IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4802
Conference Calendar

MICHAEL J. MARBLE,

Plaintiff-Appellant,

versus

RAUL PADILLA-VAZQUEZ, CO., III,

Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. CA-6-91-384

August 19, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges

PER CURIAM:*

An appellant, even one pro se, who wishes to challenge findings or conclusions that are based on testimony at a bench trial, has the responsibility to order a transcript. Fed. R. App. P. 10(b); Richardson v. Henry, 902 F.2d 414, 416 (5th Cir.), cert. denied, 498 U.S. 901 (1990), and cert. denied 498 U.S. 1069 (1991); see Powell v. Estelle, 959 F.2d 22, 26 (5th Cir.), cert. denied, 113 S.Ct. 668 (1992) (hearing transcript). This Court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

does not consider the merits of the issue when the appellant fails in that responsibility. Powell, 959 F.2d at 26; see also Richardson, 902 F.2d at 416; see United States v. Hinojosa, 958 F.2d 624, 632-33 (5th Cir. 1992) (counseled appellant). However, failure to order the record is problematic only when the lack of a record prevents the Court from reviewing particular issues. See United States v. O'Brien, 898 F.2d 983, 985 (5th Cir. 1990).

Petitioner Michael J. Marble has not provided a transcript of his bench trial. However, it does not appear from the pleadings, his Spears hearing testimony, or the magistrate judge's detailed memorandum opinion that the issues of improper training or unconstitutional policy were raised in district court. In any event, Officer Padilla-Vazquez would not be an appropriate defendant for those claims. Accordingly, since the issues are raised for the first time on appeal, we decline to address them. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990).

As to his other issue on appeal, Marble does not contend that the magistrate judge's fact findings are incorrect. We can therefore review the legal conclusions without reference to a trial transcript. A prison guard's negligent failure to protect a prisoner from assault does not amount to a violation of the prisoner's constitutional rights under the Due Process Clause. Davidson v. Cannon, 474 U.S. 344, 347-48, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); see Johnston v. Lucas, 786 F.2d 1254, 1260 (5th Cir. 1986). A prison guard violates a prisoner's Eighth Amendment right to be free from cruel and unusual punishment only

if he is deliberately indifferent in protecting a prisoner from other inmates. Wilson v. Seiter, ___U.S.___, 111 S.Ct. 2321, 2323, 2326-27, 115 L.Ed.2d 271 (1991). Because Marble did not establish that Padilla possessed the requisite state of mind to violate his constitutional rights, the magistrate judge's decision is AFFIRMED.