

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-7016

WILLIE LEE SWANSON,

Plaintiff-Appellant,

VERSUS

GARLAND POLICE DEPARTMENT,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(CA3-91-0977-T)

—
May 6, 1993

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit
Judges.

PER CURIAM:*

William Lee Swanson was arrested and placed in custody. He contends that, while in custody, he was handcuffed to a chair (allegedly called the "electric chair"); that he often lost his balance, falling to the floor; and that he suffered permanent injury to his left hand. *Pro se* and *in forma pauperis*, Swanson filed an action under 42 U.S.C. § 1983 against the

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Garland Police Department, and "all Jailers" of same for, *inter alia*, this alleged injury.

There was no service of process on the named defendants. The action was referred to a magistrate judge, who issued interrogatories to Swanson. One concerned the policy or custom of the Garland Police Department upon which Swanson based his claim against the Department. Upon review of Swanson's interrogatory answers, the magistrate judge recommended dismissal, pursuant to 28 U.S.C. § 1915(d). Concerning the excessive force claim in issue here, the magistrate judge applied our Fourth Amendment standard from ***Johnson v. Morel***, 876 F.2d 477 (5th Cir. 1989) (en banc) (force imposed during course of arrest).

The district court adopted the Findings, Conclusions, and Recommendations of the magistrate judge, and dismissed Swanson's complaint. Swanson appealed only the dismissal of his excessive force claim, and named only the Garland Police Department as appellee.

Because process was not had on the defendants, we have not had the benefit of full briefing on the issue before us. But, in any event, it is arguable that the ***Johnson*** Fourth Amendment standard is not applicable under the alleged facts. See ***Hudson v. McMillian***, ___ U.S. ___, 112 S. Ct. 995 (1992); ***Valencia v. Wiggins***, 981 F.2d 1440 (5th Cir. 1993). And, Swanson's interrogatory answers provide an arguable basis for liability on the part of the Garland Police Department. Therefore, we hold

that Swanson's excessive force claim has an arguable basis in law and in fact; and, accordingly, that the district court erred in dismissing the complaint as frivolous under § 1915(d). See, e.g., *Denton v. Hernandez*, ___ U.S. ___, 112 S. Ct. 1728, 1733 (1992); *Parker v. Fort Worth Police Dept.*, 980 F.2d 1023, 1024 (5th Cir. 1993).

We therefore remand this case to the district court for further proceedings consistent with this opinion, to include service of process on the Garland Police Department (as noted, the only named appellee), appointment of counsel for Swanson, and application of the appropriate standard to his excessive force claim.

VACATED and REMANDED.