COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3315

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

MICHAEL DAVIS,

PLAINTIFF-APPELLANT,

V.

GARY MCCAUGHTRY, CORRECTION OFFICER 2, NEUENSCHWANDER, AND JANE DOE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dodge County: JOSEPH E. SCHULTZ, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

VERGERONT, J. Michael Davis, an inmate at Waupun Correctional Institution, appeals a judgment dismissing his complaint against Warden Gary McCaughtry and Clifford Neuenschwander, a correctional officer.

The complaint alleged that Neuenschwander gave Davis medication that was intended for another inmate, telling him it was Davis' medication, and the medication caused Davis to become dizzy and fall, resulting in injuries. The complaint also alleged that Waupun has a policy that allows untrained correctional officers to pass out and administer prescription medication to inmates. The complaint sought a declaratory judgment that the policy violated state and federal law, an injunction against the policy, and damages against each defendant. The trial court granted summary judgment to all defendants on all claims.[1]

Davis contends that the trial court erred because he is entitled to a trial on his claim that Neuenschwander was negligent in performing his ministerial duty to give him the correct medication. The State concedes that the trial court erroneously dismissed Davis' state law negligence claim against Neuenschwander,[2] and we therefore reverse that portion of the judgment and remand for a trial on that claim.

Davis also contends that the trial court erroneously dismissed McCaughtry because he is entitled to a trial on his constitutional claim against McCaughtry and on his state law claim that McCaughtry is responsible for a policy on medication distribution that violates § 450.11(3), STATS. For the reasons we explain below, we conclude that the trial court properly dismissed

[1] The complaint also named Jane Doe, supervisor of the Health Services Unit (HSU). Beth Dittman is supervisor of the HSU. However, Davis does not argue in his brief on appeal that the trial court erred in dismissing her. The State points out that the notice of claim Davis filed with the attorney general under § 893.82(3), STATS., did not name her, and therefore Davis may not proceed on any state law claim against her in any event. Davis does not counter this assertion in his reply brief.

[2] The State moved for only partial summary judgment, and that motion did not include summary judgment against Neuenschwander on the negligence claim. However, the court nevertheless dismissed all claims against him.

McCaughtry. We therefore affirm in part, reverse in part and remand for a trial on the negligence claim against Neuenschwander.

The pertinent materials submitted by the State in support of summary judgment are the affidavits of McCaughtry and of Beth Dittman, supervisor of the Health Services Unit (HSU) at Waupun. McCaughtry avers that as the warden he has the duties set forth in § 302.04, STATS.,[3] and is responsible for the overall operation and administration of the institution and the formation of institutional policies applicable to inmates. He is not a licensed doctor or nurse and does not provide health care services to inmates. That function is performed by the HSU through its professional staff of doctors and nurses and through referrals for diagnostic and treatment services. He has no control over the medical decisions of the HSU staff and does not supervise them. The HSU staff are employees of the Department of Corrections Bureau of Health Services and he is employed by the separate DOC Bureau of Adult Institutions. He had no personal involvement in the events leading up to or surrounding the incidents that are the basis for this lawsuit.

Dittman's affidavit described the training given to correctional officers on the distribution of medication and the system for distributing medication to inmates at Waupun. After a physician has ordered medication for

[3] Section 302.04, STATS., provides as follows:

> Duties of warden and superintendents. The warden or the superintendent of each state prison shall have charge and custody of the prison and all lands, belongings, furniture, implements, stock and provisions and every other species of property within the same or pertaining thereto. The warden or superintendent shall enforce the regulations of the department for the administration of the prison and for the government of its officers and the discipline of its inmates.

an inmate, a nurse reviews the order and gives it to the pharmacy nurse. The pharmacy nurse either issues the medication from stock or contacts central pharmacy to obtain it. The medication is contained in individual blister packs that are heat sealed and contain a certain number of doses. These are prepared by the central pharmacy. Controlled oral medications for inmates in the adjustment center are given to the sergeant to be kept by the cell hall officers in a locked drawer in the cell hall. The cell hall officers also receive a medication record for each inmate indicating the time of day he or she is to receive medication. This medication record is prepared by the central pharmacy or an HSU health care provider. The cell hall officers distribute the medications to the inmates at the times and in the doses prescribed by the physician or other health care provider. The officers are not involved in evaluating the inmate's need for medication; determining the type, dosage, or frequency of medications; or filling prescriptions.

Davis' submissions in opposition to the State's motion consist of his affidavit describing the incident alleged in the complaint and the affidavit of two other inmates describing their experiences with cell hall officers dispensing either the wrong medication or the wrong dosage.

When we review a summary judgment, we apply the same methodology as the trial court, and we consider the issues de novo. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party has established his or her entitlement to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis.2d 293, 296, 349 N.W.2d 733, 735 (Ct. App. 1984). To prevail on a motion for summary judgment dismissing an action, a defendant must establish a prima facie defense that defeats the plaintiff's claim, and it must also appear that no triable issue of material fact exists and that

summary judgment is appropriate under the law. ***Preloznik v. City of Madison***, 113 Wis.2d 112, 116, 334 N.W.2d 580, 582-83 (Ct. App. 1983). The party opposing the motion may not rest on the allegations of the complaint, but must establish a triable issue of material fact. ***E.S. v. Seitz***, 141 Wis.2d 180, 186, 413 N.W.2d 670, 673 (Ct. App. 1987).

Davis argues that the trial court improperly dismissed McCaughtry because McCaughtry is responsible for the system permitting cell hall officers to distribute medications and therefore Davis is entitled to a trial against him on his constitutional claims. Davis does not identify in his complaint or in his briefs on appeal the constitutional provision that McCaughtry has violated. As the State points out, the only constitutional provision potentially applicable is the Eighth Amendment prohibition of cruel and unusual treatment, which, in the context of a prisoner's claims of inadequate or improper medical care, requires a showing of "deliberate indifference." *See* ***Hudson v. McMillan***, 503 U.S. 1, 8 (1992). "Deliberate indifference" in this context means criminal recklessness. *See* ***Farmer v. Brennan***, 511 U.S. 825, 839-40 (1994). "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the [Eighth Amendment]." ***Whitley v. Albers***, 475 U.S. 312, 319 (1986).

Dittman's description of the system for distributing medication is not controverted by Davis' submissions. Davis' submissions are evidence of mistakes made by officers in the distribution of medication, but are not evidence that any officer is acting with deliberate indifference toward the medical needs of Davis or other inmates. We conclude that, as a matter of law, the described system of medication distribution does not constitute cruel and unusual punishment within the meaning of the Eighth Amendment.

In addition, when a claim for a deprivation of a constitutional right is brought under 42 U.S.C. 1983, liability exists only if the individual sued caused or participated in the alleged deprivation of constitutional rights. *See* ***Wolf-Lillie v. Sonquist***, 699 F.2d 864, 869 (7th Cir. 1983). It is undisputed that McCaughtry was not involved in the incident which Davis describes. Also, there is no evidence, and no reasonable inference from the evidence, that McCaughtry was involved in the adoption, implementation or supervision of the medication distribution system. He therefore has no liability under 42 U.S.C. 1983 even if that system violated a constitutional right of Davis.

McCaughtry's lack of involvement in the medication distribution system is also fatal to Davis' state law claim against him. Davis contends that the medication distribution system violates § 450.11(3), STATS., and he is therefore entitled to a declaratory judgment to that effect against McCaughtry, an injunction against him directing that this system cease, and damages. Section 450.11(3) provides:

> (3) PREPARATION OF PRESCRIPTION DRUGS. No person other than a pharmacist or practitioner or their agents and employes as directed, supervised and inspected by the pharmacist or practitioner may prepare, compound, dispense or prepare for delivery for a patient any prescription drug.

Even if the medication distribution system violated this statute, that would not entitle Davis to any relief against McCaughtry because he is not involved in adopting, implementing or overseeing this system. Davis has identified no other state law claim against McCaughtry. Therefore, the trial court properly dismissed McCaughtry and properly concluded that Davis was not entitled to declaratory or injunctive relief against him.

Since the only remaining defendant is Neuenschwander, and the only claim against him is that he violated a ministerial duty by giving Davis the wrong medication, it is unnecessary to decide whether the medication distribution system violates § 450.11(3), STATS.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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