IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4764
Summary Calendar

SERGIO LUNA RODRIGUEZ,

Plaintiff-Appellant,

VERSUS

CHARLES MARTIN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
9 92 CV 11

April 21, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Sergio Rodriguez appeals the district court's dismissal, as frivolous, of his state prisoner's civil rights complaint, pursuant to 28 U.S.C. § 1915(d). We vacate and remand.

I.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Rodriguez filed a civil rights complaint, pursuant to 42 U.S.C. § 1983, against twelve employees of the Texas Department of Criminal Justice, Eastham Unit. A Spears hearing was held, see Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), at which Rodriguez testified that he barricaded himself in his cell after being threatened by several prison guards. Rodriguez alleged that, after the defendants used a blowtorch to open the cell, he lay face-down on the floor and offered no resistance. Five guards, including two of the guards who had previously threatened him, entered his cell and maliciously beat him. Rodriguez alleged that six supervisory personnel were present and failed to stop the beating or respond to his pleas for help. Rodriguez name, as defendants, the supervisory personnel, a sergeant, and the five guards.

The incident was the subject of an investigation that was ongoing at the time of the Spears hearing. A report prepared in connection with that investigation was read into the record. A prison physician also testified that Rodriguez was treated at the prison clinic for cuts and bruises. Rodriguez consented to have the matter tried to the magistrate judge, who dismissed the complaint as frivolous pursuant to section 1915(d).

II.

Under section 1915(d), an in forma pauperis (IFP) complaint may be dismissed if the action is frivolous or malicious. A complaint is "frivolous" if it "`lacks an arguable basis either in

law or in fact.'" Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke v. Williams, 490 U.S. 319, 325 (1989)). When making this determination, "a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations." Id. Nevertheless, "the § 1915(d) frivolousness determination . . . cannot serve as a factfinding process for the resolution of disputed facts." Id. Under Denton, "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible." Id. An IFP complaint may not be dismissed "simply because the court finds the plaintiff's allegations unlikely." Id.

Section 1915(d) dismissals are reviewed for abuse of discretion. Id. at 1734.

> In determining whether a district court has abused its discretion, the appellate court may consider whether (1) the plaintiff is proceeding pro se, (2) the court inappropriately resolved genuine issues of disputed fact, (3) the court applied erroneous legal conclusions, (4) the court has provided a statement of reasons which facilitates "intelligent appellate review," and (5) any factual frivolousness could have been remedied through a more specific pleading.

Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992) (footnote omitted).

In Hudson v. McMillian, 112 S. Ct. 995, 999 (1992), the Court observed that "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore

discipline, or maliciously and sadistically to cause harm." Factors relevant to this inquiry include (1) the extent of the injury suffered, (2) the need for the application of force, (3) the relationship between the need and the amount of force used, (4) the threat reasonably perceived by the responsible officials, and (5) any efforts made to temper the severity of a forceful response. Hudson v. McMillian, 962 F.2d 522, 523 (5th Cir. 1992) (on remand).

In her memorandum opinion and order of dismissal, the magistrate judge reasoned as follows:

> The Plaintiff states he was struck and beaten during the incident, although the injuries were not serious. I am of the opinion the Plaintiff's injuries were not harmful enough under the circumstances to be considered cruel and unusual. I am also of the opinion the actions taken by prison officials were justified in order to restore discipline. Their actions do not constitute a violation of the objective component of the Eighth Amendment. I am likewise of the opinion that the facts as alleged show that the officials acted with the intent to restore control and discipline. The Defendants use of force was not the product of a culpable state of mind. Consequently, I conclude that the facts as alleged to [sic] not provide a basis for a cognizable civil rights claim of excessive use of force.

The magistrate judge abused her discretion by improperly resolving disputed issues of material fact, i.e., whether prison officials acted with the intent to restore control and discipline. See Moore, 976 F.2d at 270. Rodriguez's allegation that the prison officials acted with malice was not irrational or wholly incredible. See Denton, 112 S. Ct. at 1733.

The magistrate judge also applied questionable legal conclusions. Moore, 976 F.2d at 270. Rodriguez alleged that, at the time of the beating, there was no longer any need to use force to

restore control and discipline, he posed no threat to prison officials, and there was no emergency requiring quick and decisive action. See Hudson, 112 S. Ct. at 998-1000; Hudson, 962 F.2d at 523.

Accordingly, we VACATE and REMAND in order that the disputed issues may be resolved. We express absolutely no view as to what determination ultimately should be made and do not mean to imply that we believe that Rodriguez's claims should be found meritorious.