

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOV 14 1990

ROBERT L. HOECKER
Clerk

JAMES SCOTT HOOPER,
Plaintiff-Appellant,

v.

GARY MAYNARD, PRINCE MCJUNKINS, MICHAEL
CODY, BOB COMBS, J.B. PATTERSON, GARY
GIBSON, MICHAEL W. SCOGGINS, DELORIS
CAMPBELL, KAREN BLAKELY, ROBERT KROOCH,
CHARLES HATCHER, THOMAS LOVELACE,
International Affairs Director of
Oklahoma Dept. of Corrections, **WOODWARD,**
Polygraph examiner for Oklahoma Dept.
of Corrections,

Defendants-Appellees.

No. 90-7015
(D.C. No. 89-284-C)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **MCKAY, MOORE, and BRORBY**, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Mr. Hooper appeals the dismissal of his pro se civil rights complaint.

Mr. Hooper is an inmate in the Oklahoma State Penitentiary. He filed pro se a complaint, an amended complaint, and a supplemental complaint. Summarizing these complaints, Mr. Hooper alleges that defendants violated various of his Constitutional rights by falsely labeling him a homosexual; by his being forced to have oral sex with one of the defendants; by removing him from a voluntary Bible class; by denying his request for a vegetarian diet; by conducting an improper disciplinary hearing; by denying him proper medical care; by denying him meals on several occasions; by improperly interrogating him; and by engaging in other acts that amounted to Constitutional deprivations.

The district court ordered Martinez reports,¹ which he received and reviewed. The district court then entered its written order which treated most of Mr. Hooper's allegations and held that: (1) the action was frivolous; (2) the allegations were unsubstantial; and (3) Mr. Hooper suffered no Constitutional deprivation of rights. The district court dismissed the action in response to defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and 28 U.S.C. § 1915(d).

Mr. Hooper now appeals pro se. He raises numerous contentions, most of which do not merit discussion; however, some

¹ Martinez v. Chavez, 574 F.2d 1043 (10th Cir. 1978).

do. We therefore grant Mr. Hooper leave to proceed in forma pauperis.

Mr. Hooper first requests that we appoint counsel to represent him. This we decline to do. We have carefully reviewed Mr. Hooper's numerous filings and the voluminous Martinez report and, based upon our review of these documents, we see no chance of Mr. Hooper prevailing on his claims.

Mr. Hooper next complains that the district court in fact granted summary judgment against him and that as he specifically requested an opportunity to conduct discovery, the district court committed reversible error. The district court did refer to and rely upon the Martinez report. When material outside of the pleadings is relied upon the matter is indeed treated as a summary judgment. We therefore review the district court's ruling de novo, Goichman v. City of Aspen, 859 F.2d 1466 (10th Cir. 1988), applying the same standard as the district court, Gray v. Phillips Petroleum Co., 858 F.2d 610 (10th Cir. 1988). The applicable standard is "'whether any genuine issue of material fact pertinent to the ruling remains, and, if not, whether the substantive law was correctly applied.'" Setliff v. Memorial Hosp. of Sheridan County, 850 F.2d 1384, 1391-92 (10th Cir. 1988) (quoting McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988)). Determinations as to whether material facts exist are made construing the record in favor of the party opposing the motion; however, "'conclusory allegations by the party opposing [the motion] are not sufficient

to establish an issue of fact and defeat the motion.'" Id. at 1392. This court "'may affirm the granting of summary judgment if any proper ground exists to support the district court's ruling.'" Id. After defendants filed their Martinez report and their motion to dismiss, Mr. Hooper filed his motion to deny or stay defendants' motion "until the plaintiff ... had an opportunity to obtain discovery." This was an inadequate request as Mr. Hooper failed to describe what discovery he desired or what he expected it to produce. We therefore conclude that defendant's motion was properly granted.

Mr. Hooper asserts that the trial court erred by disregarding his second request for appointment of counsel. He argues that the trial court should "have done more for appellant." Given the facts of this case, we are not persuaded that the district court abused its discretion in failing to appoint counsel.

Mr. Hooper next asserts that the trial court should have informed him of his right to file affidavits in opposition to the Martinez report. This assertion ignores the record. The record on appeal shows, following the receipt of the Martinez report, that a notice to respond was sent to and received by Mr. Hooper. The record also shows that he responded by filing at least seven motions with supporting briefs and three affidavits.

Mr. Hooper also alleges that one of the defendants, a prison guard, forced Mr. Hooper to have oral sex with him. This

allegation was denied in the Martinez report, thus creating a question of fact. Even assuming Mr. Hooper's allegation to be true, we do not view a single, isolated assault as being actionable under 42 U.S.C. § 1983. It may be that Mr. Hooper has a claim against this defendant, but given the posture of this case, not under 42 U.S.C. § 1983.

Mr. Hooper has raised numerous additional issues that we do not believe warrant discussion. We have considered them and find they lack merit.

The decision of the district court is **AFFIRMED**. The mandate shall issue forthwith.

Entered for the Court:

WADE BRORBY
United States Circuit Judge