UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1582

VIVIAN CHARLES LEVY,

Plaintiff-Appellant,

versus

RICHARD FORTENBERRY, Warden, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(4:91 CV 75)

September 17, 1993

Before GARWOOD, JONES, and EMILIO GARZA, Circuit Judges.*

PER CURIAM:

Vivian Charles Levy filed a pro se complaint alleging violations of his civil rights under 42 U.S.C. § 1983 against Warden Richard Fortenberry and others at the Wackenhut Correctional Facility. Finding no proper appeal from summary judgment we affirm the district court's dismissal.

Levy alleged various constitutional violations including lack of visitation-privileges, medical care and being forced to

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*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

attend substance abuse classes. Levy and the defendants consented in writing to have a U.S. magistrate judge decide the case with any direct appeal going to the district court pursuant to 28 U.S.C. § 636(c)(4).

In magistrate judge's court, the defendants filed a motion for dismissal and received no response from Levy. The magistrate judge granted the defendant's motion for summary judgment and dismissed the case.

After losing at the magistrate level, Levy filed a notice of appeal to the district court. He failed there, because he filed no appellate brief, and the district court dismissed the appeal for that reason. Levy then filed a timely notice of appeal to this court.

Levy's appeal is authorized, if at all, only under 28 U.S.C. § 636(c)(5) and Fed. R. App. Proc. 5.1 governing appeals by permission from cases tried in the magistrate judge's court. Levy did not comply with the Rule 5.1 procedure requiring a petition for leave to appeal. Moreover, Levy's brief failed either to request leave to appeal and or that his notice of appeal together with his brief be construed as such a petition.

That a notice of appeal can be treated as a petition for leave to appeal under certain circumstances has been approved by this court in Wolff v. Wolff, 768 F.2d 642, 646 (5th Cir. 1985). This court found no jurisdictional obstacle to treating a notice of appeal as the petition for leave to appeal. Wolff, 768 F.2d at 646.

Wolff recognized, however, that the granting of a petition for leave to appeal is a matter of sound judicial discretion, 768 F.2d at 647, and a petition should be granted "only if substantial and important questions of law are involved." Id. Wolff's reasoning built upon other circuits' interpretations of § 636(c)(5), which concluded that full-dress appeals to the circuit courts of appeals should not ordinarily be required in cases that were tried by a magistrate judge and have been scrutinized on appeal by the district courts.

Because Levy is pro se, we hold him to a "less stringent standard" of performance than attorneys. Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595, 30 L.Ed.2d 652 (1972). However, even under a less stringent standard we cannot find that a discretionary appeal should be granted here. The court in Wolff adopted the standards of the Eighth Circuit in determining whether petitions for leave should be granted. Factors that the court cited in its analysis included whether the magistrate's findings of fact are clearly erroneous and whether the dispositive issue has been authoritatively decided or the magistrate has decided a substantial question of law not previously determined by the court. Wolff, 768 F.2d at 647.[2]

In this case, Levy has failed to establish that he is entitled to appellate review by this court under the standards set forth in Wolff. All of the dispositive legal issues addressed in

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[2] The Eighth Circuit rule was modified by the Fifth Circuit but those modifications are not relevant here. Wolff, 768 F.2d at 647.

the magistrate judge's order--including the "deliberate indifference" standard of liability under 42 U.S.C. § 1983 and the Eighth Amendment, and the lack of constitutional claims for denial of visitation or not receiving a copy of his accident report--are well settled in this circuit and the decisions of the Supreme Court. The magistrate judge's thorough opinion was based on undisputed facts wholly consistent with the authoritative decisions of this court and the Supreme Court. Further, the magistrate judge did not decide a substantial question of law not previously determined by this court.

We therefore **DENY** leave to appeal this case and **DISMISS** it.

DISMISSED.