UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-3677
Summary Calendar

WALTER L. COLLINS,

Plaintiff-Appellant,

VERSUS

CHARLES C. FOTI, JR., Sheriff of Orleans Parish, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
CA 91 4565

June 22, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

DAVIS, Circuit Judge:[1]

Collins appeals the denial of his § 1983 action against local and state prison officials. We affirm.

I.

Pro se and IFP Louisiana prisoner Walter L. Collins filed a civil rights suit against Orleans Parish Criminal Sheriff Charles

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Foti, State Department of Corrections Secretary Bruce Lynn and Winn Correctional Center Warden John Rees. Collins alleged that from November 1989 until March 1990 he was held in Orleans Parish Prison (OPP), part of the time as a pre-trial detainee and part of the time as a convicted person. In March 1990, he was transferred from OPP to the Hunt Correctional Center, then to the Winn Correctional Center. In April 1991, Collins had a routine tuberculosis skin test at Winn that was positive.

Collins alleged that he became infected with the TB virus while in OPP or in Winn. He alleged that neither institution routinely tested incoming inmates and that he was forced to live in squalid conditions, including overcrowded cells with only inches between inmates and no ventilation. He also alleged that after he tested positive, his medical treatment was inadequate. He claimed violations of the Eighth Amendment along with deprivation of Fourteenth Amendment due process rights for the time that he was a pre-trial detainee.

After the defendants answered, the magistrate judge held a hearing at which Collins and defense witnesses testified. No transcript of that hearing is in the record.

Following a full evidentiary hearing, the magistrate judge recommended that the action be dismissed with prejudice. In his report, the magistrate judge recounted the testimony of the various witnesses. As to the TB infection, the magistrate judge stated that Collins failed to bear his burden of proof of establishing when and where he contracted the virus. As to the claim of

inadequate medical care, the magistrate judge stated that the defendants had not been deliberately indifferent to Collins's medical needs in light of their administering the appropriate treatment to Collins. According to the magistrate judge's report, Collins suffered no symptoms of the virus and was unlikely to every suffer such symptoms. Over Collins's objections the district court adopted the magistrate judge's report and dismissed the action with prejudice.

II.

Collins lists seven issues, five of which amount to a contention that the complaint should not have been dismissed because the acts of the defendants injured him. Collins asserts in the other two issues that the evidentiary hearing prevented adequate discovery and that the district court should not have set aside a default against Rees.

Collins argues first that prison conditions to which he was subjected were unconstitutional and resulted in his infection with the TB virus. In response, Rees argues that Collins's failure to order a transcript of the magistrate judge's hearing precludes review of this issue. Collins replies that he did not know that he needed to order a transcript. He does not request a transcript.

An appellant, even one pro se, who wishes to challenge findings or conclusions that are based on testimony at a hearing has the responsibility to order a transcript. Fed. R. App. P. 10(b)(2); **Powell v. Estelle**, 959 F.2d 22, 26 (5th Cir.) (per curiam), **cert. denied**, 113 S. Ct. 668 (1992). This court does not

consider the merits of the issue when the appellant fails in that responsibility. **Powell**, 959 F.2d at 26; **see also Richardson v. Henry**, 902 F.2d 414, 415-16 (5th Cir.), **cert. denied**, 498 U.S. 901 (1990), **and cert. denied**, 498 U.S. 1069 (1991) (pro se appellant); **Alizadeh v. Safeway Stores, Inc.**, 910 F.2d 234, 237 (5th Cir. 1990) (counseled appellant).

Even after he read Rees's brief, Collins made no attempt to remedy his failure to order a transcript. He simply asked that the appeal not be dismissed. We could construe his response as a request for a transcript at government expense, and could order one if we discovered a substantial question on appeal that required a transcript for resolution. 28 U.S.C. § 753(f) (West Supp. 1993); **Harvey v. Andrist**, 754 F.2d 569, 571 (5th Cir.), **cert. denied**, 471 U.S. 1126 (1985). For reasons outlined below, we find no such substantial question.

In his brief Collins disagrees with the magistrate judge's conclusions but identifies no specific error in the magistrate judge's recitation of the facts as developed at the hearing. Specifically, Collins fails to show how he met his burden of proving that he contracted TB within the prison system. Collins instead cites cases in which courts have found liability when officials exposed inmates to disease and unsanitary conditions.

Collins does mention that the magistrate judge prohibited him from presenting evidence on the "unsanitary and unhealthy appearance condition of the drinking water at Winn." The

magistrate judge's report does not address the exclusion of this testimony.

The report, however, does recite that Dr. Juarez, the only infectious disease expert at the hearing, testified that the TB virus's exclusive medium of transmission is air. In light of this testimony, Collins does not explain how the condition of the water was relevant. **See** Fed. R. Evid. 401. To attack the magistrate judge's evidentiary ruling, Collins would have to attack the magistrate judge's reliance on the doctor's testimony. Collins makes no such attack.

In short Collins does not raise a substantial question for appeal that would support a motion for transcript at government expense. Without a transcript, we are not authorized to consider Collins's attack on the magistrate judge's findings.

Collins lists as an issue, but does not argue, that the evidentiary hearing interrupted his discovery process, denying him the opportunity to complete discovery. We decline to address this issue for three reasons. First, issues must be briefed to be considered. **Price v. Digital Equip. Corp.**, 846 F.2d 1026, 1028 (5th Cir. 1988), **cert. denied**, 493 U.S. 975 (1989); **see** Fed. R. App. P. 28(a)(5). Second, the magistrate judge was required to conduct the hearing promptly. Fed. R. Civ. P. 72(a). Collins filed no objection to the timing. Third, Collins did not raise this issue in his objections to the magistrate judge's report. **Cf**. **Nettles v. Wainwright**, 677 F.2d 404, 410 (5th Cir. Unit B 1982) (en banc) (requiring objections to factual findings).

Collins argues finally that a default against Rees should not have been set aside. The determination whether to set aside a default lies within the discretion of the district court. **United States v. One Parcel of Real Property**, 763 F.2d 181, 183 (5th Cir. 1985).

Collins moved for the entry of a default against Rees for his failure to answer. The district court clerk entered the default on February 27, 1992. Rees moved to set aside the default, asserting that his answer had been filed the day before the entry of default, on February 26, 1992. The district court set aside the default. The district certainly did not abuse its discretion in setting aside a default that had been preceded by the filing of an answer.

AFFIRMED.