

NOT DESIGNATED FOR PUBLICATION

No. 125,791

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

RICKEY MARKS,
Appellant,

v.

EL DORADO CORRECTIONAL FACILITY and CENTURION MEDICAL,
Appellees.

MEMORANDUM OPINION

Appeal from Butler District Court; JOHN E. SANDERS., judge. Opinion filed August 4, 2023.
Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Fred W. Phelps, Jr., deputy chief legal counsel, Kansas Department of Corrections, for appellees.

Before HILL, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Rickey Marks appeals from the district court's order summarily dismissing his K.S.A. 60-1501 petition. Marks alleges that the prison officials at the Kansas Department of Corrections (KDOC) are "deliberately indifferent" to his serious medical needs for failing to provide him an extra thick mattress to accommodate his medical condition and chronic pain and for denying him access to an orthopedic specialist. The district court summarily dismissed the petition, finding that Marks failed to establish deliberate indifference to his medical needs by KDOC. Based on our review of the record, we agree.

FACTUAL AND PROCEDURAL BACKGROUND

Marks—an inmate at the El Dorado Correctional Facility—was convicted of the first-degree murder of his wife after he fatally stabbed her eight times while they travelled in a vehicle on the way to the grocery store. After his conviction, Marks was sentenced to life in prison with a minimum confinement of 25 years. See *State v. Marks*, 297 Kan. 131, 132, 298 P.3d 1102 (2013).

Relevant to this appeal, Marks' pro se K.S.A. 60-1501 petition for writ of habeas corpus alleges inadequate care for his medical conditions. Most pointedly, he complains about the failure of the prison to provide him with an appropriate mattress to help ease pain in his hips, knee, and lower back. Marks explained that he had requested an extra-thick mattress, and the Secretary of Corrections ordered that he get one, but prison officials had refused to provide it. Marks also amended his K.S.A. 60-1501 petition to further assert that he had not been provided adequate medical care with an orthopedic specialist. Marks claims he is experiencing unnecessary and wanton pain in violation of his rights under the Eighth Amendment to the United States Constitution and with total disregard of and deliberate indifference to his serious medical needs.

The district court ordered Marks to supplement his petition with the necessary documents to allow the court to make a preliminary determination of whether he had stated a cognizable claim and to provide proof that he had exhausted his administrative remedies. Marks provided the requested documentation.

After reviewing the additional documentation, the district court entered an order of summary dismissal. In the order, the district court concluded:

"In order to prevail . . . , Marks must show not only deliberate indifference but also a disregard of excessive risk to an inmate. Marks fails to do so. The record indicates that he was seen by the medical provider over 21 times last year alone and has been referred to and seen by an outside provider for his hip and knee pain in addition to institutional medical staff. Additionally, he was referred to physical therapy but he has only been intermittently compliant. At previous times he has been seen by a podiatrist and has received various orthotic appliances and medical shoes. His situation has been reviewed at both the institution and Department of Corrections levels. After filing a grievance, his medical situation was reviewed by the Health Services Administrator for the El Dorado Correctional Facility, . . . who concluded that appropriate steps have been taken by the medical provider, and Marks is provided regular interaction with medical staff through chronic care. It is obvious that Marks disagrees with the medical staff as to his condition and treatment, but that is not the standard."

Finally, the district court noted that Marks' complaints had not been ignored or not taken seriously, and he was unable to meet the high threshold of showing "deliberate indifference necessary to trigger an [Eighth] Amendment violation."

Marks' notice of appeal brings the matter to us.

ANALYSIS

Marks contends his K.S.A. 60-1501 petition sufficiently established a claim that the KDOC is deliberately indifferent to his serious medical needs. He specifically claims he was deprived of adequate medical treatment for his hip, back, and knee joint pain. He asks this court to remand his petition to the district court with directions to conduct an evidentiary hearing to address his claims.

To avoid summary dismissal of a K.S.A. 60-1501 petition, the petitioner's allegations must be of "shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Johnson v. State*, 289 Kan. 642, 648, 215 P.3d 575 (2009) (citing

Bankes v. Simmons, 265 Kan. 341, 349, 963 P.2d 412, *cert. denied* 525 U.S. 1060 [1998]). In determining whether this standard is met, we "must accept all well-pled factual allegations as true." *Denney v. Norwood*, 315 Kan. 163, 173, 505 P.3d 730 (2022).

"Summary dismissal is appropriate if, on the face of the petition, it can be established that petitioner is not entitled to relief, or if, from undisputed facts, or from uncontrovertible facts, such as those recited in a court record, it appears, as a matter of law, no cause for granting a writ exists." *Johnson*, 289 Kan. at 648-49.

The district court may summarily dismiss a habeas corpus petition if it plainly appears from the face of the petition and any exhibits attached that the petitioner is not entitled to relief. K.S.A. 2022 Supp. 60-1503(a); *Denney*, 315 Kan. at 173. When a court summarily dismisses a petition without issuing a writ under K.S.A. 2022 Supp. 60-1503(a), the appellate court is in just as good a position as the district court to determine whether relief is warranted. 315 Kan. at 175. Thus, we review *de novo* the district court's summary dismissal of Marks' K.S.A. 60-1501 petition. See *Johnson*, 289 Kan. at 649.

An incarcerated person retains the right to adequate medical care and treatment, stemming from the Eighth Amendment to the United States Constitution and section 9 of the Kansas Constitution Bill of Rights, both of which prohibit the infliction of cruel and unusual punishment. *Darnell v. Simmons*, 30 Kan. App. 2d 778, 780, 48 P.3d 1278 (2002). But to establish a violation of the Eighth Amendment, an inmate must prove that the state prison officials displayed deliberate indifference toward the inmate's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976).

Kansas courts have recognized that deliberate indifference is a high bar to prove, and the inmate has the burden of proof. *Darnell*, 30 Kan. App. 2d at 783. Deliberate indifference to serious medical needs is shown when prison officials prevent an inmate

from receiving the recommended treatment or when an inmate is denied access to medical personnel able to evaluate the need for treatment. *Estelle*, 429 U.S. at 104; *Darnell*, 30 Kan. App. 2d at 781.

"A Kansas federal district court used the phrases 'callous inattention,' 'reckless disregard,' and 'gross negligence' to describe deliberate indifference. The Kansas Court of Appeals discussed the meaning of deliberate indifference in *Cupples v. State*, 18 Kan. App. 2d 864, 861 P.2d 1360 (1993). The court defined deliberate indifference as more than ordinary negligence but less than express intent to harm or maliciousness. [Citations omitted.]" *Darnell*, 30 Kan. App. 2d at 781.

Deliberate indifference has both objective and subjective components. First, the inmate must objectively show the deprivation of the right to medical treatment was "sufficiently serious," meaning a physician diagnosed the medical condition or it is so obvious that a layperson would recognize the need for medical attention. 30 Kan. App. 2d at 781. Next, the inmate is required to show that a prison official is aware of the need and "disregards an excessive risk to inmate health or safety." 30 Kan. App. 2d at 781. An inmate's mere disagreement with his or her reasonably prescribed treatment regimen does not rise to the level of a constitutional deprivation of rights. *Johnson*, 289 Kan. at 656.

Our review of the record confirms that Marks has failed to prove that prison officials have shown a deliberate indifference to Marks' ongoing medical concerns. In the 12 months preceding his habeas petition, the KDOC has responded to Marks' complaints by providing x-rays, an MRI, physical therapy, pain medication and medical appliances, surgery, consultation with an outside orthopedic doctor, and a total of 21 visits with treatment providers. None of the treatment providers recommended that Marks be provided with an extra-thick mattress, and the record does not support Marks' contention that the Secretary ordered that one be provided. Rather than recommending a special mattress, the record shows the Secretary merely stated, "[Marks] may or may not be helped by improving the mattress he sleeps on; however, most of his medical problems

relate to his weight which predisposes him to low back and lower extremity problems." Furthermore, the record contains evidence of Marks' failure to follow through with recommended physical therapy to help relieve his pain.

We find Marks' difference of opinion with medical staff regarding his mattress, and his pain-management regimen generally, simply does not rise to the level of deliberate indifference. See *Thompson v. Gibson*, 289 F.3d 1218, 1222 (10th Cir. 2002) (a medical difference of opinion does not trigger a violation of constitutional rights). Twenty-one provided visits to multiple providers over the course of 12 months is not indicative of "deliberate indifference."

We find that Marks has failed to show that the denial of his request for a thicker mattress rises to the level of a disregard of an excessive risk to his health or safety. See *Darnell*, 30 Kan. App. 2d at 781. In addition, the record confirms that Marks is receiving ongoing medical attention, and his grievances are being reviewed and responded to by medical administrators and the warden. He does not show that the KDOC's response has been inadequate. As such, we find the claims set forth in Marks' petition fall far short of that required to successfully establish a claim of deliberate indifference to his ongoing medical needs.

We conclude the district court did not err in summarily dismissing Marks' petition for failure to state a claim.

Affirmed.