United States Court of Appeals for the Fifth Circuit

No. 22-50347
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
January 11, 2023
Lyle W. Cayce
Clerk

TAMIR ABDULLAH,

Plaintiff—Appellant,

versus

STATE OF TEXAS; HENRY GARZA; SHERIFF EDDIE LANGE; KILLEEN POLICE DEPARTMENT; JOHN GALLIGAN,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:22-CV-160

Before JONES, HAYNES, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Appellant Tamir Abdullah brought the instant case, proceeding pro se and in forma pauperis, under 42 U.S.C. § 1983. He alleges constitutional violations committed by his attorney, John Galligan; the State of Texas; the Killeen Police Department; the Bell County district attorney, Henry Garza; and the Bell County sheriff, Eddie Lange. The district court dismissed

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Abdullah's suit for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B). Under this section, a district court must dismiss a complaint if it is "frivolous," "malicious," or "fails to state a claim on which relief may be granted." § 1915(e)(2)(B)(i)–(ii).

We conclude that there was no error in the district court's dismissal. Rather, we agree with the district court that many of Abdullah's claims are plainly precluded.[1] Further, to the extent Abdullah attempts to challenge his current detention, that claim is not properly before us. *See Preiser v. Rodriguez*, 411 U.S. 475, 488–90 (1973) (noting that a petition for habeas relief is the proper remedy to challenge the facts or duration of confinement). Finally, Abdullah's remaining claim asserting that he was denied adequate medical care is similarly meritless. To establish such a claim, Abdullah was required to plead that prison officials acted with deliberate indifference to his medical needs.[2] *See Hare v. City of Corinth*, 74 F.3d 633, 636 (5th Cir. 1996) (en banc). But "[d]eliberate indifference is an extremely high standard to meet." *Domino v. Tex. Dep't of Crim. Just.*, 239 F.3d 752, 756 (5th Cir. 2001). It "cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm." *Thompson v. Upshur County*,

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[1] First, his claim against the State of Texas is barred by the Eleventh Amendment. *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). Second, he fails to properly plead any allegations supporting a supervisory liability theory against Sheriff Lange. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 693 (1978). Third, his claim against the Killeen Police Department is precluded because the Department is not a legal entity capable of being sued. *See Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313 (5th Cir. 1991). Fourth, District Attorney Garza is immune from suit for actions taken in connection with judicial proceedings. *See Boyd v. Biggers*, 31 F.3d 279, 285 (5th Cir. 1994). Finally, Abdullah's claim against his defense attorney Galligan fails because his attorney is not a state actor subject to § 1983 liability. *See Mills v. Crim. Dist. Ct. No. 3*, 837 F.2d 677, 679 (5th Cir. 1988).

[2] To establish deliberate indifference, a plaintiff must plead that "[1] the official was aware of facts from which an inference of substantial risk of serious harm could be drawn; [2] the official actually drew that inference; and [3] the official's response indicates the official subjectively intended that harm occur." *Thompson v. Upshur County*, 245 F.3d 447, 458–59 (5th Cir. 2001).

245 F.3d 447, 459 (5th Cir. 2001). Abdullah has failed to plead any allegations which could be construed as establishing deliberate indifference. Thus, this claim also fails.

Abdullah is warned that the district court's dismissal of his action as frivolous counts as a "strike" under 28 U.S.C. § 1915(g). If Abdullah accumulates three strikes, he will not be able to proceed in forma pauperis in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury.

AFFIRMED; SANCTION WARNING ISSUED. The motion to amend party names is DENIED. [3]

[3] On appeal, Abdullah moved to "amend the names of the parties to this action." The motion seeks to add several previously unnamed defendants. However, Abdullah never moved to amend his complaint or add additional parties in the proceedings before the district court. His attempt to do so here on appeal then is improper.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa B. Courseault, Deputy Clerk

Enclosure(s)

Mr. Tamir Abdullah

(4)

[ ] The application for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915 is DENIED for the following reason(s):

[ ]The applicant is not a pauper.

[ ]The applicant has not complied with the requirements of 28 U.S.C. § 1915(a)(1) or (a)(2) or has failed to supply the consent and authorization forms required by the institution having custody of the applicant, allowing collection of fees from the inmate trust fund account or institutional equivalent.

[ ]The applicant is barred from proceeding in forma pauperis on appeal because of the "three strikes" rule of 28 U.S.C. § 1915(g).

[ ]Pursuant to 28 U.S.C. § 1915(a)(3) and FED. R. APP. P. 24(a)(3), the court certifies that the appeal is not taken in good faith.

IF PERMISSION TO APPEAL IN FORMA PAUPERIS IS DENIED BECAUSE THE COURT CERTIFIES THE APPEAL IS NOT TAKEN IN GOOD FAITH, COMPLETE THE SECTION BELOW.

[ ]Although this court has certified that the appeal is not taken in good faith under 28 U.S.C. § 1915(a)(3) and FED. R. APP. P. 24 (a)(3), the applicant may challenge this finding pursuant to Baugh v. Taylor, 117 F.3d 197 (5th Cir. 1997), by filing a separate motion to proceed IFP on appeal with the Clerk of Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of this order. The cost to file a motion to proceed on appeal with the Fifth Circuit is calculated below, and if the appellant moves to proceed on appeal IFP, the prison authorities will be directed to collect the fees as calculated in this order.

[ ]_____is assessed an initial partial fee of $0 [2]. The agency having custody of the prisoner shall collect this amount from the trust fund account or institutional equivalent, when funds are available, and forward it to the clerk of the district court.

[ ]Thereafter, the prisoner shall pay $505.00, the balance of the filing fees, in periodic installments. The appellant is required to make payments of 20% of the preceding month's income credited to the appellant's prison account until appellant has paid the total filing fees of $505.00. The agency having custody of the prisoner shall collect this amount from the trust fund

[2] See footnote 1.

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account or institutional equivalent, when funds are available and when permitted by 28 U.S.C. § 1915(b)(2), and forward it to the clerk of the district court.

If the appellant moves to proceed on appeal IFP, the clerk shall mail a copy of this order to the inmate accounting office or other person(s) or entity with responsibility for collecting and remitting to the district court interim filing payments on behalf of prisoners, as designated by the facility in which the prisoner is currently or subsequently confined.

SIGNED on June 13, 2022

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

TAMIR ABDULLAH	§	6:22-CV-00160-ADA
(Bell County #1285182)	§	
	§	
V.	§	**W-22-CA-160-ADA**
	§	
STATE OF TEXAS, et al.	§	

ORDER

Before the Court are Plaintiff's complaint (#4), more definite statement (#9), and advisory (#8). Plaintiff is proceeding pro se and in forma pauperis.

STATEMENT OF THE CASE

At the time he filed his complaint pursuant to 42 U.S.C. § 1983, Plaintiff was confined in the Bell County Jail awaiting trial. Plaintiff claims that in 2016-17, he filed a lawsuit in California regarding "abuses suffered at the hands of District Attorney Michael Ramos." Plaintiff indicates that he is now in Bell County Jail in Texas, but he believes he is still suffering "negative and positive reprisals" in retaliation for his California lawsuit.

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Plaintiff claims that he was in a fight with another inmate on August 21, 2021. Plaintiff alleges he suffered two broken ribs. Plaintiff contends, however, that the Bell County medical technician Phillips examined him and said: "I can't see anything."

2

Plaintiff asserts that he asked Phillips for x-rays, but Phillips instead returned him to his cell. The following day Plaintiff claims he "suffered a busted head" and was taken to an outside hospital for stitches. Plaintiff indicates that the head injury was a result of the "callous lack of concern" of Phillips and an unnamed Defendant, Jane Doe #1. Plaintiff

further contends that he contracted Covid-19 in December 2021, because he was not given a vaccination.

Plaintiff also complains about the criminal case that is proceeding against him. He alleges that the District Attorney, Henry Garza, filed an incorrect indictment. Plaintiff appears to mostly complain that the indictment alleges he possessed an improvised explosive device. He contends that he instead possessed a flare gun "modified with nails." Plaintiff contends that due to his arrest, he also had property unlawfully confiscated.

Plaintiff sues the State of Texas, Henry Garza, Sheriff Eddie Lange, Killeen Police Department, and John Galligan. Plaintiff seeks the dismissal of his state criminal prosecution, immediate release, $100 million in damages, the return of his firearm and ammunition, and for police officers to "cease and desist with the constant harassment."

After reviewing his complaint, the Court asked Plaintiff to file a more definite statement providing additional details and explaining why his claims were not barred by law. Plaintiff elaborated on his claims. He asserts that Lange is "directly responsible for every injury Plaintiff suffered" because he is the Sheriff and his department serves as the staff for the jail. Plaintiff complains that Phillips should have better addressed his concerns about rib pain and ordered an x-ray. Plaintiff also implies that Phillips denied him a Covid-19 vaccine. Plaintiff further claims that Phillips ignored Plaintiff's request for medication to address an "ear clogging problem." Plaintiff fails to identify Jane Doe #1,

or specify her involvement, but indicates she "was assisting" Phillips.[1] Plaintiff explained that he believes Garza is alleging false charges against Plaintiff and is responsible for the continued prosecution of Plaintiff. Plaintiff contends that Galligan has somehow prevented Plaintiff from attending court and has only seen Plaintiff twice since his detention began.

DISCUSSION AND ANALYSIS

A. Standard Under 28 U.S.C. § 1915(e)

An in forma pauperis proceeding may be dismissed sua sponte under 28 U.S.C. § 1915(e) if the court determines the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief against a defendant who is immune from suit. A dismissal for frivolousness or maliciousness may occur at any time, before or after service of process and before or after the defendant's answer. *Green v. McKaskle*, 788 F.2d 1116, 1119 (5th Cir. 1986).

When reviewing a plaintiff's complaint, the court must construe plaintiff's allegations as liberally as possible. *Haines v. Kerner*, 404 U.S. 519 (1972). However, the petitioner's pro se status does not offer him "an impenetrable shield, for one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation

[1] Plaintiff has the obligation to provide the Court with the information needed to serve process on the unidentified Defendant. *Kersh v. Derozier*, 851 F.2d 1509 (5th Cir. 1988). Plaintiff did not identify Jane Doe #1 with enough specificity for them to be served. Plaintiff also has not made any showing that he has diligently attempted to discover the name of Jane Doe #1. Therefore, Plaintiff's claims Jane Doe #1 are dismissed. However, as discussed below, Plaintiff has also failed to state a constitutional violation. Consequently, Plaintiff's claims against Jane Doe #1 would also be dismissed for the same reasons explained in this order.

and abuse already overloaded court dockets." *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986).

B. Eleventh Amendment Immunity

Pursuant to the Eleventh Amendment, federal courts are without jurisdiction over suits against a state unless that state has waived its sovereign immunity or Congress has clearly abrogated it. *Moore v. La. Bd. of Elementary and Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). The Eleventh Amendment may not be evaded by suing state agencies or state employees in their official capacity because such an indirect pleading remains in essence a claim upon the state treasury. *Green v. State Bar of Texas*, 27 F.3d 1083, 1087 (5th Cir. 1994). To the extent that any of Plaintiff's claims could be construed against Defendants in their official capacities for monetary damages, or to the extent Plaintiff sues the State of Texas, Defendants are immune from suit under the Eleventh Amendment because such an action is the same as a suit against the sovereign. *Pennhurst State School Hosp. v. Halderman*, 465 U.S. 89 (1984).

C. Supervisory Liability

Plaintiff fails to allege any personal involvement by Defendant Lange. To the extent Plaintiff is asserting Defendant Lange is liable due to his supervisory position those claims are dismissed. Supervisory officials cannot be held vicariously liable in § 1983 cases solely on the basis of their employer-employee relationship. *Monell v. Department of Social Services*, 436 U.S. 658, 693 (1978); *Lozano v. Smith*, 718 F.2d 756, 768 (5th Cir. 1983). If a supervisor is not personally involved in the alleged constitutional deprivation, he may be held liable only if there is a sufficient causal

connection between the supervisor's wrongful conduct and the constitutional violations. *Thompkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir. 1987). In order to demonstrate a causal connection, the supervisor would have to "implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Id.* at 304. Plaintiff alleges that Lange is a supervisor for all jail staff. Although Plaintiff makes conclusory allegations of policies of racial profiling, Plaintiff fails to make any specific allegations of such policies, fails to explain how any such policies affected his treatment at Bell County Jail, and, in any event, makes no allegations that Defendant Lange was personally involved. Thus, Plaintiff's claims against Defendant Lange are dismissed.

D. Killeen Police Department and City Liability

Killeen Police Department is not a legal entity capable of being sued. *See Guidry v. Jefferson County Detention Center*, 868 F. Supp. 189, 191 (E.D. Tex. 1994) (holding that the Jefferson County Detention Center is not a legal entity subject to suit); *Darby v. Pasadena Police Dep't*, 939 F.2d 311 (5th Cir. 1991) (holding that police and sheriff's departments are governmental subdivisions without capacity for independent legal action). Therefore, Plaintiff's claims against Killeen Police Department are dismissed.

The Court asked Plaintiff to explain whether he wished to pursue these claims against the City of Killeen instead. Plaintiff was not clear about this, but he appears to claim that it is the policy of the Killeen Police Department, or the City of Killeen, to "racial[ly] profile with constant harassment and traffic stops." A political subdivision cannot be held responsible for a deprivation of a constitutional right merely because it

employs a tortfeasor; in other words a local government unit cannot be held responsible for civil rights violations under the theory of respondeat superior. *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992). The standard for holding a local government unit responsible under § 1983 requires that there be a custom or policy that caused the plaintiff to be subjected to the deprivation of a constitutional right. *Id. Collins v. City of Harker Heights, Tex.*, 916 F.2d 284, 286 (5th Cir. 1990). Thus, the City of Killeen would violate an individual's rights only through implementation of a formally declared policy, such as direct orders or promulgations, or through informal acceptance of a course of action by its employees based upon custom or usage. *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984). Aside from Plaintiff's conclusory statement, Plaintiff fails to provide any factual basis supporting such a policy, and fails to explain how any such policy led to a violation of his constitutional rights.

E. Prosecutorial Immunity

Henry Garza, the district attorney, is protected by absolute immunity. Under the doctrine of prosecutorial immunity, a prosecutor is absolutely immune in a civil rights lawsuit for any action taken in connection with a judicial proceeding. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *Burns v. Reed*, 500 U.S. 478, 487-92 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 427-31 (1976). "[A]cts undertaken by the prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protection of absolute immunity." *Boyd v. Biggers*, 31 F.3d 279, 285 (5th Cir. 1994) (quoting *Buckley v. Fitzsimmons* 509 U.S. at 273). Prosecutorial immunity applies to the prosecutor's

actions in initiating the prosecution and in carrying the case through the judicial process. *Boyd*, 31 F.3d at 285; *Graves v. Hampton*, 1 F.3d 315, 318 (5th Cir. 1993). Thus, a prosecutor is immune from civil rights liability for actions taken in connection with a judicial proceeding, even if taken maliciously. *Brummett v. Camble*, 946 F.2d 1178, 1181 (5th Cir. 1991), *cert. denied*, 504 U.S. 965 (1992); *Rykers v. Alford*, 832 F.2d 895, 897 (5th Cir. 1987).

The Court recognizes that not all prosecutorial functions are protected. In *Imbler*, the Court declared that absolute immunity applied to a prosecutor's actions in "initiating a prosecution and in presenting the State's case." *Imbler*, 424 U.S. at 431. This immunity protected the alleged knowing use of false testimony at trial and the alleged deliberate suppression of exculpatory evidence. In *Imbler*, the Court left open the issue of whether absolute immunity applied to administrative or investigative acts. However, in *Burns*, the Court answered that question, stating that absolute immunity does not apply to investigative or administrative acts performed by prosecutors. *Burns*, 500 U.S. at 493.

In this case, Plaintiff merely alleges that he has been indicted for a crime he did not commit. Plaintiff makes conclusory claims that Garza is committing a felony, violating his oath, and "acting outside of his official capacity." Plaintiff also asserts that Garza has "concocted a false indictment for personal reasons." Plaintiff does not, however, allege any actions taken by Garza that are outside the course and scope of representing the State, but rather alleges they relate to the pursuit of his indictment. Plaintiff's complaints against Garza are wholly based on his actions "initiating a

prosecution and in presenting the State's case." *Imbler*, 424 U.S. at 431. These actions are therefore protected by absolute prosecutorial immunity.

F. Defense Attorney is Not a State Actor

Plaintiff appears to allege that Galligan, his defense attorney, has been ineffective. Plaintiff claims he has somehow prevented Plaintiff from attending court and has only seen Plaintiff twice since his detention began. Defense attorneys, whether public defenders or private attorneys, are not "state actors" and cannot be sued under Section 1983. *See Polk Cty. v. Dodson*, 454 U.S. 312, 324-25, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981) ("[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding"); *Mills v. Criminal Dist. Court No. 3*, 837 F.2d 677, 679 (5th Cir. 1988) ("[P]rivate attorneys, even court-appointed attorneys, are not official state actors, and generally are not subject to suit under section 1983."); *cf. Sellers v. Haney*, 639 F. App'x 276, 277 (5th Cir. 2016) (per curiam) ("The district court properly concluded that Sellers's defense attorneys were not state actors." (citing *Dodson*, 454 U.S. at 317-18)).

Plaintiff was given the opportunity in his more definite statement to explain why he believes he has a § 1983 claim against Galligan, his defense attorney. Plaintiff makes a conclusory allegation that Galligan has acted "in collusion with Judge Duskie and D.A. Henry Garza" to "deprive Plaintiff of his liberty" and his right to a speedy trial. These are not sufficient factual allegations to show that his counsel has conspired with state actors to deprive Plaintiff of constitutional rights. *See Mills*, 837 F.2d at 679.

Accordingly, Plaintiff has not stated a plausible claim against Galligan, his defense counsel.

G. Habeas Claims

Some of Plaintiff's claims are more properly characterized as challenges to his current detention. To the extent Plaintiff seeks injunctive relief and release from custody relating to his state charges, he must seek such relief in an application for habeas corpus relief after he has exhausted his state court remedies. The exclusive remedy for a prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release is habeas corpus relief. *Preiser v. Rodriguez*, 411 U.S. 475, 488-490, (1973). The Court declines to construe this action as a request for habeas corpus relief. If the Court construed this as a habeas application, it could be subject to the restrictions on "second or successive" motions. *See e.g. Castro v. United States*, 540 U.S. 375 (2003). Additionally, Plaintiff makes no allegations suggesting he has exhausted his state court remedies.[2]

H. Ongoing State Criminal Proceeding

Plaintiff indicates he still has ongoing state criminal proceedings. Any claim he has regarding such a proceeding would be covered by the doctrine of abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). "In *Younger*, the Supreme Court 'instructed federal courts that the principles of equity, comity, and federalism in certain

[2] Plaintiff has a petition for writ of habeas corpus currently pending in this Court. *Abdullah v. Eddy Lange, et al.*, 6:22-CV-332 (W.D. Tex.). He alleges he is being falsely imprisoned pursuant to an arbitrary traffic stop and seeks his release. Plaintiff was warned in that case about the need for exhaustion and ordered to show cause regarding the issue of exhaustion by May 2, 2022.

circumstances, counsel abstention in deference to ongoing state proceedings." *Wightman v. Texas Supreme Court*, 84 F.3d 188, 189 (5th Cir. 1996) (quoting *Fieger v. Thomas*, 74 F.3d 740, 743 (6th Cir. 1996)). "Younger preclude[s] federal intrusion into ongoing state criminal prosecutions." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013). Concerns of comity and federalism underlie the strong policy requiring federal courts to not issue injunctive and declaratory relief concerning an ongoing state court proceeding. *See Kolski v. Watkins*, 544 F.2d 762, 766 (5th Cir. 1977).

Thus, the Court abstains from entertaining Plaintiff's requests relating to his state criminal case because, if granted, the relief would disrupt the ongoing state judicial proceedings. To the extent Plaintiff is making a claim for malicious prosecution based on his criminal charges, such a claim is dismissed. The Fifth Circuit has established "that no . . . freestanding constitutional right to be free from malicious prosecution exists," *Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) (en banc).

I. Deliberate Indifference to Medical Needs

Plaintiff's claims against Phillips and Jane Doe #1 stem from his assertion that they failed to adequately examine his ribs, failed to provide him a Covid vaccination, and failed to provide medication for an "ear clogging issue." He alleges they examined him, but did not see anything wrong with his ribs, and told him he could not receive a vaccination. Plaintiff's allegations about the medication for his ear issue are wholly conclusory. Plaintiff does not explain in any way how the actions of any Defendant led to his alleged head injury.

Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. *Baker v. McCollan*, 443 U.S. 137 (1979). As the United States Fifth Circuit Court of Appeals has observed, "'[I]t is fundamental to our federal jurisprudence that state law tort claims are not actionable under federal law; a plaintiff under section 1983 must show deprivation of a federal right.'" *Price v. Roark*, 256 F.3d 364, 370 (5th Cir. 2001) (quoting *Nesmith v. Taylor*, 715 F.2d 194, 196 (5th Cir. 1983)). The Eighth Amendment prohibits cruel and unusual punishment. Prison officials must provide humane conditions of confinement, ensure that inmates receive adequate food, clothing, shelter, and medical care, and take reasonable measures to guarantee the safety of the inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Conditions that result in "unquestioned and serious deprivations of basic human needs" or "deprive inmates of the minimal civilized measure of life's necessities" violate the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 8–10 (1992); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Such a violation occurs when a prison official is deliberately indifferent to an inmate's health and safety. *Farmer*, 511 U.S. at 834. "Deliberate indifference is an extremely high standard to meet." *Domino v. Texas Dept. of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). To act with deliberate indifference, a prison official must both know of and disregard an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

While prisoners are entitled to adequate medical care, they are not entitled to the "best medical care money can buy." *Mayweather v. Foti*, 958 F.2d 91, 91 (5th Cir. 1992). Claims of inadvertent failure to provide medical care or negligent diagnosis are insufficient to state a claim of inadequate medical care. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Similarly, unsuccessful medical treatment or disagreement between an inmate and his doctor concerning the manner of treatment does not give rise to a cause of action. *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995); *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). In short, a claim of medical malpractice does not amount to a constitutional violation merely because the plaintiff is a prisoner. *Id.* at 106.

The basis of Plaintiff's deliberate indifference claim against Phillips and Jane Doe #1 is Plaintiff's belief that he should have been more thoroughly examined regarding his rib injury and given x-rays. Plaintiff admits that Phillips examined him and did not find anything wrong, though Plaintiff disagrees with Phillips's assessment. As for Plaintiff's Covid-19 vaccination, he fails to explain what steps he took to request one and how or why his request was refused. Without sufficient details, such a claim fails to show that any defendant was aware of and disregarded an excessive risk to Plaintiff's health. To the extent Plaintiff complains that Phillips was violating Jail policy by failing to provide a vaccination, the mere allegation that prison policies were not followed does not state a claim. *Myers v. Klevenhagen*, 97 F.3d 91, 94 (5th Cir. 1996) (per curiam).

Plaintiff admits that his rib injury was examined by Phillips who then stated "I can't see anything." Plaintiff believes the examination was not sufficiently thorough.

Even assuming that Phillips provided an incomplete and ineffective examination, there is nothing in Plaintiff's allegations that indicates such failure was a result of deliberate indifference. Plaintiff contends he should have been given x-rays, but there is no constitutional right to a particular or requested course of treatment. *Hines,* 547 F.3d at 920 (citations omitted). Even assuming the facts set forth by Plaintiff are true, Plaintiff has failed to show any deliberate indifference. At most, Plaintiff has established a claim of negligence or a disagreement with medical treatment which does not amount to a constitutional violation.

J. Retaliation

In order to state a valid claim for retaliation under § 1983, a prisoner must allege the following: (1) a specific constitutional right; (2) the defendant's intent to retaliate against the prisoner for the exercise of that right; (3) a retaliatory adverse act; and (4) causation. *Jones v. Greninger*, 188 F.3d 322, 324-325 (5th Cir. 1999). The plaintiff must establish that "but for the retaliatory motive the complained of incident . . . would not have occurred." *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995). Mere conclusory statements that retaliation occurred are not sufficient; "The inmate must produce direct evidence of motivation or, the more probable scenario, allege a chronology of events from which retaliation may plausibly be inferred." *Id.* Here, Plaintiff indicates his belief that somehow his criminal prosecution and alleged mistreatment in jail in Texas in 2021 were in retaliation for a lawsuit he filed against a district attorney in California in 2016. Plaintiff fails, however, to allege any intent or causation. In fact, aside from his conclusory statements, Plaintiff fails to explain in any way why he believes that

anything that has occurred in Texas in 2021 was in retaliation for his lawsuit in California in 2016. Consequently, Plaintiff's claim of retaliation fails.

CONCLUSION

It is therefore **ORDERED** that Plaintiff's complaint is dismissed with prejudice for failure to state a claim pursuant to 28 U.S.C. § 1915(e).

It is further **ORDERED** that Plaintiff is warned that if Plaintiff files more than three actions or appeals while he is a prisoner which are dismissed as frivolous or malicious or for failure to state a claim on which relief may be granted, then he will be prohibited from bringing any other actions in forma pauperis unless he is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

It is further **ORDERED** that the Clerk shall e-mail a copy of this order and the final judgment to the keeper of the three-strikes list.

It is finally **ORDERED** that all other pending motions are **DISMISSED**.

SIGNED on April 14, 2022

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 07, 2023

#1285182
Mr. Tamir Abdullah
Bell County Central Jail
113 W. Central Avenue
Belton, TX 76513-0000

No. 22-50347 Abdullah v. State of Texas
USDC No. 6:22-CV-160

Dear Mr. Abdullah,

We will take no action on your petition for rehearing. The time for filing a petition for rehearing under **FED. R. APP. P.** 40 has expired.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

(42)

United States Court of Appeals for the Fifth Circuit

No. 22-51052

United States Court of Appeals
Fifth Circuit
FILED
February 13, 2023
Lyle W. Cayce
Clerk

TAMIR ABDULLAH,

Petitioner—Appellant,

versus

EDDY LANGE; JEFF LANDRY,

Respondents—Appellees.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 6:22-CV-1096

ORDER:

Tamir Abdullah, a Texas pretrial detainee, moves for a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2241 petition for failure to exhaust state court remedies and, alternatively, pursuant to the *Younger v. Harris*, 401 U.S. 37 (1971) abstention doctrine. Abdullah contends, in a conclusional manner, that the exhaustion doctrine does not apply to his § 2241 petition, that he did exhaust his claims, and that the district court erred in denying relief pursuant to *Younger*. He also reasserts his substantive claims that his speedy trial rights were violated, there was no probable cause to search his vehicle, the pending criminal

(8)

charge is a violation of his Second Amendment right to bear arms, and he was denied his Sixth Amendment right to self-representation.

To obtain a COA to appeal the dismissal of a § 2241 petition, Abdullah must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2); *Stringer v. Williams*, 161 F.3d 259, 261-62 (5th Cir. 1998), by showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted). Because the district court dismissed Abdullah's petition on procedural grounds without reaching the merits of his claims, he must show "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Abdullah has failed to make the requisite showing. *See id.* Accordingly, his motion for a COA is DENIED.

/s/ Carl E. Stewart
CARL E. STEWART
United States Circuit Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

TAMIR ABDULLAH,	§	
BELL COUNTY No. 1285182,	§	
	§	
V.	§	**W-22-CV-1096-ADA**
	§	
EDDY LANGE AND JEFF LANDRY.	§	

ORDER

Before the Court is Tamir Abdullah's Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241. (ECF No. 4.) Abdullah is a pretrial detainee in Bell County, charged with Unlawful Possession of a Firearm by a Felon in Cause No. 21DCR84869. Petitioner raises four claims for habeas corpus relief: (1) Killeen police officers had no probable cause to search his vehicle, thereby violating his Fourth and Fifth Amendment rights; (2) Petitioner has been unlawfully detained without trial since August 15, 2021, which violates his Sixth Amendment right to a speedy trial; (3) Petitioner has a Second Amendment right to bear arms, and the firearm was legally located in a vehicle; and (4) the trial court judge is violating Petitioner's Sixth Amendment right to counsel by allowing him to proceed pro se but then denying his pro se motions without a hearing.

To warrant habeas relief under § 2241, a state petitioner must be in custody and must have exhausted all available state remedies. *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973). The exhaustion doctrine "requires that the Texas Court of Criminal Appeals be given an opportunity to review and rule upon the petitioner's claim before he resorts to the federal courts." *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985). Although exhaustion of state remedies is mandated by statute only for

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habeas claims under 28 U.S.C. § 2254(b), Fifth Circuit precedent holds that the federal courts should abstain from exercising jurisdiction over pretrial habeas claims if the issues raised in the petition may be resolved either by trial on the merits in the state court or by other state procedures available to the petitioner. *See Dickerson v. Louisiana*, 816 F.2d 220, 225 (5th Cir. 1987); *Brown v. Estelle*, 530 F.2d 1280, 1284 (5th Cir. 1976). Federal habeas relief should not be used as a "pre-trial motion forum for state prisoners." *Braden*, 410 U.S. at 493.

State records show that, on October 13, 2021, Petitioner filed a pro se habeas corpus application in the trial court; however, there is no record that this petition was forwarded to the Texas Court of Criminal Appeals (TCCA). On May 13, 2022, the trial court held a special hearing, during which Petitioner appeared pro se. The trial court denied Petitioner's pro se motions to dismiss and to suppress and addressed Petitioner's request for speedy trial by advising him that a trial date would be requested. The trial court finally concluded that, after discussion with Petitioner during the hearing, Petitioner could not effectively represent himself and appointed him counsel. Petitioner filed an appeal, which was dismissed for lack of jurisdiction. *Abdullah v. State*, No. 03-22-00286-CR (Tex. App.—Austin, July 29, 2022, pet ref'd). On August 12, 2022, the TCCA refused Petitioner's Petition for Discretionary Review. *Abdullah v. State*, No. PD-0401-22 (Tex. Crim. App. Aug. 12, 2022).

In the present case, Petitioner's pro se state habeas petition was not forwarded to the TCCA for review. In addition, Petitioner's appeal to the Texas Third Court of Appeals was dismissed for lack of jurisdiction and his PDR was refused. The record

before the Court shows that Petitioner has tried, albeit unsuccessfully, to exhaust his state court remedies but the state court has nonetheless not had the initial opportunity to pass upon and correct any alleged errors of federal law. Further, Petitioner fails to allege any circumstances which would allow the court to excuse the exhaustion requirement.

Unlike petitions filed under 28 U.S.C. § 2254, there is not a statute of limitations for petitions brought under § 2241. Accordingly, because Petitioner has failed to exhaust his state court remedies, this petition must be dismissed without prejudice to refiling when Petitioner's state court remedies are exhausted.[1]

CERTIFICATE OF APPEALABILITY

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's

[1] Even if Petitioner had successfully exhausted his state court remedies, his claims are nonetheless subject to *Younger* abstention, a doctrine which discourages federal courts from interfering with state criminal proceedings except in extraordinary circumstances where the danger of irreparable loss is both great and immediate. *Younger v. Harris*, 401 U.S. 37, 45 (1971). The *Younger* doctrine requires federal courts decline to exercise jurisdiction over a state criminal defendant's claims when three conditions are met: "(1) the federal proceeding would interfere with an ongoing state judicial proceeding; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the [petitioner] has an adequate opportunity in the state proceedings to raise constitutional challenges." *Bice v. La. Pub. Defender Bd.*, 677 F.3d 712, 716 (5th Cir. 2012). All prerequisites for *Younger* abstention are met here.

underlying constitutional claim, a [certificate of appealability] should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, reasonable jurists could not debate the dismissal of Petitioner's § 2241 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, a certificate of appealability shall not be issued.

It is therefore **ORDERED** that Petitioner's federal habeas petition is **DISMISSED WITHOUT PREJUDICE** for failure to exhaust state court remedies; and

It is finally **ORDERED** that a certificate of appealability is **DENIED**.

SIGNED this 22nd day of November, 2022.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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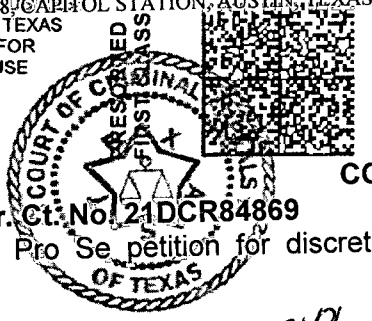

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ABDULLAH, TAMIR **Tr. Ct. No. 21DCR84869**

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

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Deana Williamson, Clerk

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TAMIR ABDULLAH
BELL COUNTY LEC - #1285182
HOUSING UNIT 219
113 W. CENTRAL AVE.
BELTON, TX 76513

HMEWNAB 76513

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-22-00286-CR

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CRIMINAL APPEALS of
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AUSTIN,
TX
78701

Tamir Abdullah, Appellant

v.

The State of Texas, Appellee

FROM THE 426TH DISTRICT COURT OF BELL COUNTY
NO. 21DCR84869, THE HONORABLE STEVEN J. DUSKIE, JUDGE PRESIDING

MEMORANDUM OPINION

Tamir Abdullah, acting pro se, filed a notice of appeal complaining of pretrial rulings denying his motion to dismiss, motion to suppress evidence, motion for bail reduction, motion for discovery, and motion to recuse or disqualify the district court judge. The record contains no orders on these motions, except as to the motion to recuse or disqualify.

PG 47 Clerk's Record

In criminal cases, we have jurisdiction to consider appeals from the entry of an appealable order. *See* Tex. R. App. P. 25.2; Tex. Code Crim. Proc. art. 44.02; *see also* Tex. R. App. P. 26.2(a)(1). However, there must be a written, signed order from which to appeal. *See State v. Sanavongxay*, 407 S.W.3d 252, 259 (Tex. Crim. App. 2012) (affirming dismissal for lack of jurisdiction because record contained no written order from which defendant could appeal). Without a written order signed by the trial court ruling on Abdullah's motions seeking dismissal, suppression of evidence, bail reduction, and discovery, there is no appealable order. *See id.*

Additionally, we lack jurisdiction to consider Abdullah's appeal from the order denying his motion to recuse or disqualify the district court judge. An order denying a motion to

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recuse is reviewable only on appeal from a final judgment. Tex. R. Civ. P. 18a(j)(1)(A). There is no final judgment of conviction in this record. Without a timely appeal from a final conviction in a criminal case, we lack jurisdiction over a stand-alone order denying a motion to recuse. *See Green v. State*, 374 S.W.3d 434, 445-46 (Tex. Crim. App. 2012).

An order on a motion to disqualify "may be reviewed by mandamus and may be appealed in accordance with other law." Tex. R. Civ. P. 18a(j)(2); *see DeLeon v. Aguilar*, 127 S.W.3d 1, 5 (Tex. Crim. App. 2004) (orig. proceeding) (applying Rule 18a to criminal cases). In criminal cases, "[j]urisdiction must be expressly given to the courts of appeals in a statute" thus, "[t]he standard for determining jurisdiction is not whether the appeal is precluded by law, but whether the appeal is authorized by law." *Ragston v. State*, 424 S.W.3d 49, 52 (Tex. Crim. App. 2014). There is neither a mandamus petition before us nor any statutory authorization for an interlocutory appeal of an order denying a motion to disqualify in a criminal case.

Accordingly, we dismiss this appeal for want of jurisdiction. *See* Tex. R. App. P. 43.2(f).

Darlene Byrne, Chief Justice

Before Chief Justice Byrne, Justices Triana and Smith

Dismissed for Want of Jurisdiction

Filed: July 29, 2022

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