

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-3575
Summary Calendar

Travis Carter,

Plaintiff-Appellant,

VERSUS

Bruce Lynn, Secretary, Department of Corrections,
State of Louisiana, et al.,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Louisiana

(CA 91 1101 A)

(December 14, 1992)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge*:

*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

State pro se prisoner, Travis Carter, filed a civil rights action which was subsequently submitted to the magistrate for a report and recommendation. After Carter appealed all of the magistrate's rulings to the district court, the district court sanctioned him for meritless appeals by prohibiting Carter from appealing any nondispositive matter from the magistrate to the district court. Carter seeks mandamus relief from this sanction and, in addition, appeals the denial for appointment of counsel and denial for leave to amend his complaint. We deny Carter's request for mandamus, however, we find merit in Plaintiff's appeal for appointment of counsel, and thereby direct the district court to appoint counsel. Plaintiff has no standing to complain about the denial of his co-Plaintiff's motion to amend, therefore Plaintiff's appeal on this issue is dismissed.

Facts and Prior Proceedings

In December 1991, Appellant Travis Carter and another inmate¹ at the Louisiana State Penitentiary (Angola), filed a civil rights action under 42 U.S.C. § 1983 requesting declaratory and injunctive relief requiring that the defendants (1) establish mandatory AIDS and other contagious disease testing of inmates and correctional employees; (2) segregate or otherwise identify infected inmates; (3) establish mandatory testing for all discharged inmates for

that this opinion should not be published.

¹ Richard Lay

contagious diseases; (4) provide follow-up treatment for infected inmates released from prison; (5) prevent infected employees from having physical contact with noninfected inmates, and (6) notify the State Department of Health and Human Resources of all infected inmates and employees. Plaintiff Carter is not infected with the HIV virus or with any other contagious disease but fears he soon may be. The Plaintiffs proceeded in forma pauperis, although both Plaintiffs asked for the appointment of counsel in their original complaint as well as in many other documents throughout the Spring of 1992. The Plaintiff's complaint was referred to a magistrate judge pursuant to 28 U.S.C. 636(b)(1)(B). It is sufficient to say that the Plaintiffs appealed every ruling of the magistrate to the district court, and the district court promptly dismissed Plaintiffs' appeals as meritless and then prohibited Plaintiffs from appealing any ruling of the magistrate judge on any nondispositive matter. Plaintiff Carter appealed to this court the denial of his requests for declaratory and injunctive relief.² In supplemental pleadings to that appeal, Carter attempted to raise the issue of whether the district could prohibit Carter from appealing the orders of the magistrate, however, the issue was not properly before this court and we declined to rule. Subsequent to that appeal, both Plaintiffs filed a "motion for relief" asking

² In **Travis Carter v. Bruce Lynn**, No. 92-3398 (5th Cir. Oct. 13, 1992)(unpublished opinion), Carter challenged the district court's deferral of his motion for a declaratory judgment and preliminary injunction and the 90 Day Stay Order. This court found no error by the district court.

for, among other things, the appointment of counsel.³ The magistrate denied the request to appoint counsel stating that no motion was ever filed.⁴ Shortly thereafter, Plaintiff Lay filed a proper motion to appoint counsel, but it was denied. The magistrate's order stated that Lay's action did not show exceptional circumstances, was not factually or legally complex and did not meet any of the other factors needed under **Ulmer** to appoint counsel. Further, the order stated that the court had been unable to find anyone who would be willing to handle a § 1983 case for the Plaintiffs. On June 22, both Plaintiffs made a motion to amend their complaint. The magistrate denied the motion stating that the matter was on appeal.

The Issues on Appeal

Carter presents this court with three issues on appeal: (1) Whether Carter is entitled to mandamus relief from the district court's order prohibiting Carter from appealing any nondispositive order of the magistrate judge; (2) Whether Carter may appeal to

³ Further, Plaintiffs asked the magistrate to certify their complaint as a class action, rule on Plaintiff Lay's "Rule to Show Cause", and set Plaintiff's motion for declaratory and injunctive relief. The magistrate denied the motion to "Rule" because that motion had already been denied earlier and granted the motion requesting that the motion for declaratory and injunctive relief be set for hearing by the district court. There was no ruling on the issue of class certification.

⁴ We believe that this was the ruling of Magistrate Noland, although we had great difficulty in deciphering her handwriting, as Magistrate Noland sometimes prefers to handwrite her orders on top of the parties' motions as opposed to creating typewritten separate documents. **See Fed. R. Civ. P. 58.**

this Court the denial of his motion for appointment of counsel by the magistrate; (3) Whether Carter may appeal to this Court the denial of his motion to amend and supplement his complaint by the magistrate.

Discussion

1. Mandamus Relief

The district court "sanctioned" Plaintiffs for filing meritless "appeals" to the district court by prohibiting the Plaintiffs from filing any appeals from rulings of the magistrate judge on any nondispositive matter.⁵ In his brief to this Court, Carter seeks relief through mandamus. Carter argues that the district court's sanction violates Fed. R. Civ. P. 72(a) and 28 U.S.C. § 636(b)(1)(B). Carter maintains that Rule 72 and § 636(b)(1)(B) provide for mandatory review of the magistrate's rulings if an objection is timely made. Carter argues that he indeed made timely objections to the magistrate's rulings in this case, therefore the District Court should be ordered to rule on these objections.

Mandamus is an extraordinary remedy and is only available in exceptional circumstances. **In re American Airlines, Inc.**, 972 F.2d 605, 608 (5th Cir. 1992). Mandamus may not be a substitute for appeal. **Id.** (citing **Warren v. Bergeron**, 831 F.2d 101, 103 (5th Cir. 1987)). The standards for review by mandamus are well established: Carter must show that he lacks an adequate

⁵ It should be noted that Plaintiff Carter alone is appealing to this court.

alternative means to obtaining relief and that his right to relief is clear and indisputable. **Id.** Carter cannot show that he lacks an adequate alternative means to relief because he is appealing the denial of review of pre-trial nondispositive matters. After the entry of final judgment in this case, Carter may appeal the district court's order prohibiting appeals from nondispositive matters. Again, mandamus cannot be used as a substitute for appeal, even when hardship may result from delay or from an unnecessary trial. **In re Willy**, 831 F.2d 545, 549 (5th Cir. 1987). Further, Carter cannot show that his right to relief is clear and indisputable. The Supreme Court has indicated that "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" **Allied Chemical Corp. v. Daiflon, Inc.**, 449 U.S. 33, 36 101 S.Ct. 188, 191, 66 L.Ed.2d 193 (1980) (per curiam). Indeed, this court has held that a writ of mandamus should not issue merely because this court believes that it would have exercised discretion differently from that of the trial court. **Matter of Hester**, 899 F.2d 361, 367 (5th Cir. 1990). The imposition of sanctions is within the broad discretion of the district court. **American Airlines, Inc. v. Allied Pilots Association**, 968 F.2d 523, 533 (5th Cir. 1992). Under Rule 11, the district court has broad discretion to impose sanctions that are

tailored to deter parties from filing meritless appeals.⁶ **See id.** The record indicates that the Plaintiffs filed meritless appeals.⁷ Because Plaintiff has an alternative means for relief through appeal from final judgment and because the imposition of sanctions is purely discretionary, mandamus will not issue.

2. Appointment of Counsel

Carter argues that the magistrate abused her discretion in denying Carter counsel. Carter points out that the magistrate did not make specific findings as to each **Ulmer**⁸ factor in deciding whether Plaintiffs were entitled to appointed counsel. In addition, Carter argues that unless he has counsel, he will not be allowed to review medical records of the prisoners and employees who are infected with communicable diseases, and these records are vital to Plaintiff's claim.

Ordinarily a party cannot appeal directly to this Court from an order of a magistrate judge, unless the parties have consented that the magistrate judge may conduct proceedings and enter final

⁶ This court reviews sanctions issued by a district Court under the abuse of discretion standard. **Id.** A district Court would abuse its discretion if it imposed sanctions based upon an erroneous view of the law or a clearly erroneous assessment of the evidence. **Smith v. Our Lady of the Lake Hospital, Inc.**, 960 F.2d 439 (5th Cir. 1992).

⁷ For example, Plaintiffs filed an "appeal" challenging the authority of the District Court to refer Plaintiff's complaint to a magistrate for recommendations. Plaintiffs also filed an "appeal" to complain that each Plaintiff was not being individually served with all rulings and judgments, when the record showed they were being served individually. Plaintiff also filed an "appeal" challenging the Magistrate's order staying the action pending exhaustion of administrative remedies.

⁸ **Ulmer v. Chancellor**, 691 F.2d 209 (5th Cir. 1982).

judgment. **Trufant v. Autocon, Inc.**, 729 F.2d 308, 309 (5th Cir. 1984). A review of a magistrate's order usually should be conducted by the district court. **Id.** In this case, however, the district court has barred any appeals to it from nondispositive orders of the magistrate judge. Under these circumstances, the magistrate's denial of a motion for appointment of counsel should be appealable to this Court, since the district court's approval of such a ruling upon review would be appealable. **See Caston v. Sears, Roebuck & Co.**, 556 F.2d 1305, 1307-08 (5th Cir. 1977).⁹ The Appellee argues that Carter was not a party to the motion to appoint counsel because the motion was only signed by Plaintiff Lay and therefore Carter cannot raise this issue on appeal. Upon thorough review of the record, we find that Plaintiff Carter asked for appointment of counsel on at least six different occasions.¹⁰ Although none of the documents were entitled, "motion to appoint counsel", we think Carter made his request quite clear. In forma pauperis filings are construed liberally. **See Wesson v. Oglesby**, 910 F.2d 278, 281 (5th Cir. 1990). On December 12, 1991, Plaintiff Lay and Carter filed a document entitled, "Notice of Objection", asking for among other things, appointment of counsel. This motion was denied on January 8, 1992, and the handwritten denial does not recite whether or not the **Ulmer** factors were taken into

⁹ **See also Robbins v. Maggio**, 750 F.2d 405, 411-413 (5th Cir. 1985).

¹⁰ Carter asked for appointment of counsel in his original complaint, amended complaint, "notice of objection", "memorandum in support of appeal", another "notice of objection", and "motion for relief".

consideration.

A civil rights complainant has no right to appointment of counsel unless the case presents exceptional circumstances. **Ulmer**, 691 F.2d at 212.¹¹ Recently, this Court found exceptional circumstances in a case similar to the present one. In **Moore v. Mabus**,¹² this Court held that the district court erred in denying the appointment of counsel under **Ulmer** in a civil rights action filed by state prisoners who were HIV positive.¹³ We said that allegations of deliberate indifference to the serious needs of HIV/AIDS prisoners demonstrates that

¹¹ In considering whether a particular civil rights action presents such exceptional circumstances, this court has relied on a number of factors: (1) the type and complexity of the case; (2) whether the indigent is capable of adequately presenting his case; (3) whether the indigent is in a position to investigate adequately the case; and (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and cross examination. **Ulmer**, 691 F.2d at 213. In addition, the courts should examine whether appointment of counsel would serve to sharpen the issues in the case. **Id.**

¹² 976 F.2d 268 (5th Cir. 1992).

¹³ In that case, a State prisoner filed a § 1983 action claiming that he had been mistreated because he tested positive for the HIV virus and that his treatment amounted to deliberate indifference to serious medical needs in violation of the eighth amendment, his conditions of confinement violated the eighth amendment, his right of privacy had been violated, and his loss of privileges due to being HIV positive was in violation of due process. In the present case, however, Carter is not HIV positive, and demands to be segregated from inmates and employees who are HIV positive or are inflicted with contagious diseases like Hepatitis B or Tuberculosis. We do not think that the different positions of the two prisoners is of consequence in the decision to appoint counsel.

(1) the type and complexity of the issues raised in the complaint are deserving of professional development, (2) the complex subject of HIV-AIDS management in a prison environment is beyond the ability of a mere prisoner to investigate adequately, (3) the scope of the questions raised and the extensive resources required to pursue properly the issues in this case far exceed the capability and resources of a prisoner, and (4) the apparently essential testimony from experts on HIV-AIDS management in the prison environment will require professional trial skills. We are persuaded that this is an extraordinary case in which appointment of counsel will assist the plaintiffs, the State..., and the court in resolving these important unanswered questions. The district court should promptly appoint qualified counsel.

Moore, 976 F.2d at 272 (citing **Harris v. Thigpen**, 941 F.2d 1495 (11th Cir. 1991)). This court may appoint counsel in civil rights suits presenting exceptional circumstances,¹⁴ and after review of the facts of this case, we believe Carter should be appointed counsel.

3. Amended Complaint

Carter argues that before the Defendants had even answered his complaint, he filed a motion to amend his complaint on April 17, 1992 and therefore should have been allowed to amend his complaint. The record, however, indicates that this motion was filed by Plaintiff Lay alone and was styled without Carter's name as the Plaintiff. The magistrate subsequently denied the motion on May 18, 1992. First of all, Carter is not entitled to relief on this motion because he did not sign the motion, and he therefore lacks standing to complain of the magistrate's ruling. **See Mikeska v. Collins**, 928 F.2d 126 (5th Cir. 1991); **White v. United States Pipe**

¹⁴ **Cooper v. Sheriff, Lubbock County, Texas**, 929 F.2d 1078, 1084 (5th Cir. 1991).

& Foundry Co., 646 F.2d 203, 205-06 (5th Cir. 1981). Further, this was the only time before the instant appeal that Plaintiff had asked to amend his complaint. There are no other documents making any such request that could even be construed liberally.¹⁵ Therefore, his appeal on this issue is dismissed.

Conclusion

We deny Plaintiff's request for mandamus. We dismiss the appeal from denial of the motion to amend complaint for lack of standing and direct the district court to appoint counsel for Plaintiff Carter due to the exceptional circumstances of this case.

¹⁵ Plaintiff Carter filed a motion to amend complaint on June 22, 1992, which was after the date that he filed this appeal. The motion was denied because the "matter is on appeal".