

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5061

Summary Calendar

CECIL LLOYD ALLEN,

Plaintiff-Appellant,

versus

CAPTAIN UNKNOWN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(CA 9 90 183)

(August 12, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Cecil Lloyd Allen, a Texas prisoner proceeding pro se, brought this civil rights action against prison officials pursuant to 42 U.S.C. § 1983. Allen asserts that defendants intentionally deprived him of his property and then refused to return the property in retaliation for his filing a grievance. The district court concluded that Allen's retaliation claim is

* 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 Pursuant to that rule, we have determined that this opinion should not be published.

meritless and dismissed this action with prejudice. Finding no error, we affirm.

I. BACKGROUND

On October 14, 1990, Cecil Allen, Ricky Long, and Herbert Wallace--all inmates at the Eastham Unit of the Texas Department of Criminal Justice, Institutional Division (TDCJ)--were sitting in the facility's day room while waiting for showers. The three inmates had their shower supplies with them, which consisted of soap, shampoo, and deodorant. Several officers then entered the day room, accused the inmates of gambling, and confiscated their shower supplies.

The following day, the inmates visited Captain Jimmy Rollo and requested that their property be returned. Rollo returned Long's and Wallace's shower supplies, but refused to return Allen's. According to Allen, Rollo observed a prison grievance form protruding from his shirt pocket and made a derogatory remark about the form. Allen then protested Rollo's refusal to return his property, and Rollo responded by telling Allen that, if he was dissatisfied with Rollo's refusal to return his shower supplies, he should file a grievance. Allen filed a grievance seeking the return of his property or the retaking of Long's and Wallace's property. According to Allen, the warden then told him to visit Rollo again, he complied, and Rollo again refused to return his property.¹ Allen also alleges that, around the time

¹ The information presented on Allen's grievance form is inconsistent with this statement. According to the grievance form, the warden told Allen to contact Michael Anderson, the

he received the warden's response to his grievance, Anderson told him that he was directed by Rollo to destroy Allen's property because Allen had filed a grievance.

Allen then filed a complaint pursuant to 42 U.S.C. § 1983, and the district court granted him leave to proceed in forma pauperis and referred the matter to a magistrate judge. The magistrate judge held a Spears hearing,² determined that Allen had not exhausted his prison grievance remedies, and instructed Allen to do so. Allen then exhausted his prison remedies and submitted his grievance forms to the district court. The magistrate judge recommended dismissing Allen's complaint. First, the magistrate judge found that Texas provides adequate post-deprivation remedies for intentional deprivations of property. She recommended that Allen's claim that he was deprived of his property without due process of law be dismissed without prejudice pending exhaustion of these state-law remedies. Second, the magistrate judge found that Allen had failed to allege facts sufficient to give rise to a retaliation claim. She therefore recommended that Allen's retaliation claim be dismissed as frivolous. The district court adopted the magistrate judge's report and recommendations and entered a judgment accordingly.

property officer of the Eastham Unit, about regaining his property. The grievance form also states that Anderson advised Allen that he would return Allen's property if no disciplinary action were taken against Allen.

² See Spears v. McCotter, 766 F.2d 179, 182 (5th Cir. 1985).

This court affirmed the district court's dismissal of Allen's due process contention, stressing that Texas provides an adequate post-deprivation remedy for intentional deprivations of property. However, we found that Allen had stated a plausible retaliation claim based upon his allegation that Anderson told him that his property had been destroyed at Rollo's behest. Therefore, we remanded the retaliation claim for further proceedings.

On remand, the district court referred Allen's case to a magistrate judge for a hearing on the merits pursuant to 28 U.S.C. § 636(b)(1). The magistrate judge found that Allen had stated a cause of action under 42 U.S.C. § 1983, and gave Rollo thirty days to answer Allen's complaint. Allen then moved for leave to amend his complaint to add Anderson as a defendant. Allen also complained that the defendants failed to submit an incident report and to hold a hearing which would have enabled him to establish that he was not gambling when his property was confiscated. According to Allen, by failing to hold such a hearing, the defendants violated his right to due process. The magistrate judge granted Allen's motion for leave to amend, ordered Anderson served, and gave Anderson thirty days to answer Allen's complaint.

The magistrate judge then set Allen's case for an expanded evidentiary hearing on the merits and ordered the parties to submit their witness lists. In response, Allen submitted a list identifying John Felder, Willie Gee, and Curtis Shabazz as

witnesses. Allen also noted that "there are additional potential witnesses that could have been named, including, but not limited to, Billy Walker, Bennie Jones, and (FNU) Lightner" and asserted that the prison staff had made it difficult for him to obtain affidavits from these potential witnesses. Specifically, according to Allen, he limited his witness list to Felder, Gee, and Shabazz because he did not "want to participate in this guessing game with prison staff" The magistrate judge ordered Felder, Gee, and Shabazz to be present at the evidentiary hearing.

During the evidentiary hearing, Allen testified consistently with the allegations in his complaint. Felder testified that he stood directly behind Allen at the "property window" when Allen sought return of his property from Anderson and that he heard Anderson tell Allen that Rollo had ordered the destruction of Allen's property because he had filed a grievance. Gee, also in line at the property window when Allen sought the return of his property, testified that he too heard Anderson tell Allen that Rollo had ordered the destruction of Allen's property because of the grievance he had filed.

Rollo testified that he had supervised the shift in Allen's building when Allen allegedly attempted to collect his property, and that he did not remember Allen, Wallace, and Long requesting that their property be returned. Rollo also testified that he did not recall having any problems with Allen, and that he might have told another officer that the warden had instructed him to

return the property of one inmate. According to Rollo, gambling was routine in the prison, the guards frequently seized gambling items and prisoners frequently used their shower supplies for gambling, and he ordinarily was not notified when guards seized property used for gambling. Rollo added that, had he been approached by Allen about the return of property, he probably would have told Allen to see Anderson. According to Rollo, although he knew Anderson, he did not work with him and had no supervisory authority over him. Finally, Rollo flatly denied that he had retaliated against Allen for filing a grievance.

Anderson testified that nobody instructed him to destroy Allen's shower supplies in retaliation for his filing a grievance. In fact, according to Anderson, he and Rollo never spoke about Allen's property until two days before the evidentiary hearing. Anderson added that, in October 1990 when the alleged incident took place, only an official holding the rank of assistant warden or higher could have given him orders regarding a prisoner's property. Finally, Anderson noted that, under prison policy, an inmate facing no charges could have his property returned upon showing proof of ownership and Anderson would destroy confiscated property after thirty days if the owner of that property failed to produce proof of ownership. Allen's property was seized on October 16 and destroyed on December 25, and Anderson speculated that he had destroyed Allen's property because Allen had failed to submit proof of ownership.

At the conclusion of the evidentiary hearing, Allen requested the magistrate judge to address his claim that he was denied due process because no disciplinary hearing was held, thereby depriving him of an opportunity to establish that he was not gambling when his shower supplies were confiscated. Allen also asserted that the guards seized his property in accordance with TDCJ procedure and that, pursuant to section 1983, he should be allowed to pursue federal remedies for the deprivation of a protected property interest. Anderson and Rollo stated that they were unprepared to address Allen's due process assertion, and the magistrate judge then ended the evidentiary hearing without addressing this claim.

The magistrate judge concluded that Anderson destroyed Allen's property in accordance with prison policy because Allen had failed to prove ownership of the property within thirty days from its confiscation. She therefore recommended that the district court dismiss Allen's retaliation claim with prejudice. Allen objected to the magistrate judge's report, asserting that the magistrate judge had erred by concluding that his property was destroyed because he had failed to provide proof of ownership rather than as retaliation for filing a grievance. Allen also asserted that the magistrate judge erred by allowing him to amend his complaint to add a due process contention only to then refuse to allow him to present evidence to support that contention.

The district court conducted a de novo review of the record and overruled Allen's objections to the magistrate judge's

report. The court also noted that Allen had filed another lawsuit and that, in his new complaint, Allen "confesses [that] he would have never filed the instant lawsuit had he known information that came out during the testimony in the [evidentiary] hearing" The district court adopted the magistrate judge's report and recommendations and entered a judgment accordingly.

II. DISCUSSION

Allen appeals from the district court's judgment dismissing both his retaliation and due process claims with prejudice, asserting that this court should remand for another evidentiary hearing. In his appeal, Allen raises the following issues: **(A)** whether the district court, based upon its de novo review of the record, made proper credibility determinations; **(B)** whether the magistrate judge improperly limited the number of witnesses who could testify on Allen's behalf; **(C)** whether the magistrate judge and district court ignored the previous opinion of this court; and **(D)** whether the district court improperly denied Allen's constructive motion to amend his complaint to add a new due process claim.

A. Challenges to the Credibility Determinations

Allen first challenges the district court's credibility determinations regarding the testimony presented at the evidentiary hearing. Specifically, according to Allen, his testimony, along with that of Felder and Gee, establishes that

Rollo and Anderson retaliated against him and that they perjured themselves.

Pursuant to the Federal Magistrate Act, magistrate judges may hold evidentiary hearings in prisoners' civil rights cases and submit proposed findings to the district court. See 28 U.S.C. § 636(b)(1). In the case at issue, the district court conducted a de novo review of the record and considered Allen's objections to the magistrate's report and recommendations before entering its judgment. This court will not overturn a district court's findings of fact absent clear error, and a district court's findings of fact are not clearly erroneous if "plausible in light of the record viewed in its entirety" Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S. Ct. 1504 (1985). In fact, we have expressly held that "[w]e do not casually disturb a district court's credibility determinations" United States v. Casteneda, 951 F.2d 44, 48 (5th Cir. 1992) (citations omitted). We will only do so, and declare testimony incredible as a matter of law, "when testimony is so unbelievable on its face that it defies physical laws" Id., quoting United States v. Lindell, 881 F.2d 1313, 1322 (5th Cir. 1989), cert. denied, 493 U.S. 1087, 110 S. Ct. 2621 (1990).

The record establishes that prison policy dictates that confiscated property be destroyed when it is not claimed within thirty days and that Allen did not claim his property in accordance with this policy. Moreover, Rollo and Anderson both testified that Rollo did not order Anderson to destroy Allen's

property and that they did not retaliate against Allen for filing his grievance. In light of the record read in its entirety, the district court's factual finding that neither Rollo nor Anderson retaliated against Allen is plausible. Accordingly, we conclude that Rollo's and Anderson's testimony is not "so unbelievable on its fact that it defies physical laws[,]" and that the district court's credibility determinations are not clearly erroneous.

B. Allen's Opportunity to Call Witnesses

Allen next contends that he is entitled to an opportunity to impeach Rollo and Anderson with the testimony of Long, Wallace, and Billy Walker, none of whom testified at the evidentiary hearing. Allen did not assert any difficulty in obtaining the testimony of Long and Wallace before the magistrate judge and the district court and, therefore, we will not consider this issue on appeal. Beck v. Lynaugh, 842 F.2d 759, 762 (5th Cir. 1988) ("[A]ppellants would raise on appeal issues not presented to the district court. This they may not do.").

As for Allen's alleged difficulty in obtaining fellow inmate Walker's testimony, Allen prefaced his witness list with a comment that "there are additional potential witnesses that could have been named, including, but not limited to, Billy Walker, Bennie Jones, and (FNU) Lightner." According to Allen, the prison staff obstructed his access to these witnesses and, rather than "participate in [a] guessing game with prison staff," he would proceed with Felder, Gee, and Shabazz as witnesses. At the evidentiary hearing, Allen asserted that he experienced

difficulties in obtaining access to Walker, Jones, and Lightner. The magistrate judge determined that this testimony would have been cumulative of Felder's, Gee's, and Shabazz's, and she then proceeded with the hearing. When objecting to the magistrate's report and recommendations, Allen did not reassert this issue.

Construing Allen's appellate brief liberally,³ he challenges the determination that Walker's testimony would have been cumulative of the testimony given by Allen's other witnesses. Under analogous circumstances where plaintiffs request that the district court exercise its power to subpoena witnesses, we have held that the district court "has discretionary power to refuse to subpoena witnesses and prevent abuse of process in both civil and criminal proceedings." Cupit v. Jones, 835 F.2d 82, 86 (5th Cir. 1987), quoting Mosby v. Mabry, 697 F.2d 213, 214 (8th Cir. 1982). And we have expressly stated that "[i]t is well established that testimony which is merely repetitious and cumulative of testimony already introduced may be excluded by the trial court in its discretion." Harvey v. Andrist, 754 F.2d 569, 572 (5th Cir.), cert. denied, 471 U.S. 1126, 105 S. Ct. 2659 (1985).

Allen, Felder, and Gee all testified about Allen's alleged confrontation with Anderson, and, therefore, Walker's testimony about that confrontation would have been repetitive. The issue addressed during the magistrate judge's expanded evidentiary

³ See Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594 (1972).

hearing was Allen's retaliation claim, not the initial seizure of Allen's property, and, therefore, Walker's testimony about that incident would have been superfluous. Accordingly, we conclude that the district court did not abuse its discretion by accepting the magistrate judge's report and recommendations based upon a de novo review of the record.

C. Compliance with this Court's Previous Opinion

Allen also contends that the district court ignored this court's previous opinion by failing to address whether Allen must establish a liberty interest to pursue his retaliation claim and whether Texas has created a liberty interest through the implementation of its grievance procedures. The magistrate judge found that the defendants did not retaliate against Allen for filing a grievance and the district court adopted this finding. Because the district court, based upon a de novo review of the record, found that Allen's claim of retaliation is without merit, we conclude that there was no need for the district court to reach these secondary issues.

D. Allen's Opportunity to Present his Due Process Claim

Finally, Allen asserts that the district court erred by granting him leave to amend his complaint to add a due process claim only to then refuse to allow him to present evidence to support that claim. In his motion to amend his original complaint, Allen addressed the due process claim now at issue as follows:

The Amended Complaint states claims that arose out of the same transaction asserted in the original complaint

but at the time of filing the original complaint plaintiff was not aware that the conduct of the original defendant gave rise to additional deprivation of plaintiff's constitutionally secured right of due process which was not properly pled in the original complaint.

The magistrate judge granted Allen's motion to amend his complaint in a summary fashion but made express reference to this court's mandate. Later, when Allen attempted to address his "new" due process claim at the expanded evidentiary hearing, the magistrate judge stated that she did not recognize the due process claim now at issue as a new claim. After questioning Allen about the claim, she stated, "I think the Fifth Circuit has resolved that issue and affirmed this Court's decision"

We remanded this case to the district court with an express mandate to address Allen's retaliation claim, and the due process issue which Allen has attempted to raise on remand is outside of the scope of our mandate to the district court. Moreover, in addressing Allen's first appeal to this court, we stated that Texas provides prisoners with adequate post-deprivation remedies and that Allen's due process challenge to Texas' grievance procedures is therefore without merit. We find that Allen's "new" due process claim is simply a reiteration of the due process claim he has raised before and that it is resolved by our previous decision. See Reid v. Rolling Fork Public Utility Dist., 979 F.2d 1084, 1086 (5th Cir. 1992) (discussing the law of the case doctrine); see also Newball v. Offshore Logistics Intern., 803 F.2d 821, 826 (5th Cir. 1986) (a mandate controls on all matters within its scope and that a district court on remand

is free to pass upon any issue which was not expressly or impliedly disposed of on appeal).

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment dismissing Allen's civil rights action.