IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60828
Summary Calendar

LEBARRON LITTLE,

Plaintiff-Appellant,

VERSUS

ED SPEARS, Warden, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(93-CV-252)

(May 2, 1995)

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

PER CURIAM:[*]

Lebarron Little appeals the dismissal, as frivolous, of his federal prisoner's Bivens[1] action pursuant to 28 U.S.C. § 1915(d). Finding no error, we affirm.

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[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

[1] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

I.

After being attacked by another inmate, Little, a prisoner at the Federal Correctional Institution in Three Rivers, Texas, filed a pro se and in forma pauperis ("IFP") complaint alleging that prison officials had responded to the attack with deliberate indifference to his safety and had failed to provide adequate medical care.[2] The magistrate judge ordered Little to file a more definite statement of facts by submitting answers to a questionnaire.

Little alleged that prison officials were aware that the inmate who attacked him with a razor blade on the morning of February 14, 1993, "Diaz," had a history of mental instability. According to Little, Diaz had received counseling for his condition. Little listed four other inmates who had been harassed by Diaz directly prior to the attack.[3] Little also asserted that Diaz had threatened him the day before the attack. Little stated that he received "multiple cuts and bruises" to his face and a "serious cut" to his left ear that resulted in an infection because of inadequate medical care.

Little then filed a motion for leave to amend his complaint, which the district court granted. Four days later, however, the

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[2] Although Little filed the instant complaint under 42 U.S.C. § 1983, the action is construed as one brought pursuant to Bivens because it alleges civil rights violations by federal defendants. See Stephenson v. Reno, 28 F.3d 26, 26 n.1 (5th Cir. 1994) (per curiam).

[3] Although it is not entirely evident from the record that these four inmates, Brooks, Childs, McClendon, and Rideau, were verbally harassed rather than physically attacked, Little's brief does not mention Brooks at all and refers to "verbal" assaults only on the other three inmates.

district court dismissed the action as frivolous pursuant to 28 U.S.C. § 1915(d) without allowing Little to amend. Little filed a "motion to amend complaint" and a FED. R. CIV. P. 59(e) "motion to reconsider/new trial of order to dismiss."[4] The district court denied these motions.

II.

The district court may dismiss an IFP complaint as frivolous under § 1915(d) if it lacks an arguable basis in law or fact. Macias v. Raul A. (Unknown), Badge No. 153, 23 F.3d 94, 97 (5th Cir.), cert. denied, 115 S. Ct. 220 (1994). "Section 1915(d) accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Id. (internal quotation and citation omitted). This court reviews such a dismissal only for an abuse of discretion. Id.

III.

[4] Little's "motion to reconsider/new trial of order to dismiss" is effective as a rule 59(e) motion because it calls into question the correctness of the July 7 judgment and was filed on July 18, within 10 days after the date of entry of that judgment. See Craig v. Lynaugh, 846 F.2d 11, 12-13 (5th Cir. 1988) (holding that if the complaint was dismissed before service of process and "[i]f a judgment has been entered, a Rule 59(e) motion, or its legal equivalent, filed within 10 days after the date of entry of judgment is timely even though it has not been served on the defendants"); see also FED R. CIV. P. 6(a) (holding that because period to file a motion under rule 59(e) is less than 11 days, intermediate Saturdays and Sundays are excluded from the computation of the 10-day filing period).

Little asserts a failure-to-protect claim and the denial of adequate medical care. To establish a failure-to-protect claim under the Eighth Amendment, a prisoner must show that prison officials were deliberately indifferent to his need for protection. Wilson v. Seiter, 501 U.S. 294, 302-03 (1991). The Supreme Court has recently adopted "subjective recklessness as used in the criminal law" as the appropriate test for deliberate indifference. Farmer v. Brennan, 114 S. Ct. 1970, 1980 (1994). Thus, a prison official acts with deliberate indifference "only if he knows that inmates face a substantial risk of serious harm and [he] disregards that risk by failing to take reasonable measures to abate it." Id. at 1984.

Little's pleadings do not indicate that prison officials were deliberately indifferent to his safety. While Diaz had behaved in a verbally abusive manner toward other inmates prior to his attack on Little, prison officials had no way of knowing that Little faced a substantial risk of physical harm from Diaz. When the attack occurred, prison officials physically intervened. To the extent that Little contends that prison officials acted negligently in failing to break up the attack sooner, he does not have a Bivens claim. See Johnson v. Lucas, 786 F.2d 1254, 1260 (5th Cir. 1986).

III.

The Eighth Amendment's prohibition against "cruel and unusual punishment" protects Little from improper medical care only if the

care is "sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). A prison official is deliberately indifferent if he intentionally denies or delays access to medical care. Id. at 104-05.

Little's original complaint stated merely that his requests for medical assistance were ignored. He asserted in the questionnaire response that he received "multiple cuts and bruises" to his face and a "serious cut" to his left ear, which resulted in an infection "due to lack of medical attention while placed in administrative detention." In deciding that this claim was frivolous, the district court noted that Little was released from administrative segregation forty-eight hours after the incident occurred and that he did not allege that he was denied medical care after his release. According to Little's motion for reconsideration, "prison officials saw cuts on Plaintiff's hands and face and blood on Plaintiff's clothing and yet they refused to provide medical attention." We agree with the district court that there is no showing of deliberate indifference.

IV.

Little contends that he should have been allowed to amend his complaint. Ordinarily the district court should not dismiss a pro se complaint without providing the plaintiff with an opportunity to amend, although if it is obvious that the plaintiff had pleaded his

"best" case, leave to amend is not necessary. See Jacquez v. Procunier, 801 F.2d 789, 793 (5th Cir. 1986).

Although the district court granted Little's motion for leave to amend his complaint four days later, it dismissed the action as frivolous under § 1915(d) without allowing Little to amend. This procedural irregularity was subsequently cured, however, when the court reviewed Little's amended complaint and his rule 59(e) motion for reconsideration. As the court did consider Little's amended pleadings, albeit after dismissal of his suit, this claim is meritless.

V.

Little also complains that he should have been able to conduct discovery. Discovery would have been premature, however, as the defendants had not been served.[5]

AFFIRMED.

EMILIO M. GARZA, concurring in part and dissenting in part:

I concur with the majority opinion except part III, which I would reverse and remand for additional proceedings on that issue only.

[5] Nor is there any merit to Little's unsupported assertion that the district court, in determining that his complaint was frivolous, inappropriately "considered pleadings by the defendants outside the records and events pertaining to the complaint."