COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1464 **Cir. Ct. No. 99-CV-1102**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DENNIS E. JONES,

PLAINTIFF-APPELLANT,

V.

WISCONSIN DEPARTMENT OF CORRECTIONS, WAUPUN CORRECTIONAL INSTITUTION, GARY R. MCCAUGHTRY, PETER HUIBREGTSE, BETH DITTMAN, PAULINO BELGADO, BRUCE SEIDSCHLAG, CHRIS PEREZ, STEVE SCHUELER, DON STRAHOTA, JODINE DEPPISCH, DOUGLAS KNAPP, JON E. LITSCHER, CINDY O'DONNELL, SHARON ZUNKER, LAURA HARDING AND FLECK,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed*.

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Dennis Jones appeals an order dismissing his civil rights suit against the Wisconsin Department of Corrections (DOC), the Waupun Correctional Institution (WCI), and various prison officials. Jones asserts the circuit court erred in concluding he had failed to present a material issue of fact on his claims of receiving deficient medical care in prison and retaliatory treatment for complaining about his medical care. We disagree and affirm for the reasons discussed below.

BACKGROUND

¶2 Jones ruptured the patella tendon in his knee while incarcerated at WCI. He was taken to the hospital, where surgery was performed and his leg was placed in a cast. After the cast was removed, Jones was given a metal knee brace and began physical therapy. When Jones was placed in administrative confinement a couple weeks later, prison officials took away the brace on the grounds that it could be used as a weapon and gave Jones a neoprin sleeve instead. Jones alleged that he suffered pain without the brace because he would bend his knee while he slept. Jones's access to physical therapy equipment was also reduced while he was in administrative confinement, although his treating physician prescribed alternate in-cell exercises that could be performed without the equipment. Jones complained that he had to stop performing the prescribed exercises because, in retaliation for his repeated requests to have his brace returned, prison officials refused to give him sufficient pain medication or ice to reduce the swelling which the exercises caused.

¶3 Jones filed suit, seeking damages for injury he claimed was caused by his reduced therapy options. The trial court dismissed the action on summary judgment, concluding that Jones's allegations and affidavits were insufficient to

establish that prison officials acted with reckless disregard to Jones' health or that any injury to Jones's leg resulted from his lack of access to exercise equipment. Jones appeals.

STANDARD OF REVIEW

¶4 This court reviews summary judgment decisions de novo, applying the same methodology employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). That methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751.

ANALYSIS

Cruel and Unusual Punishment

¶5 The Eighth Amendment prohibition against cruel and unusual punishment encompasses the denial of medical care. ***Estelle v. Gamble***, 429 U.S. 97, 104-05 (1976).

> In order to prevail, an inmate must establish that a serious medical need was ignored, and that the prison officials were deliberately indifferent to the prisoner's condition. A "serious medical need" means that the illness or injury is sufficiently serious or painful to make the refusal of assistance uncivilized, and it should not be of the type for which people who are not in prison do not seek medical attention. "Deliberate indifference" implies "an act so dangerous that the defendant's knowledge of the risk [of harm resulting from the act] can be inferred."

Cody v. Dane County, 2001 WI App 60, ¶10, 242 Wis. 2d 173, 625 N.W.2d 630 (internal citations omitted).

¶6 Here, there is no dispute that the prison officials provided Jones with hospital care after the initial injury, and later consulted with Jones's primary treating physician before removing the leg brace. The physician explained that the primary purpose of the brace was to assist with strenuous activities, such as running, and that it was not medically necessary to have the brace in an administrative confinement situation where those activities were otherwise proscribed, particularly given the amount of time that had passed since the surgery. Jones saw medical personnel at regular intervals throughout his recovery, including having seventeen rehabilitative sessions over a period of six months. When Jones lost access to the exercise equipment, he was provided with other therapy options. When narcotics were discontinued after a certain amount of time as a matter of course, other pain medications were allowed. Jones eventually recovered nearly full range of motion in his knee. The fact that Jones was dissatisfied with his treatment does not mean that the prison officials were ignoring his needs or indifferent to his medical condition. Even assuming that any factual disputes would be resolved in Jones's favor, we see nothing in the undisputed care provided which was so dangerous that a risk of serious harm could be inferred.

Retaliatory Treatment

¶7 An act taken by state officials in retaliation for the exercise of a constitutionally protected right may be actionable under 42 U.S.C. § 1983 even if

the act, when taken for a different reason, would have been proper.[1] *See* ***Black v. Lane***, 22 F.3d 1395, 1402-03 (7th Cir. 1994).

¶8 Here, Jones made conclusory allegations in his complaint that prison officials denied him medication and ice packs in retaliation for his repeated requests for the return of his brace. Jones `offered nothing in his summary judgment materials, however, that would show that his treatment deviated from that which was standard from either a medical or prison security standpoint. There is simply no basis in the record for a retaliation claim. We conclude that the trial court properly dismissed Jones's action.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

[1] There seems to be some confusion in the case law as to whether the source of a retaliation claim is the Fourteenth Amendment, or the more specific provision whose exercise allegedly triggered the retaliatory treatment, or both. *See, e.g.,* ***Williams v. Lane***, 851 F.2d 867, 878 (7th Cir. 1988) (citing the Fourteenth Amendment); ***Bruise v. Hudkins***, 584 F.2d 223, 229 (7th Cir. 1978) (citing the First Amendment); and ***Crowder v. Lash***, 687 F.2d 996, 1004 n.6 (7th Cir. 1982) (citing the First and Fourteenth Amendments). Resolution of this question is not necessary to the resolution of this appeal.