

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1738
Summary Calendar

ISRAEL PATINO,

Plaintiff-Appellant,

VERSUS

JIMMY LAWSON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(2:91-CV-0170)

(March 4, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Israel Patino, a state prisoner in the Texas Department of Criminal Justice (TDCJ), appeals the district court's dismissal of his suit as frivolous under 28 U.S.C. § 1915(d). We **AFFIRM**.²

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

² We also deny Patino's motion for appointment of appellate counsel, because his claims do not present "exceptional circumstances", as required for the appointment of counsel to represent a § 1983 plaintiff. See *Cooper v. Sheriff Lubbock County*, 929 F.2d 1078, 1084 (5th Cir. 1992).

I.

Subsequent to a disciplinary hearing in June 1991, the TDCJ concluded that Patino was guilty of sexual abuse of another inmate. Patino asserts in his complaint that, as a result of this finding, his class line status was reduced to III; he was detained in solitary confinement for seven days; he lost 1080 days of good time credit; and he was forced to remain in "low custody" until further notice.

Proceeding *pro se*, Patino filed suit, pursuant to 42 U.S.C. § 1983, against an officer and assistant warden, alleging that his due process rights were violated for a number of reasons: (1) he was not allowed to have witnesses testify in person at the hearing; (2) it was held in front of only one hearing officer; (3) he was not provided an adequate record of the proceeding; (4) his counsel substitute (jailhouse advocate) provided "frivolous" representation; and (5) the guilty finding was not supported by the evidence.³

The magistrate judge held a **Spears** hearing⁴ and concluded that Patino was afforded due process. Accordingly, he recommended dismissing the suit as frivolous under § 1915(d).⁵ The district

³ Contrary to testimony subsequently adduced at the **Spears** hearing, discussed *infra*, Patino also alleged in his complaint that he did not receive an adequate written statement of the fact finder and that he was deprived of his right to appeal the guilty finding.

⁴ See **Spears v. McCotter**, 766 F.2d 179 (5th Cir. 1985).

⁵ The magistrate judge did not state the standard, discussed *infra*, for § 1915 dismissals. However, because he concluded that, "[c]learly, plaintiff received all the due process required", we can easily infer that he determined that the action had no arguable basis in law or fact.

court adopted the report and recommendation, over Patino's objections, and dismissed the suit.

II.

A.

Patino contends that the district court erroneously dismissed his complaint as frivolous. A district court may so dismiss an *in forma pauperis* complaint if it lacks an arguable basis in either law or fact. **Denton v. Hernandez**, ___ U.S. ___, 112 S. Ct. 1728, 1733 (1992). We review such a dismissal only for abuse of discretion. **Moore v. Mabus**, 976 F.2d 268, 270 (5th Cir. 1992).

Patino's prison disciplinary hearing was conducted in accordance with due process requirements for such hearings, as set forth in **Wolff v. McDonnell**, 418 U.S. 539, 564-66, 571 (1974).⁶ Patino admits that he was given the necessary timely written notice of the claimed violation; that he was allowed to present written statements from four inmates in addition to oral testimony from another; and that the fact finder produced a written statement, signed by Patino, setting forth the evidence relied on and the reason for the disciplinary action. Moreover, there is no indication that the TDCJ was anything but detached and neutral;

⁶ Where, as here, a prison disciplinary hearing may result in the loss of good time credits or solitary confinement, a prisoner must receive (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; (3) a written statement by the fact finder of the evidence relied on and the reasons for the disciplinary action; and (4) an impartial fact finder. **Wolff v. McDonnell**, 418 U.S. at 564-66; see **Moody v. Miller**, 864 F.2d 1178, 1180 (5th Cir. 1989).

Patino's statements to the contrary in his complaint are completely unsupported. The district court did not abuse its discretion in finding no basis for Patino's contention that he received inadequate procedural safeguards.

Similarly, we reject Patino's contention that his disciplinary hearing was held in violation of TDCJ procedures and therefore arguably resulted in a due process violation. Assuming, without so holding, that a violation of TDCJ procedures constitutes a due process violation, Patino's contention is baseless. Contrary to Patino's understanding, he was not entitled to a three-officer panel. The 1991 version of the TDCJ-ID Disciplinary Rules and Procedures for Inmates provides that the disciplinary hearing be held in front of a single unit officer.

In addition, the district court properly exercised its discretion in finding no arguable basis for Patino's challenge to the disciplinary finding. "Federal courts will not review the sufficiency of the evidence at a disciplinary hearing; a finding of guilt requires only the support of some facts or any evidence at all." *Gibbs v. King*, 779 F.2d 1040, 1044 (5th Cir.)(internal quotations and citations omitted), *cert. denied*, 476 U.S. 1117 (1986). The testimony adduced at the *Spears* hearing established that the guilty finding was based on information provided by a reliable confidential informant, as conveyed through the written

report and testimony of the reporting officer. Accordingly, the guilty finding was amply supported.⁷

B.

Patino maintains that he was entitled to counsel at his **Spears** hearing. At that hearing, Patino requested counsel, but had not earlier filed the requisite motion. The magistrate judge informed Patino that he was not entitled to an attorney in a § 1983 case. Because Patino did not appeal the denial of counsel to the district judge, this issue is not reviewable. See **Boren v. N.L. Industries, Inc.**, 889 F.2d 1463, 1465 (5th Cir. 1989) (holding that a ruling by a magistrate judge may not be appealed directly to this court), *cert. denied*, 497 U.S. 1029 (1990).

C.

Patino contends that he should be allowed to amend his complaint; however, he failed to file a motion to amend, or the equivalent, in the district court. We do not consider issues

⁷ In the prison disciplinary context, reliable confidential informant testimony, presented through the testimony of a reporting officer, who appears at the disciplinary hearing, is sufficient to support a guilty finding. **Smith v. Rabalais**, 659 F.2d 539, 546 (5th Cir. 1981) (holding that due process is satisfied where testifying officer verified that he knew the informers, that he had used them in the past, and that the informers had firsthand knowledge); *cert. denied*, 455 U.S. 992 (1982); **McKinney v. Meese**, 831 F.2d 728, 731 (7th Cir. 1987) (holding that due process is satisfied where the investigating officer swears to the truth of his report containing confidential information and appears before the disciplinary committee). Here, because Patino provides us with no basis to question the informant's reliability, we conclude that the evidence presented through the officer constitutes the requisite "some evidence" of guilt.

raised for the first time on appeal. **Beck v. Lynaugh**, 842 F.2d 759, 762 (5th Cir. 1988).⁸

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

⁸ Likewise, we refuse to consider the other issues raised by Patino for the first time on appeal: (1) the officers of the TDCJ knowingly used false testimony at his disciplinary hearing; (2) Patino was denied due process by the TDCJ's dismissal of his Step III grievance without further investigation; (3) he was denied equal protection because the Attorney General failed to represent him and investigate his claim; (4) he was denied "equal treatment" by the TDCJ's labeling him as a violent rapist; and (5) he suffers cruel and unusual punishment each time he faces a classification committee.