

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1184
Conference Calendar

RICHARD JAMES BARNARD,

Plaintiff-Appellant,

versus

JIM BOWLES, SHERIFF OF DALLAS
COUNTY, ET AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:92-CV-2005-X
- - - - -
(December 15, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Richard James Barnard filed a pro se, in forma pauperis (IFP) civil rights complaint alleging that he was denied adequate medical care for his injured right shoulder in violation of the Eighth Amendment. He filed an amended complaint in which he alleged that the response to the grievance he filed as a result of the inadequate care was insufficient and that he was denied medical care in violation of the Equal Protection clause.

The magistrate judge, without considering the issues raised in Barnard's amended complaint, recommended dismissing the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

complaint as frivolous. Barnard filed objections to the magistrate judge's report in which for the first time he raised additional, unrelated claims of inadequate medical care. The district court, after making an independent review of the record, adopted the magistrate judge's report and dismissed the complaint as frivolous, but did not address the issues raised in the amended complaint or the new claims raised in the objections to the magistrate judge's report.

A complaint filed IFP can be dismissed sua sponte if the complaint is frivolous. 28 U.S.C. § 1915(d); Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986). A complaint is frivolous if it lacks an arguable basis in law or fact. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992). This Court reviews the district court's dismissal for an abuse of discretion. Id.

Barnard argues that he was denied adequate medical care for his injured right shoulder. A pretrial detainee is entitled to "reasonable medical care." Mayweather v. Foti, 958 F.2d 91, 91 (5th Cir. 1992) (internal quotations and citation omitted). To state a medical claim cognizable under § 1983, a convicted prisoner must allege acts or omissions sufficiently harmful to evidence a deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Unsuccessful medical treatment, negligence, neglect, and even medical malpractice do not state a claim under § 1983. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). The district court applied the more lenient standard of reasonable

medical care, although at some point Barnard was convicted of the state charges.

Barnard alleged that he injured his right shoulder when he fell on August 21, 1991, and was seen by a doctor on September 9, 1991. X-rays were taken and showed no broken bone, and the doctor prescribed robaxin and motrin. Barnard also alleged that he was seen by another physician and additional tests were performed after he continued to complain of pain in his shoulder. These facts demonstrate that Barnard received reasonable medical care and is not entitled to relief. See Mayweather, 958 F.2d at 91 (where pretrial detainee received continual treatment, an occasional forgotten dose of medication does not show an unreasonable standard of care). Because Barnard cannot state a cognizable § 1983 claim under the reasonable medical care standard, he cannot demonstrate the prison officials were deliberately indifferent to his serious medical needs.

In his amended complaint Barnard alleged that he was denied "outside" medical care in violation of the Equal Protection clause. To establish an equal protection violation Barnard must demonstrate, inter alia, that similarly situated individuals were treated differently. Muhammad v. Lynaugh, 966 F.2d 901, 903 (5th Cir. 1992). The only facts that Barnard alleges to support his allegation are that his non-indigent, citizen co-defendant was able to receive "outside" medical care, but he was denied the same despite repeated requests. Barnard does not allege, however, that similarly situated inmates, the inmates who are indigent and do not have insurance, received outside medical

care. Barnard has not stated a cognizable Equal Protection claim.

Finally, Barnard argues that the jail had a policy of providing inadequate medical treatment and inadequate medication distribution. He raised these claims for the first time in his objections to the magistrate judge's report. Issues raised for the first time in a magistrate judge's report are not properly before the district court and will not be addressed on appeal. United States v. Armstrong, 951 F.2d 626, 630 (5th Cir. 1992). Barnard had already amended his complaint once as a matter of right and therefore should have requested leave to amend his complaint to raise the new claims. Armstrong, 951 F.2d at 630. This Court will not address these claims.

AFFIRMED.