

IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5214
Summary Calendar

RILEY RAY FULTZ,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas
(92-5214)

(August 20, 1993)

Before JOLLY, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

In this case we are asked to determine whether the district court properly granted summary judgment dismissing all of the appellant's claims in a § 1983 action. Because we find that the district court was correct, we affirm its judgment.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellant Riley Ray Fultz is a Texas state prisoner presently in the custody of the Texas Department of Criminal Justice. He filed a complaint pursuant to 42 U.S.C. § 1983 alleging various violations of his civil rights. Specifically, he alleged that he was improperly classified as a member of a disruptive group, the Aryan Brotherhood of Texas (ABT). He also alleged that the review procedure regarding his gang classification was defective, and additionally made the same argument on behalf of all ABT members. He further alleged that the defendants perpetuated his confinement in administrative segregation (ad seg) as retaliation for his legal activities. He also set forth numerous allegations regarding deficiencies in virtually every aspect of the conditions of ad seg confinement. In sum, he maintains that the totality of his claims result in cruel and unusual punishment and that his constitutional rights to equal protection and due process have been violated.¹

¹Fultz also alleged in his § 1983 complaint that he was denied release to the general population, classified as an escape risk, was on "commissary stinger" restriction, was forced to recreate by himself, was denied access to table games, and was subjected to the "double-door standard." He admits, however, that these allegations were contained in a previous lawsuit that was dismissed by the district court. He alleges that the reason that the district court entered its order of dismissal was because prison officials failed to mail his objections to the magistrate judge's recommendation. His contention is unavailing. Fultz has failed to point to any supporting evidence, nor allege that he filed a motion pursuant to Fed. R. Civ. P. 60(b) or that he appealed the district court's dismissal. Thus, these claims are not properly before this court.

The district judge conducted an evidentiary hearing pursuant to Spears v. McCotter, 766 F.2d 179, 182 (5th Cir. 1985) on January 22, 1992. Prior to the hearing, Fultz filed a motion for leave to file a motion for sub-class certification, and the defendants filed a Rule 12(b)(6) motion to dismiss or, in the alternative, a Rule 56 motion for summary judgment. Fultz then filed a motion for leave to file a response in opposition to defendants' motion to dismiss. Although the district court did not specifically dispose of that motion, the order of dismissal, which granted the defendant's motion for summary judgment, ordered that all motions not already ruled upon were denied.

The district court entered a memorandum opinion granting defendants' motion for summary judgment and dismissed the case with prejudice. The court held that Fultz was not denied due process of law concerning his classification and confinement in ad seg, and that his Eighth Amendment rights had not been violated. Additionally, the district court held that Fultz's constitutional right to equal protection had not been violated.

II

A district court's grant of a summary judgment is reviewed de novo. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1118-19 (5th Cir. 1992). Summary judgment is proper if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Letcher v. Turner, 968 F.2d 508, 509 (5th Cir. 1992); Fed. R. Civ.

P. 56(c). After this burden has been satisfied, the nonmoving party is obligated to establish each of the challenged essential elements of its case for which it will bear the burden of proof at trial. Campbell, 979 F.2d at 1119. The opponent of the motion may not rely on mere allegations or denials set out in its pleadings, but must provide specific facts in demonstrating that there is a genuine issue for trial. This court uses the same standards as the district court and draws all inferences and views all factual issues in favor of the party opposing the motion. Letcher, 968 F.2d at 509.

III

A

As an initial matter, Fultz argues, both on appeal and in his response to defendants' motion for summary judgment, that he was denied an adequate opportunity to engage in discovery. In essence, he asserts that he should have been allowed to discover the prison records submitted by the defendants concerning his classification and retention in ad seg because they would prove his allegations, although he does not explain how discovery would establish material issues of fact to contradict the contents of his prison record.

Fed. R. Civ. P. 56 does not require that discovery take place before summary judgment can be granted. If a party cannot adequately defend the motion for summary judgment without discovery, Rule 56(f) allows the opposing party to request a continuance to conduct discovery. Washington v. Allstate Inc. Co.,

901 F.2d 1281, 1285 (5th Cir. 1990). Vague assertions that discovery will produce needed but unspecified facts are insufficient to obtain a Rule 56(f) continuance.

Fultz is responsible for his failure to request a Rule 56(f) continuance. Martin v. Harrison County Jail, 975 F.2d 192, 193 (5th Cir. 1992). A district court is not required to notify a pro se litigant of the potential consequences of a summary judgment motion and of his right to submit opposing affidavits because the Rules of Civil Procedure and local rules provide sufficient notice. Fultz's entitlement to discovery prior to a ruling on a summary judgment motion may be terminated when, within the trial court's discretion, the record indicates that further discovery is not likely to produce facts necessary to defeat the motion. Fisher v. Metropolitan Life Ins. Co., 895 F.2d 1073, 1078 (5th Cir. 1990). Thus, having failed to file a Rule 56(f) motion in the district court, Fultz is not entitled to appellate relief on the ground that the district court ruled precipitously on the motion for summary judgment. Martin, 975 F.2d at 193.

The district court's ruling regarding discovery in a summary judgment context is reviewed for abuse of discretion. Washington, 901 F.2d at 1285-86; Mills v. Damson Oil Corp., 931 F.2d 346, 350-51 (5th Cir. 1991). The district court stayed discovery pending the entry of a show-cause order. No specific show-cause order was entered although the defendants were ordered to answer Fultz's complaint. The defendants submitted Fultz's prison records

comprised of classification documents relating to Fultz's claims for an in camera inspection. They argued that they were "reluctant to furnish plaintiff with such record due to the possibility that identities of informants may be ascertained. Even if the records are excised circumstances, dates, cell assignments and other facts may permit identification and exposure to risk." The district court evidently conducted an in camera inspection of the documents prior to rendering its opinion, and ordered that the Clerk of Court "seal the prison records submitted by the Defendants. . . ."

A review of those records evidences their confidential nature and the possibility that confidential informants could be identified and compromised had Fultz been allowed to discover the documents. Due to the vague nature of Fultz's request for discovery, the confidential nature of the documents sought to be discovered, and his failure to request a Rule 56(f) continuance, the district court did not abuse its discretion in denying his request before ruling on the motion for summary judgment.

B

As an additional preliminary matter, Fultz argues that foul play occurred because the appellate record is allegedly devoid of certain vital and material documentary evidence. Specifically, Fultz refers to exhibits that he filed during his Spears hearing, a transcript of his Spears hearing, his motion for sub-class certification attached to his motion for leave to file said motion, his response to defendants' motion for summary judgment attached to

his motion for leave to file said motion, his second motion for appointment of counsel attached to his motion for leave to file said motion, and page five of defendants' motion for summary judgment. He is mistaken.

Although page five of defendants' motion for summary judgment is not in the first volume of the record, it is in the supplemental record. Additionally, there is a transcript of his Spears hearing² and the exhibits that he submitted at that hearing are also part of the record. Fultz's second motion for appointment of counsel, his response to defendants' motion for summary judgment, and his motion for sub-class certification are contained in the second supplemental record. His allegation of foul play is therefore meritless.

IV

We now turn to the merits of the substantive arguments Fultz raises on appeal. Fultz argues that the district court improperly granted summary judgment on several issues because a genuine issue of material fact exist concerning: 1) his classification as a gang member; 2) the constitutionality of the prison's ad seg review process; and, 3) the defendants' allegedly retaliatory scheme to prevent his release to the general prison population.

². We note that Fultz has not requested a copy of the Spears hearing transcript. See 28 U.S.C. § 753(f).

Gang Classification

Fultz contests the propriety of his classification as a gang member. Prison officials have broad discretion in classifying inmates, and federal courts will interfere with classification decisions only in extreme circumstances. "In reviewing prison administrative actions in section 1983 actions, the court must uphold the administrative decision unless it was arbitrary and capricious." Stewart v. Thigpen, 730 F.2d 1002, 1005 (5th Cir. 1984). "The transfer of an inmate to less amiable and more restrictive quarters for nonpunitive reasons" is an event within the compass of a prison term. Hewitt v. Helms, 459 U.S. 460, 468, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). Inmates have neither protectable property nor liberty interests in custodial classification. Moody v. Baker, 857 F.2d 256, 257-58 (5th Cir.), cert. denied, 488 U.S. 985 (1988). To the extent that Fultz's claim is that he is improperly classified, he has not stated a constitutional violation.

To the extent that he claims his confinement in ad seg is a result of a disciplinary proceeding, there is "some evidence" to support the prison officials' action. Federal review of the sufficiency of the evidence at a disciplinary hearing resulting in ad seg confinement is limited to determining only whether the findings were supported by "some facts" or "any evidence at all."

Stewart, 730 F.2d at 1006; Gibbs v. King, 779 F.2d 1040, 1044 (5th Cir.), cert. denied, 476 U.S. 1117 (1986).

An administrative segregation report dated November 16, 1984, recommended that Fultz be placed in ad seg protective custody because several threats were received against him due to a "wide spread belief in the inmate general population that he (Fultz) played a direct role in the November 14, 1984, stabbing of [another] inmate. . . ." Fultz refused to sign this ad seg report. An administrative segregation hearing was conducted on November 21, 1984. Fultz was appointed counsel substitute. He was permitted to make a statement, none of his witnesses were excluded, and those witnesses were allowed to make statements. As a result of the hearing, Fultz was confined to ad seg protective custody.

An administrative segregation report dated January 18, 1985, indicates that Fultz was reclassified from "protective custody" to "threat to the order of and security of the institution" as well as "the physical safety of other inmates or staff." The report indicates that Fultz had eight major disciplinary infractions since August 1980 and was a known member of a racist group (ABT). Additionally, an investigation tied him to a severe assault on an inmate. Further, Fultz had a prior history of escape from the Texas Department of Corrections (TDC) and had felony detainers against him related to bank robberies allegedly committed while on escape.

An administrative segregation hearing record dated January 1, 1985, indicates that Fultz received notice of his placement in ad seg security detention, refused to appear, was appointed counsel substitute, was allowed to make a statement, and refused to sign the record. Additionally, Fultz's prison record indicates that a number of individuals identified him as a ABT member and indicated their fear of him. "Some facts" exist which support his confinement to ad seg security detention.

Fultz also claims that the Administrative Segregation Plan (ASP) and the TDC Disciplinary Rules and Procedures for Inmates equate to a state-created liberty interest to remain in the general population. He is mistaken. He contends that ASP §§ I(A), III(A)(e), and A(4)(b), in conjunction with the TDCJ Disciplinary Rules, contain mandatory language which creates particular substantive criteria for limiting the discretion of prison officials. See Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983); white brief, 11-14. Even assuming, arguendo, that he does have a liberty interest, record evidence supports the prison officials' actions. Fultz's due process rights were not violated.

Fultz further argues that TDC administrative directive AD-04.12, is being misapplied to circumvent established procedures for releasing Fultz to the general population. His argument on this point is similarly unavailing. As previously discussed,

Fultz's prison record evidences his gang affiliation and the propriety of his ad seg confinement.

B

Review Process

Fultz also contends that he has been denied periodic review of his gang status. This argument is factually incorrect. A review of his prison record indicates that he has received numerous reviews in accordance with the ASP § III(A)(3). Fultz has shown no constitutional violation nor any fact issue which would preclude summary judgment.

C

Retaliatory Scheme

Fultz also contends that ad seg is being used as a retaliatory tool to harass and intimidate him. Specifically, he contends that he is: 1) denied the same privileges, exercise periods, and educational programs as general population prisoners; 2) denied access to the courts due to denial of inmate legal visits and assistance and access to law books and materials; 3) forced to recreate by himself; and, 4) subjected to intolerable cell conditions. All other complaints concerning conditions of ad seg raised in the district court are not raised on appeal, and thus those issues are deemed abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

With regard to his argument concerning ad seg conditions versus the general prison conditions, ad seg inmates do not have a

constitutional right to the same conditions as general population prisoners. See Dorrough v. Hogan, 563 F.2d 1259, 1262-63 (5th Cir. 1977), cert. denied, 439 U.S. 850 (1978).

With regard to his argument concerning single-man recreational status, there is no constitutional right to group recreation in prison. Fultz does not contend that he is denied the opportunity to recreate; he argues only that other prisoners have group recreation, so he should receive it also. The ASP grants prison officials the discretion to determine an inmate's recreational schedule. ASP § II(A)(3)(a). Furthermore, the segregation of violent inmates is reasonably related to the prison administration's legitimate interest in protecting prison guards and other prisoners from danger and preserving some degree of harmony in the institution. Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir.) (en banc) (prison officials have a duty to control or separate prisoners who endanger the physical safety of other prisoners), cert. dismissed, 453 U.S. 950 (1981). The segregation of gang members satisfies a legitimate penal interest which does not invalidly impair Fultz's constitutional right to equal protection.

With regard to Fultz's claim of intolerable cell conditions, he is apparently referring to an incident where his cell was allegedly without water for approximately three days. His grievance was investigated by the prison's Internal Affairs Division and that investigation found that the plumbing problem

relative to Fultz's comode was not created "to harass or discriminate against [Fultz] in any way."

Fultz further claims that he was denied inmate legal visits and assistance and access to law books and legal materials. Although less than clear, it appears that Fultz is requesting the same privileges with regard to the law library and legal materials that general population inmates receive. He does not have that right. See Dorrough, 563 F.2d at 1262-63.

With regard to the denial of inmate legal visits and assistance, he has offered only conclusional allegations which do not rise to the level of a constitutional claim. Ross v. Estelle, 694 F.2d 1008, 1012 (5th Cir. 1983). In fact, the only indication in the record with regard to the denial of inmate legal visits concerns a denial of three visits, all on August 1, 1989, wherein the visits were denied due to a threat to security. Fultz has offered no evidence or authority to indicate that those denials were improper or unconstitutional. His claim on this point is without merit.

V

As a final matter, Fultz contends that the district court erred by denying his motion for sub-class certification without ruling on its merits. He is mistaken. In order to obtain class certification for his action, Fultz must, inter alia, proceed through qualified counsel who is able to conduct the proposed litigation. Gonzales v. Cassidy, 474 F.2d 67, 72, 72-73 n.10 (5th

Cir. 1973); Fed. R. Civ. P. 23(a). Fultz has not done this. The district court did not err in denying his motion.

VI

In conclusion, because Fultz has failed to show a constitutional violation or a genuine issue of material fact regarding same, the district court's grant of summary judgment dismissing all of the appellant's claims is

A F F I R M E D.