the district court abused its discretion in dismissing Howard's claim that defendants' failure to protect him from another inmate constituted deliberate indifference without developing the factual basis for the claim, we reverse and remand.

I

FACTS AND PROCEEDINGS

Howard filed a civil rights action against Arthur Valesquez, the Senior Warden at Ramsey Unit; Lieutenant Joseph Moya, the shift officer; Marshall D. Herklotz, the Southern Regional Director; and John E. Stice, the Deputy Director of the Texas Department of Criminal Justice. Howard alleged that (1) he was physically assaulted by Calvin Earl Martin, a "non safekeeping inmate," while in the shower area; (2) he is a "safe keeping protective segregation inmate" because of his reputation as a snitch and, as such, requires an officer present to protect him from injury by other inmates; (3) when he was taken to shower by Moya, the latter should have known that there was a risk of assault, but was deliberately indifferent to the need to protect Howard; and (4) when Moya saw Howard exit the shower covered with blood he should have been taken by Moya to the infirmary and Moya should have filled out an investigative report.

After the incident, Howard asked for a transfer, but the Unit Classification Committee denied his request. Howard then filed a grievance and appealed the decision of that Committee to Warden Valesquez, but the Warden denied his appeal due to lack of evidence to substantiate an "enemy situation." At steps II and III of the

grievance procedure, Herklotz and Stice denied relief, purportedly without conducting an investigation. Howard alleged that these defendants should have known that their recklessness would deprive him of his Eighth Amendment right to be free from the threat of violence or actual violence.

Howard sought money damages totaling $90,000. He requested a hearing to develop the factual allegations in his complaint and asked to be placed under the protection of the district court because of Martin's threats of further assault.

The district court determined that Howard had not alleged that the defendants were aware of any risk of harm to him from Martin before the day of the assault or that he was ever threatened or assaulted prior to this incident. The district court therefore dismissed the complaint as frivolous under 28 U.S.C. § 1915(d).

II

ANALYSIS

Howard contends that the defendants were notified that he had enemies but were deliberately indifferent to the threat of impending harm and the need to protect him from injury. He argues that § 1915(d) dismissal was improper because the district court failed to notify him of any deficiencies in his complaint and to afford him an opportunity to "refine" the deficiencies.

Prison officials have a duty under the Eighth Amendment to protect inmates from violence at the hands of other prisoners. Farmer v. Brennan, _____ U.S. _____, 114 S. Ct. 1970, 1976, 128 L.Ed.2d 811 (1994). Still, not every injury "by one prisoner at

the hands of another . . . translates into constitutional liability for prison officials responsible for the victim's safety." Id. at 1977. To constitute an Eighth Amendment violation, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm" and the prison official's state of mind must be one of "deliberate indifference" to the inmate's health or safety. Id. A prison official is deliberately indifferent if the official is both "aware of facts from which the inference could be drawn that a substantial risk of harm exists" and draws that inference. Id. at 1979.

A district court may dismiss an in forma pauperis proceeding if the claim has no arguable basis in law and fact. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992). "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible. . . ." Denton v. Hernandez, _____ U.S. _____, 112 S. Ct. 1728, 1733, 118 L.Ed.2d 340 (1992). A delusional, irrational, fantastic, or wholly incredible claim may be factually frivolous, but allegations that are merely unlikely, are not. Id. "Should it appear that insufficient factual allegations might be remedied by more specific pleading, [this court] must consider whether the district court abused its discretion by dismissing the complaint either with prejudice or without any effort to amend." Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994).

Accepting the allegations in Howard's complaint as true, we cannot say with certainty that his claim is "clearly baseless."

Denton, 112 S. Ct. at 1733-34; see Gartrell v. Gaylor, 981 F.2d 254, 259 (5th Cir. 1993). The district court neither conducted a Spears[1] hearing despite Howard's request that it do so, nor provided a questionnaire to develop Howard's allegations. Without more, the court's dismissal of Howard's complaint for failure to allege sufficient facts was an abuse of discretion, requiring reversal and remand for further proceedings consistent herewith. REVERSED and REMANDED.

[1]Spears v. McCotter, 766 F.2d 179, 181 (5th Cir. 1985).