

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3830
Summary Calendar

GENE ROY HESS, SR., and
GENE R. HESS, JR.,

Plaintiffs-Appellants,

VERSUS

ERNEST WOOTEN and
STATE OF LOUISIANA,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-91-3718-H)

June 29, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Gene Roy Hess, Sr.,² an inmate at the Louisiana State Penitentiary at Angola, appeals *pro se* the dismissal of his 42

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 Pursuant to that rule, the court has determined that this opinion should not be published.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 Although Gene Roy Hess, Jr., purportedly signed the notice of appeal, he is not a party to this action. The magistrate judge's report, which the district court approved, recommended dismissal of Hess, Jr., from the action, because Hess, Sr., advised the court that his son had no interest in the suit, and the subject matter of the suit relates only to Hess, Sr.

U.S.C. § 1983 action against Plaquemines Parish Sheriff Ernest Wooten and the State of Louisiana. We **AFFIRM**.

I.

Proceeding *pro se* and *in forma pauperis*, Hess alleged that he was denied access to documents to which he was entitled under the Louisiana Public Records Act, regarding an alleged 45-day sentence imposed on him.³ Both defendants moved to dismiss -- the State asserting Eleventh Amendment immunity; and Wooten asserting that his records on Hess revealed no 45-day sentence, with the supporting affidavit of his records supervisor, Sandra Beckham. Hess did not respond.

The magistrate judge recommended dismissal of the claims against the State on Eleventh Amendment grounds and because a state is not a "person" within the meaning of § 1983. See **Will v. Michigan Dept. of State Police**, 491 U.S. 58, 64 (1989). It also recommended dismissal of the claims against Wooten on the basis that the documents in issue did not exist, and that even if they did, the Louisiana Public Records Act provided an adequate post-deprivation state remedy. See **Hudson v. Palmer**, 468 U.S. 517, 533 (1984). Hess objected, asserting that the documents did exist, and that Beckham had altered records regarding the amount of his bond. (We have today rendered an opinion in Hess's separate action against Beckham. See **Hess v. Beckham**, No. 93-3254 (5th Cir. June ___, 1993) (unpublished).) The district court approved the

³ Hess was convicted of attempted murder, aggravated criminal damage to property, obstruction of justice, and simple escape.

magistrate's report and recommendations, and dismissed Hess's complaint with prejudice.

II.

The only contention that Hess's brief, liberally construed, raises regarding the dismissal is that he was not allowed to present witnesses and was "never even given a fair chance".

Live testimony is inappropriate at the summary judgment stage. Hess had an opportunity to present affidavit testimony in response to the motion, but did not do so. See *Hanchey v. Energas Co.*, 925 F.2d 96, 97 (5th Cir. 1988). Furthermore, his conclusory argument about fairness is insufficient to show that the judgment should be overturned. See *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Hess's remaining contentions are raised for the first time on appeal, so we will not consider them. See *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992).⁴

III.

For the foregoing reasons, the judgment is

AFFIRMED.

⁴ Hess's motion for appointment of counsel is **DENIED**. Needless to say, the requisite exceptional circumstances are lacking.