COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0293 **Cir. Ct. No. 01-CV-426**

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

DONALD MURTAUGH,

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN, WISCONSIN DEPARTMENT OF CORRECTIONS, ROMAN KAPLAN, M.D., CAROL BUTZ, L.P.N. AND GEORGE M. DALEY, M.D.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. In this civil action brought under 42 U.S.C. § 1983, Donald Murtaugh appeals a summary judgment in favor of the State of Wisconsin and its co-defendants (the State). The trial court concluded that Murtaugh failed to

make a case for an Eighth Amendment violation. Murtaugh argues that there are competing factual inferences rendering summary judgment inappropriate. We disagree and affirm the judgment.

Background

¶2 In 1994, Murtaugh was sentenced to eleven years' imprisonment. In 1998, he was placed at Oshkosh Correctional Institution (OCI). On October 4, 1999, Murtaugh fell from the top bunk in his cell and suffered a separation of his shoulder. He was initially examined at the prison by Dr. Roman Kaplan, who requested Murtaugh be evaluated off-site. An emergency room physician examined Murtaugh and prescribed Tylenol, Advil, and shoulder immobilization. When Murtaugh was returned to OCI, a member of the Health Services staff noted the following medical restrictions for Murtaugh: no work or active sports, arm immobilization, a cold pack, and confinement to a lower bunk.

¶3 On October 5, Kaplan again examined Murtaugh, prescribing 600 milligrams of ibuprofen for two weeks, 325 milligrams of Tylenol for two weeks, and referral to a physical therapist specializing in musculoskeletal injuries. Kaplan scheduled a follow-up exam for two weeks later. Kaplan apparently did not believe surgery was an option.

¶4 Between October 6 and November 9, Murtaugh completed at least four Health Services requests complaining about the inadequacy of his pain medication. On November 3, Kaplan ordered Murtaugh to be seen by OCI's medical director, Dr. George Daley. The record is unclear whether Daley actually examined Murtaugh, but on November 16 Daley approved surgery for Murtaugh's injury. An orthopedic consultation was scheduled for January 21, 2000.

¶5 At the time the consultation was scheduled, Murtaugh's anticipated release date was August 15, 2002. However, Murtaugh was released on December 28, 1999. His discharge notice did not contain any information regarding his shoulder injury. Murtaugh claims that he is unable to work because of his injury and that the OCI staff's deliberate indifference to his condition contributed to this disability. Accordingly, he brought this civil rights action. The State moved for summary judgment, which the trial court granted. Murtaugh appeals.

Discussion

¶6 We review summary judgment de novo, applying the same standard as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Cody v. Dane County***, 2001 WI App 60, ¶11, 242 Wis. 2d 173, 625 N.W.2d 630. We view the facts in the light most favorable to the nonmoving party. ***Id.***

¶7 The Eighth Amendment to the United States Constitution[1] embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency … against which we must evaluate penal measures." ***Estelle v. Gamble***, 429 U.S. 97, 102 (1976) (citations omitted). "These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration." ***Id.*** at 103.

[1] The Eight Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

¶8 Deliberate indifference to prisoners' serious medical needs constitutes the unnecessary and wanton infliction of pain proscribed by the Eight Amendment. ***Id.*** at 104. "This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." ***Id.*** at 104-05 (footnotes omitted).

¶9 "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." ***Id.*** at 106. "It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." ***Id.*** Stated another way, 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." ***Cody***, 242 Wis. 2d 173, ¶10.

¶10 This standard erects two hurdles that every inmate-plaintiff must clear. ***Dunigan v. Winnebago County***, 165 F.3d 587, 590 (7th Cir. 1999). First, a plaintiff must show the medical condition was serious, an objective standard. ***Id.*** "A condition is serious if 'the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain.'" ***Id.*** at 590-91 (citation omitted). Second, a plaintiff must show that a state official had the requisite culpable state of mind, deliberate indifference, which is a subjective standard. ***Id.*** at 591. Officials are deliberately indifferent if they know of and disregard an excessive risk to inmate health or safety, are aware of facts from which one could infer that a substantial risk of serious harm exists, and they must also draw that inference. ***Id.*** We must examine the totality of the inmate's care when considering whether the care evidences deliberate indifference to the inmate's medical needs. ***Id.***

¶11 The parties do not appear to dispute that Murtaugh's medical condition meets the "serious" threshold. However, we conclude that Murtaugh fails on the second prong of the test.

¶12 Murtaugh makes three assertions that he claims demonstrate the State's deliberate indifference: His discharge notice gave him a "clean bill of health," he was not provided adequate pain medication, and he was released without surgery on his shoulder. Even viewing the facts in the light most favorable to Murtaugh, these facts are insufficient to demonstrate deliberate indifference by OCI staff.

Discharge Notice

¶13 Murtaugh's discharge paperwork notes only his ongoing psychiatric treatment and mentions neither his shoulder injury nor his impending surgery. Murtaugh claims this omission demonstrates the OCI staff's deliberate indifference to his medical condition; otherwise, he reasons, there is no explanation for the error. However, Murtaugh fails to demonstrate how this relates to his care while in OCI. It has no bearing on the treatment he did or did not receive prior to completion of the paperwork. While Murtaugh takes issue with the trial court's "finding" that this omission was simply an oversight, we conclude that it creates no genuine issue of material fact, nor does it give rise to "competing inferences" regarding any State official's state of mind.[2]

[2] Murtaugh does not allege that the nurse who completed the discharge notice had treated him. Of the four Health Services requests of which he now complains, it does not appear the discharge nurse handled any of them.

Pain Medication

¶14 Murtaugh filled out multiple "Health Services Request" forms alleging the inadequacy of his pain medication. Each form has several lines for the inmate to explain the nature of the request. The form also has two boxes, one of which should be checked; either "I Desire To See Health Services Staff" or "I Do Not Need To See Health Services Staff" (the "no" box).

¶15 On October 6, Murtaugh asked for something stronger than his 600 milligrams of ibuprofen, claiming it was ineffective. He also checked the "no" box. Staff responded to his October 6 complaint, noting that ibuprofen was an appropriate treatment for Murtaugh's type of injury and that his history of drug and alcohol abuse might be a contributing factor to the lack of relief.

¶16 On October 10, he asked to have his dose of ibuprofen raised to 800 milligrams and checked the "no" box. Staff responded that they could not change his dose without the doctor's order.

¶17 On November 8, he asked for a refill of his prescription and checked the "no" box. Staff responded that on October 29, they had filled a prescription for thirty tablets with directions to take one per day. Based on the doctor's dosing instructions, the prescription could not be refilled until November 29.

¶18 On November 9, Murtaugh again filled out a request for a refill, stating that 600 milligrams of ibuprofen did not provide lasting relief, again checking the "no" box. This time, staff replied that if he wanted to be re-evaluated for his pain, he should submit a new request and ask to be seen by the staff. Otherwise, staff informed him that he could purchase ibuprofen from the canteen.

¶19 None of this demonstrates deliberate indifference. Regarding the October 6 request, Murtaugh offers no evidence that a different pain killer would have provided him with any relief. Moreover, a difference of opinion as to how a condition should be treated, such as the appropriate pain medication to use, does not give rise to a constitutional violation. *See* ***Garvin v. Armstrong***, 236 F.3d 896, 898 (7th Cir. 2001).

¶20 Regarding his October 10 request for a higher dose of ibuprofen, Murtaugh does not show that the larger dose would have provided him any relief. Indeed, since he later used thirty prescription pills in approximately ten days, it seems that even self-tripling the dose from 600 milligrams to 1,800 milligrams was ineffective. Still, Murtaugh never requested to be seen by OCI staff.

¶21 With regard to his complaints on October 10 and November 8, staff informed him that they needed physician authorization to change or refill his prescription. Murtaugh does not dispute this, nor does he offer evidence that the authorization was unnecessary. We are unpersuaded the Eighth Amendment requires prison staff to violate a physician's dispensation orders relating to medication simply because a prisoner asks them to do so.

¶22 Finally, Murtaugh was not without access to medication; as staff indicated on November 9, he could purchase ibuprofen from the canteen in an over-the-counter dose. Murtaugh does not claim he lacked funds to purchase the medication, and thus fails to show that he was denied access to the medication.

¶23 In short, staff responded promptly to each of his requests. That Murtaugh disagreed with their responses does not give rise to an Eighth Amendment violation. *See* ***id.***

Discharge Without Surgery

¶24 OCI did not cause Murtaugh to be discharged without surgery. Daley and Kaplan were under the impression Murtaugh would not be released until August 2002. Murtaugh's surgery was authorized in mid-November 1999. A pre-surgical consultation was scheduled for January 21, 2000. Murtaugh was granted early release from prison, though, and was released in December 1999.

¶25 Murtaugh's injury was designated a class III-A procedure. Class III-A procedures are:

> Those involving persistent pain and experiencing serious discomfort or rapidly progressive disease or impairment, or where severity of pain has been progressive. The condition must be subject to surgical or medical correction or arrest. *While no ill effects will result from a delay of several weeks or months*, adequate care dictates the performance of medical or surgical procedures as soon as scheduling will reasonably permit. (Emphasis added.)

¶26 Murtaugh makes no showing that Daley or Kaplan knew of his December release date, that the consultation was an unnecessary step, or that there was any opportunity for the consultation or surgery prior to his release. Class III-A procedures are not emergencies that require immediate scheduling, and mere delay in treatment does not constitute deliberate indifference. *See* ***Langston v. Peters***, 100 F.3d 1235, 1240 (7th Cir. 1996); ***Murphy v. Walker***, 51 F.3d 714, 717 (7th Cir. 1995); ***Shockley v. Jones***, 823 F.2d 1068, 1072 (7th Cir. 1987).

¶27 In fact, when an inmate complains that a delay in treatment rises to a constitutional violation, it is incumbent upon the inmate to "place verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment to succeed." ***Langston***, 100 F.3d at 1240 (citation omitted). Murtaugh provides no such evidence, which seems to be of particular import

considering his injury classification states that he will suffer no ill effects from a delay of weeks or even months.

¶28 At best, Murtaugh might have a potential claim that Kaplan erred in his initial diagnosis that there were no surgical options and by prescribing inadequate pain medication. Absent more, however, even medical malpractice and negligence do not violate the Eighth Amendment. ***Estelle***, 429 U.S. at 106; ***Abdul-Wadood v. Nathan***, 91 F.3d 1023, 1024-25 (7th Cir. 1996); ***Shockley***, 823 F.2d at 1072. For all this record demonstrates, Murtaugh received the textbook treatment for his injuries. *See* ***Abdul-Wadood***, 91 F.3d at 1025.

By the Court.—Judgment affirmed.

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