Affirmed in Part; Reversed and Remanded in Part; and Memorandum Opinion filed April 12, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00279-CV

DICK W. GRAY, Appellant

V.

BOBBY R. PURVIS, JUAN JACKSON, JR., AND DAVID A. TURRUBIARTE, Appellees

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 56367

MEMORANDUM OPINION

Dick W. Gray appeals from the trial court's dismissal of his lawsuit against appellees, Bobby R. Purvis, Juan Jackson, Jr., and David A. Turrubiarte. The trial court dismissed Gray's lawsuit, a *pro se* inmate lawsuit governed by chapter 14 of the Texas Civil Practice and Remedies Code, as frivolous. We affirm in part and reverse and remand in part.

I. Background

Gray is an inmate at the Texas Department of Criminal Justice Ramsey Unit in Rosharon, Texas. In his original petition, Gray alleged that defendant/appellee Purvis is the captain of correctional officers at the unit, defendant/appellee Jackson is the major of correctional officers at the unit, and defendant/appellee Turrubiarte is an assistant warden at the facility. According to Gray, in the 18-24 months prior to the incident giving rise to this lawsuit, he had been receiving "medical treatment for chronic weakness, fatigue, vertigo, and equilibrium problems." Because of this, he was "medically prohibited from prolonged standing, climbing stairs, etcetera," and was "issued a cane to assist with balance when walking."

Further according to Gray, prior to October 2009, Purvis had instituted a policy requiring all inmate traffic in a certain location to move in a particular direction and enter the "main building" only via a breezeway. Neither the entrance to the breezeway nor the entrance from the breezeway into the building has a ramp for access by handicapped inmates. The breezeway entrance requires inmates to negotiate a 6-8 inch step, and the entrance to the building was by way of five 8-inch steps. Gray further represented that the policy implemented by Purvis provided no exception for inmates using canes or crutches.

Gray contends that during lunchtime on October 1, 2009, the one-way traffic policy was in effect, and in addition, Purvis had officers searching each inmate as the inmates were entering the main building from the breezeway. Apparently, this resulted in a back-up which caused Gray to have to wait for about 45 minutes, "standing the whole time in the heat, direct sunlight and on his cane." Upon being ordered into the building, Gray states that he lost his balance when attempting the first step, falling and breaking a bone in his leg. Gray was removed from the scene in a wheel chair and was still under treatment for the broken leg at the time of this filing of the lawsuit in February 2010.

Further in his petition, Gray asserted that on October 2, Senior Warden K. Reagans modified the one-way traffic policy to allow inmates using canes and crutches to enter the main building through an entrance equipped with a ramp. However, on October 3, Gray contends that defendant/appellee Jackson prevented inmates using canes and crutches from using the ramp and instead required them to continue using the breezeway. This group included Gray, who was then on crutches because of his broken leg.

Based on these events, Gray filed two grievances, a "Step 1" grievance in October 2009 and a "Step 2" grievance in November 2009. In his Step 1 grievance, Gray requested the following action: "I request adequate provision for infirm and handicapped offenders be provided and/or adhered to. I request adequate and proper medical care for my injury. I request to suffer NO retaliation for filing this grievance."

In his Step 2 grievance, Gray gave the following reasons for appealing the response to his first grievance:

> The Step-1 grievance answer completely and utterly ignores the root problem presented, i.e., the custom, practice and policies implemented by the Ramsey officials were the proximate cause of my being injured. Further, the Step-1 grievance answer ignores the issue of the design of the Ramsey unit not being compatible with the custom, practice and policies implemented by the Ramsey officials, or, the issue of myself and other offenders on canes and crutches being forced to climb stairs into and out of the "breezeway."

Defendant/appellee Turrubiarte responded to the first grievance, and a different prison official, who was not implicated in Gray's lawsuit, responded to the second grievance. It appears from the grievance forms that only Gray's medical complaints were addressed, and that his complaints regarding the ramp design and the one-way traffic policy were not addressed.

Gray then filed suit against Purvis, Jackson, and Turrubiarte in their individual capacities. In his petition, Gray stated that the action was brought under chapter 37 of the Civil Practice and Remedies Code (the Uniform Declaratory Judgments Act) and 42 U.S.C. § 1983 (establishing a private right of action for violations of an individual's federally guaranteed rights).

He specifically raised two sets of claims. In the first, he asserted that all three appellees committed acts amounting to cruel and unusual punishment, which is prohibited by the Eighth Amendment to the United States Constitution and Article 1, § 13 of the Texas Constitution. Specifically, he alleged that appellees failed to protect him and acted with deliberate indifference to his serious medical condition, which resulted in his being injured.

In his second set of claims, Gray maintained that Turrubiarte denied him adequate redress of his grievances, as guaranteed by the First Amendment to the United States Constitution and by Article 1, § 27 of the Texas Constitution. He contends Turrubiarte failed to properly address and correct the issues he raised in his Step 1 grievance.

On the same day that he filed his petition with the court below, February 23, 2010, Gray also filed a number of other documents, including a series of affidavits. He filed an affidavit indicating that he had exhausted his administrative remedies. He filed another affidavit stating that he was unable to pay costs of court. And he filed a third affidavit, as required under section 14.004 of the Civil Practice and Remedies Code, explaining that he had not filed any prior lawsuits. Lastly, Gray filed a request for the clerk of the court to execute service of citation on the defendants named in the petition.

On February 26, 2010, the trial court entered an order of dismissal, stating simply that Gray's lawsuit was dismissed as frivolous. The dismissal order did not provide further explanation and did not state whether it was with or without prejudice. There is no indication in the record that service was ever effected. Appellees filed no documents in the trial court and have filed no brief in this appeal.

II. Standards of Review

A court may dismiss an inmate claim, filed *in forma pauperis*, either before or after service of process occurs, if it finds the claim to be frivolous or malicious. Tex. Civ. Prac. & Rem. Code Ann. § 14.003(a)(2). A claim is frivolous if it has no basis in law or fact. *See id*. § 14.003(b)(2). However, when a trial court dismisses a claim without conducting a fact hearing, as the trial court did here, the dismissal can be affirmed on appeal only if the claim has no arguable basis in law. *Retzlaff v. Tex. Dep't of Crim. Justice*, 94 S.W.3d 650, 653 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). A claim is considered to have no arguable basis in law if a prisoner has failed to exhaust his administrative remedies. *Id*.; *see also* Tex. Gov't Code § 501.008(d) (requiring inmates to exhaust the grievance process before pursuing a claim in court); Tex. Civ. Prac. & Rem. Code § 14.005 (referencing section 501.008(d)). A claim is also considered to have no arguable basis in law either when the legal theory on which it is based is indisputably meritless or when the factual allegations on which it is based are wholly incredible or irrational. *Nabelek v. District Attorney of Harris County*, 290 S.W.3d 222, 228 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). An inmate's cause of action, however, may not be dismissed merely because the court considers the allegations "unlikely." *Minix v. Gonzales*, 162 S.W.3d 635, 637 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Our review of whether a claim is legally cognizable is *de novo*. *Retzlaff*, 94 S.W.3d at 653. In conducting our review, we take the allegations in the plaintiff's petition as true. *Scott v. Gallagher*, 209 S.W.3d 262, 266 (Tex. App.—Houston [1st Dist.] 2006, no pet.). We examine the claims asserted and the relief requested to determine whether the petition stated a cause of action that would authorize relief. *Hamilton v. Williams*, 298 S.W.3d 334, 339 (Tex. App.—Fort Worth 2009, pet. denied). A pro se inmate's petition should be viewed with liberality and patience and is generally

not held to the stringent standards applied to formal pleadings drafted by attorneys. *Minix*, 162 S.W.3d at 637 (citing *Hughes v. Rowe*, 449 U.S. 5, 9-10 & n.7 (1980)).

III. Discussion

As indicated above, there was no motion to dismiss filed in this case because the trial court dismissed Gray's lawsuit before service of process occurred. Furthermore, the trial court did not explain in its order the basis on which it dismissed the claims as frivolous. We will therefore examine the three possible bases for the trial court's action: (1) failure to exhaust the grievance process, (2) factual allegations that are wholly incredible or irrational, and (3) indisputably meritless legal theories.

A. Exhaustion of Administrative Remedies

We begin by analyzing whether Gray properly exhausted the grievance process. The record reveals that Gray filed two grievances based on the same operative facts as his petition, and he filed an affidavit implying that doing so exhausted the grievance process.[1] The grievances gave prison administrators fair notice of Gray's allegations such that the alleged occurrences and issues could have been addressed if substantiated. Furthermore, there is no indication in the administrative response that the allegations were not understood by officials or deemed inadequate. Although Gray's grievances did not specifically raise the legal theories on which he relies in his lawsuit, such is not required for exhaustion of the grievance process. *See Brewer v. Simental*, 268 S.W.3d 763, 769 (Tex. App.—Waco 2008, pet. denied)[2]; *see also* Tex. Gov't Code § 501.008(d)

[1] Gray's affidavit was entitled "Affidavit of Exhaustion of Administrative Remedies." In it, he averred that pursuant to section 14.005 of the Civil Practice and Remedies Code, he filed a Step 1 grievance and a Step 2 grievance, and both grievances were signed by the "grievance authority." Section 14.005 requires inmates to file an affidavit regarding the grievance process as well as copies of the written decisions from the grievance system. Tex. Civ. Prac. & Rem. Code § 14.005. It references section 501.008(d) of the Government Code, which, as mentioned above, requires inmates to exhaust the grievance system before filing claims in court. Tex. Gov't Code § 501.008(d).

[2] As stated in *Brewer*:

> Other than reviewing a grievance to insure that the inmate's claim arises from the same operative facts set forth in the grievance, nothing in the grievance system statutes

(providing that an inmate may not file a claim in state court regarding "operative facts" for which the grievance system provides the exclusive administrative remedy until the inmate has exhausted the administrative remedies as described in that subsection); *Wallace v. Tex. Dep't of Criminal Justice—Institutional Div.*, 36 S.W.3d 607, 609–11 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (determining that inmate's claim in lawsuit that he was injured by faulty machinery was based on same operative facts as grievance alleging negligent health care for the injury). Consequently, we find that Gray properly exhausted the grievance process, and his claims could not be properly dismissed on this basis.

B. Factual Allegations

Next, we turn to the question of whether the facts as stated by Gray in his petition were wholly incredible or irrational. As fully described above, Gray detailed conduct by appellees that he alleges caused him injury and violated his rights. The course of events and causal connections described are straightforward and plausible. Accordingly, Gray's claims could not properly be dismissed for stating wholly incredible or irrational facts.

C. Basis in Law

Lastly, we examine whether the legal theories on which Gray's claims were based are indisputably meritless. *See Nabelek*, 290 S.W.3d at 228.

1. Cruel and Unusual Punishment

Gray's first claim, or set of claims, alleged violations of his right against cruel and unusual punishment as guaranteed by the Eighth Amendment to the United States Constitution and Article 1, § 13 of the Texas Constitution. Gray sought redress for these violations through 42 U.S.C. § 1983, which provides a private right of action for

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> supports the . . . contention that the trial court—or an appellate court reviewing a trial court—can or should parse through an inmate's grievance to determine the nature of the inmate's claims . . . .

268 S.W.3d at 769.

violations of an individual's federally guaranteed rights by those acting under color of state law, as well as chapter 37 of the Civil Practice and Remedies Code, which governs actions for declaratory judgments in Texas. 42 U.S.C. § 1983; Tex. Civ. Prac. & Rem. Code §§ 37.001-37.011.

Gray specifically alleged that appellees failed to protect him and acted with deliberate indifference to his serious medical condition, which resulted in his being injured. He described policies and conditions at the prison facility where he was an inmate that he believes were dangerous and that he alleges caused him injury and have gone uncorrected. As for relief, Gray requested monetary damages, declaratory judgment that his rights had been violated, and injunctive relief to remedy the allegedly hazardous conditions.

Allegations similar to these have been construed as falling under the ambit of section 1983 and the constitutional prohibitions against cruel and unusual punishment. *See Helling v. McKinney*, 509 U.S. 25, 35 (1993) (holding inmate in pro se section 1983 lawsuit stated a cause of action under the Eighth Amendment by alleging that prison officials had, with deliberate indifference, exposed him to levels of second-hand cigarette smoke that posed an unreasonable risk of serious damage to his future health); *Green v. Atkinson*, 623 F.3d 278, 280-81 (5th Cir. 2010) (holding district court erred in dismissing inmate's pro se section 1983 lawsuit, without further development of the facts, where inmate alleged prison employees were deliberately indifferent to inmate health and safety when they failed to screen food for foreign objects despite receiving prior complaints); *Carson v. Gomez*, 841 S.W.2d 491, 494 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding inmate stated section 1983 claim with arguable basis in law for cruel and unusual punishment violation based on deliberate indifference to serious medical needs where prison employees allegedly assigned him to kitchen duty despite his inability to stand for long periods or withstand excessive heat); *Onnette v. Reed*, 832 S.W.2d 450, 453 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding inmate stated section 1983

claim with arguable basis in law for cruel and unusual punishment violation based on deliberate indifference to his health and safety where prison employees allegedly compelled him to work on unsafe scaffolding despite his physical impairment).

Furthermore, declaratory judgment and injunctive relief can be had in appropriate cases for violations of the Texas Constitution. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) (explaining that money damages cannot be awarded for violations of the Texas Constitution but that injunctive relief is available); *City of Arlington v. Randall*, 301 S.W.3d 896, 904, 906-08 (Tex. App.—Fort Worth 2009, pet. filed) (discussing *Bouillion* and determining that plaintiff could seek injunctive relief in declaratory action for violations of Texas Constitution). Accordingly, Gray's cruel and unusual punishment claims could not properly be dismissed as being based on indisputably meritless legal theories.[3]

2. Address of Grievances

Gray makes no argument in his briefing regarding his claim that he was denied adequate redress of grievances. *See* Tex. R. App. P. 38.1(i) ("[Appellant's] brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). Accordingly, we affirm the trial court's dismissal of this claim. *See Nabelek*, 290 S.W.3d at 230 n.8 (rejecting inmate's appellate contention for failure to provide adequate briefing).

[3] We take no position on the ultimate merit of Gray's claims or the suitability of his requests for relief.

IV. Conclusion

We affirm the portion of the trial court's judgment dismissing Gray's claim that he was denied adequate redress of his grievances. We reverse and remand the portion of the judgment dismissing Gray's claims regarding cruel and unusual punishment.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Brown, Boyce, and Jamison.