UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1896

(Summary Calendar)

JOE G. NUNEZ, JR.,

Plaintiff-Appellant,

versus

BRENDA WILKERSON ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(5:91-CV-048-C)

(February 16, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Joe G. Nunez, Jr., a Texas prison inmate, brought suit under 42 U.S.C. § 1983 (1988) alleging that the defendants' failure to provide him with two scientific publications))namely, the *Merck Index* and *Scientific Evidence in Criminal Cases*))denied him his constitutional right of access to the courts. Proceeding pro se, Nunez appeals the district court's summary judgment of his claims. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

While serving a state sentence for intent to manufacture methamphetamine, Nunez ordered two books to assist him in preparing a habeas corpus petition. His request for the *Merck Index* was denied because that book listed drug toxicity levels and contained chemical formulas that could be used in the manufacture of drugs. His request for *Scientific Evidence* was denied because eleven pages contained detailed information regarding the manufacture of explosives and other weapons. Nunez was also denied an edited copy of that book, less the objectionable pages.

Nunez subsequently filed a § 1983 action, alleging that the defendants' failure to provide the aforementioned books denied him his right of access to the courts because he allegedly needed those books to prepare his petition for habeas corpus relief. In their answer, the defendants raised the defense of failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). At the *Spears*[1] hearing, the defendants' failed to submit the two books for an *in camera* inspection by the magistrate judge. Instead, the defendants submitted an affidavit describing the contents of the *Merck Index,* and an authenticated record describing the objectionable eleven pages of *Scientific Evidence.* Nunez did not contest in any way those documents at the hearing.

Relying upon the documents submitted by the defendants and citing the need for prison security, the district court apparently granted summary judgment of Nunez's claims to the extent that it

[1] *Spears v. McCotter,* 766 F.2d 179 (5th Cir. 1985).

upheld the defendants' refusal to deliver the *Merck Index,* but ordered that the defendants deliver to Nunez *Scientific Evidence,* less the objectionable eleven pages. *See* Fed. R. Civ. P. 12(c). Nunez filed a timely notice of appeal.[2]

II

We initially address Nunez's arguments regarding appointment of counsel. He first argues that the district court abused its discretion by denying his motion for appointment of counsel. The district court may appoint counsel in civil rights cases presenting "exceptional circumstances." *Ullmen v. Chancellor,* 691 F.2d 209, 212 (5th Cir. 1982). Factors to be considered, among others, are the complexity of the issues and the plaintiff's ability to represent himself adequately. *Id.* at 213. The issues presented in this case are not complex. Moreover, Nunez's pleadings demonstrate his ability to provide himself with adequate representation. The district court therefore did not abuse its discretion by denying counsel below. Nunez has also filed a motion for appointment of counsel on appeal. We consider the same factors as those considered by the district court in determining whether an appellant is entitled to appointment of counsel. *See Cooper v.*

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[2] Nunez timely filed his notice of appeal within thirty days after entry of judgment. *See* Fed. R. App. P. 4(a)(1) (stating that appeals in civil cases must be filed within thirty days of entry of judgment). Nunez's motion for reconsideration))i.e., to correct the district court's judgment to reflect that Nunez filed objections to the magistrate judge's report))had no effect on his notice of appeal, as the motion was not of the kind enumerated in Fed. R. App. P. 4(a)(4). Because the defendants filed their cross-appeal more than 14 days after Nunez filed his notice of appeal, we lack jurisdiction over the cross-appeal. *See* Fed. R. App. P. 4(a)(3).

Sheriff, Lubbock County, Tex., 929 F.2d 1078, 1084 (5th Cir. 1991). For the reasons we have cited, Nunez's motion for appointment of counsel on appeal is denied.

We now turn to the merits of the appeal, in which Nunez contests the district court's summary judgment of his access-to-courts claims.[3] We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Cent. R.R.,* 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

The district court granted summary judgment of Nunez's claims because it found that the defendants' refusal to provide the *Merck Index* and eleven pages of *Scientific Evidence* served a legitimate penological interest))i.e., prison security. "[I]n determining the

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[3] "It is clearly established that prisoners have a constitutionally protected right of access to the courts [which] . . . assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Brewer v. Wilkinson,* 3 F.2d 816, 820 (5th Cir.) (citations omitted) (attributions omitted), *petition for cert. filed,* Dec. 8, 1993.

constitutional validity of prison practices that impinge upon a prisoner's rights with respect to mail, the appropriate inquiry is whether the practice is reasonably related to a legitimate penological interest." *Brewer v. Wilkinson,* 3 F.3d 816, 824 (5th Cir.), *petition for cert. filed,* Dec. 8, 1993. Prison security is a legitimate penological interest. *See id.* at 825. According to the documents submitted by the defendants, the objectionable portions of those books contained information regarding the manufacture of weapons or drugs, and also drug toxicity levels. Nunez did not contest the contents or validity of the documents submitted by the defendants. Because the information in the requested books posed a threat to prison security, we hold that the district court properly granted summary judgment of Nunez's claims.[4]

III

Accordingly, the motion for appointment of counsel is DENIED; the district court's judgment is AFFIRMED.

[4] Because Nunez's complaint did not clearly show a potential ground for relief, we further hold that the district court did not abuse its discretion by denying Nunez's motion for leave to amend his pro se complaint. *See Gallegos v. La. Code of Criminal Procedures,* 858 F.2d 1091, 1092 (5th Cir. 1988) (stating that a pro se plaintiff "should be permitted to amend his pleadings when it is clear from his complaint that there is a potential ground for relief").