

FILED

November 6, 2003

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-41192
Summary Calendar

RUDOLFO B. MARTINEZ,

Plaintiff-Appellant,

versus

UP BREAUX; UNIDENTIFIED PARTY, Jane Doe,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(1:01-CV-767)

Before BARKSDALE, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:*

Proceeding *pro se* and *in forma pauperis*, Rudolfo B. Martinez, Texas prisoner # 340699, filed this civil rights action under 42 U.S.C. § 1983 against BreauX, a Texas Department of Criminal Justice property officer, and Jane Doe. The district court found that Martinez failed to exhaust his administrative remedies and dismissed the action *without* prejudice. (Martinez's motion for appointment of counsel is **DENIED**. See, e.g., *Cupit v. Jones*, 835 F.2d 82, 86 (5th Cir. 1987).)

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Martinez maintains he was unable to comply with the administrative procedures - which require filing the step 1 grievance with the step 2 grievance - because his step 1 grievance was never returned to him. There is no evidence in the record supporting this claim. Martinez has not shown that the district court erred when it found the failure to exhaust. See *Wendell v. Asher*, 162 F.3d 887, 890-91 (5th Cir. 1998). Accordingly, the judgment of the district court is **AFFIRMED**.

AFFIRMED; MOTION DENIED