IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5252
(Summary Calendar)

MICHAEL JOHN TURNBOUGH,

Plaintiff-Appellant,

versus

NASH MOXON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(91-CV-222)

(May 26, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Michael John Turnbough, a Texas state prisoner proceeding pro se and in forma pauperis (IFP), appeals the dismissal of the civil rights complaint he filed pursuant to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

42 U.S.C. § 1983. Turnbough alleged that prison officials retaliated against him for filing a grievance. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

After Turnbough filed his lawsuit, the matter was referred to the magistrate judge who conducted an evidentiary hearing pursuant to Spears v. McCotter, 766 F.2d 179, 182 (5th Cir. 1985). At the Spears hearing, Turnbough consented, pursuant to 28 U.S.C. § 636(c), to have the magistrate judge conduct all further proceedings, including trial.

Turnbough testified at the Spears hearing regarding his retaliation claim, alleging that he was deprived of due process during a prison disciplinary hearing. The crux of Turnbough's retaliation claim is that, when he was transferred to the Coffield Unit, he was retaliated against by Warden Alford for filing a grievance against Warden Moxon (warden of Beto I, where Turnbough had been previously incarcerated). The alleged retaliation was by way of Turnbough's assignment to field work. He claims that as a result of that assignment he developed a sunburn. Turnbough admits, however, that he received proper medical attention for that ailment.[1]

[1] Turnbough has not expressly argued, either in the district court or on appeal, that the defendants were deliberately indifferent to his serious medical needs. His appellate argument regarding the admissibility of testimony of prison medical staff relates to the issue of damages arising from his retaliation claim only.

After the Spears hearing, the magistrate judge dismissed all defendants except Moxon and Alford, whom he ordered to file answers regarding the retaliation claim only. Alford answered, but the claims against Moxon were dismissed after the magistrate judge reconsidered them. The case against Alford as the sole remaining defendant was tried to a jury, with the magistrate judge presiding. The jury found that Alford had neither retaliated against Turnbough for filing a grievance against Moxon nor discouraged him from exercising any future right of access to the grievance procedure. Final judgment was entered accordingly and the case was dismissed, after which Turnbough timely filed his notice of appeal.

II

ANALYSIS

A. Propriety of Consent to Trial Conducted by the Magistrate Judge

Turnbough contends that the magistrate judge "required [him] to execute the [jury trial] consent form in open court during a SPEARS hearing," which he contends "subverts the blind consent provision of 28 U.S.C. § 636(c)(2) and the intent of Congress." Thus, he maintains that his waiver of his right to trial before an Article III judge was invalid, making the magistrate judge lack jurisdiction to conduct the jury trial and thus requiring a remand for a new trial.

At the Spears hearing, the following exchange occurred.

BY THE COURT:

> Mr. Turnbough, you filed a civil suit complaining of the violation of your civil rights. If as a result of this hearing this morning I decide that your rights may

have been violated, I'll recommend that you have a trial, and that, of course, will be a jury trial, because the Attorney General always demands a jury trial. If one party to a lawsuit demands a jury trial, the case is tried to a jury.

In trying to help bring your case to trial sooner, Congress has allowed civil cases to be tried by magistrate judges, if the parties consent, and that's what I am, a magistrate judge. Are you interested in consenting to that procedure?

[TURNBOUGH:]

I think I would just rather go to a jury trial, Judge.

[BY THE COURT:]

Well, that's what it would be. It would be a jury trial with me presiding if you're allowed to proceed, and the jury would decide your case.

[TURNBOUGH:]

That's fine with me.

[BY THE COURT:]

Okay, if you'll sign this paper then.

Both parties consented to trial before the magistrate judge, and signed the applicable form. Approximately one month later, Turnbough filed a motion to vacate his consent. The magistrate judge denied that motion, holding that Turnbough would "not be permitted to revoke his consent and forum shop."

The consent form which Turnbough signed reflects that his consent to trial before the magistrate judge was "clear and unambiguous." Parks v. Collins, 761 F.2d 1101, 1106 (5th Cir. 1985); see 28 U.S.C. § 636(c). Turnbough's insistence that his consent was coerced is refuted by the record.

Valid consent to trial before a magistrate judge waives the

right to trial before an Article III judge. Once that right is knowingly waived, as in this case, "a party has no constitutional right to recant at will." Carter v. Sea Land Services, Inc. 816 F.2d 1018, 1021 (5th Cir. 1987). Therefore, Turnbough's argument that the magistrate judge erroneously denied his motion to vacate consent is without merit. "[M]otions to withdraw consent before a magistrate may be granted only for good cause, determination of which is committed to the court's sound discretion." Id. at 1021.

Turnbough did not demonstrate good cause to the magistrate judge. In his motion to vacate consent, Turnbough alleged that he "made it clear at the Spears hearing . . . that [he] only wanted to proceed before a United States District Judge." He insists that he thought he was signing "a Notice of Appeal," as opposed to a consent form. The record clearly indicates otherwise. When informed that he would receive a jury trial with the magistrate judge presiding, Turnbough stated "[t]hat's fine with me." On appeal, Turnbough fails to offer any argument that would establish that the denial of his motion to withdraw consent constituted an abuse of discretion, so his arguments are unavailing.

B. Propriety of Dismissing Moxon

Turnbough also contends that the district court erred by dismissing defendant Moxon. Turnbough's complaint and the evidence elicited at the Spears hearing show that Turnbough alleged that he was improperly written up by Moxon, and was called a liar by Moxon during a prison disciplinary hearing. After the Spears hearing,

Moxon was initially ordered to answer Turnbough's complaint, but Turnbough then filed a motion for default judgment against Moxon. Upon further consideration, the magistrate judge determined that (1) Turnbough's claims against Moxon were unrelated to Turnbough's retaliation claim against Alford; (2) the claims against Moxon were essentially claims of malicious prosecution, libel, and slander, all of which were more properly claims of state law violations; and (3) those claims were insufficient to amount to a constitutional violation. Citing Geter v. Fortenberry, 849 F.2d 1550, 1556 (5th Cir. 1988), the magistrate judge dismissed Moxon and denied Turnbough's motion for default judgment. Turnbough then filed a motion for reconsideration which likewise was denied.

Although the magistrate judge did not refer to 28 U.S.C. § 1915(d) in the order dismissing Moxon, the dismissal is implicitly a finding that Turnbough's claims against Moxon are legally frivolous. Spears, 766 F.2d at 181 n.3. An IFP complaint alleging a violation of 42 U.S.C. § 1983 may be dismissed as frivolous if it lacks an arguable basis in law or in fact. Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992). We review a § 1915(d) dismissal under the abuse-of-discretion standard. Id. at 1734.

Claims such as slander, libel, and malicious prosecution are matters more properly within the realm of state tort law, seldom if ever amounting to constitutional violations. See Geter, 849 F.2d at 1556-57. The district court did not abuse its discretion in dismissing Turnbough's claims against Moxon. Furthermore,

Turnbough's allegation that he was retaliated against by Moxon's filing of false disciplinary charges is specifically raised for the first time on appeal, so it is not properly before us. Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985).

C. Medical Claims

Turnbough also contends that the magistrate judge erred by using prison medical records and the testimony of prison medical staff "to factually resolve and dismiss Plaintiff's medical claims." But Turnbough asserted no "medical claims." All that he alleged was that he was retaliated against by Alford and was subjected to cruel and unusual punishment by being assigned to field workSQan assignment allegedly inconsistent with Turnbough's medical conditionsQwhich produced "mental pain, anguish, and a severe sunburn."

Although Turnbough maintains that his medical classification precluded the work assignment he received upon transfer to the Coffield Unit, he does not allege even inferentially that any defendants were deliberately indifferent to his serious medical needs. In fact, the medical records relied on at the Spears hearing were not used to dismiss Turnbough's retaliation claim against Alford; that claim proceeded to a jury trial on the merits. As Turnbough confuses deliberate indifference with retaliation, his argument is factually frivolous.

D. Conspiracy Allegations

Turnbough next contends that a conspiracy existed "among several Defendants to retaliate against him for assisting other

inmates in legal matters and pursuing complaints of official misconduct through the prison grievance process and the courts." Specifically, he avers that three officialsSQMoxon, Disciplinary Captain Richard Thompson, and Supervisor Thelma SoapesQconspired to file a false disciplinary charge[2] against him for exercising grievance procedures. He does not, however, allege that those three individuals denied him due process in grievance procedures.

Turnbough's argument that the guilty finding at his disciplinary hearing was not supported by sufficient evidence is unmeritorious. Federal review of the sufficiency of the evidence supporting a prison disciplinary finding is limited to determining whether the findings are supported by any evidence at all. Stewart v. Thigpen, 730 F.2d 1002, 1005-06 (5th Cir. 1984).

Turnbough admits Moxon testified at the disciplinary hearing that Turnbough was to receive money for doing inmate legal work. Additionally, inmate Brown, who allegedly directed his sister to send Turnbough money in exchange for legal services, stated in his affidavit that he "only told [his] sister to send Mr. Turnbough the money to thank Mr. Turnbough for his help. [He] knew [his] sister would not send Mr. Turnbough the money unless [he] told her [he] owed the money to Mr. Turnbough." We find that the prison disciplinary decision is supported by "some evidence." Turnbough's argument that his disciplinary hearing violated due process is

[2] Turnbough and inmate Charles Brown were charged with soliciting assistance from an inmate to violate prison rules, stemming from an allegation that Turnbough was to receive money via Brown's sister in exchange for legal work done for Brown.

misplaced. As he was given timely notice of the charges against him, had an opportunity to present evidence at the hearing, and was given a copy of the disciplinary board's findings, the constitutional minima for the hearing were met. See Wolff v. McDonnell, 418 U.S. 539, 564-66, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

As for Turnbough's retaliatory conspiracy claim itself, if conduct claimed to constitute retaliation does not, by itself, raise an inference of retaliatory motivation, then the claim fails as conclusional unless the plaintiff makes other factual allegations showing a retaliatory motive. Whittington v. Lynaugh, 842 F.2d 818, 819 (5th Cir.), cert. denied, 488 U.S. 840 (1988). Turnbough's claim of retaliation involving the three alleged conspirators is classically conclusional; and he has not made any other factual assertions indicating a retaliatory motive. Turnbough's merely conclusional assertion of the existence of a conspiracy is therefore frivolous. Wilson v. Budney, 976 F.2d, 957, 958 (5th Cir. 1992). Turnbough has not shown an abuse of discretion regarding the dismissal of either the claim or the alleged conspirators. See Denton, 112 S.Ct. at 1734.

E. Admission of Medical Testimony

Turnbough next contends that the magistrate judge erred at trial by admitting the testimony of Dr. Ford and Nurse Fountain. The crux of his argument is that the defense did not timely comply with the Track 2 Disclosure Plan (Plan). Turnbough also argues that the magistrate judge erred by allowing the testimony of

"untimely and improperly disclosed witnesses." His arguments are unconvincing.

The magistrate judge assigned Turnbough's case to "Track 2 for case management purposes." Turnbough filed his notice of disclosure pursuant to the Plan. Turnbough then filed for leave to file, inter alia, a "Motion to Dismiss or Alternatively Preclude Evidence and Witnesses as a Sanction for Failure to Properly Disclose as Required by the `Plan.'" Three days later Alford filed a "Continuation of Disclosure," stating that the delay in providing the remaining materials was "due to fact that [he] simply did not have [the remaining materials].

The next day Turnbough filed a motion for Alford's counsel to be held in contempt. After Turnbough's motion for leave to file was granted, he filed, inter alia, a motion to strike disclosures and a motion to dismiss or alternatively preclude evidence and witnesses. The motions were denied as moot because Alford had filed his "Continuation of Disclosure" on June 1, 1992. Trial was reset for July 29, 1992, and Turnbough's motion for contempt was denied.

Alford next filed a notice of disclosure on June 30, 1992. He subsequently filed a motion to alter the disclosure. Turnbough then filed a "Continuation of Disclosure" and attached his prison medical records. After various resettings, trial commenced on November 4, 1992.

A trial court's decision regarding the admissibility of evidence as a means of enforcing a pretrial order is reviewed for

a clear abuse of discretion. Geiserman v. MacDonald, 893 F.2d 787, 790 (5th Cir. 1990); Fed. R. Civ. P. 16(f).

1. Dr. Ford's Testimony

Alford offered Dr. Ford as an expert witness and Turnbough objected. The crux of Turnbough's objection was that he did not receive disclosure that Dr. Ford was to be an expert witness until one day after the discovery deadline. The magistrate judge, noting that Turnbough had a transcript of the Spears hearing at which Dr. Raspberry (another prison doctor) testified, permitted Dr. Ford to testify but stated that if "Dr. Ford's testimony varies from the Spears hearing [the magistrate judge would] entertain an objection." Turnbough's counsel objected to Dr. Ford's testimony on a number of occasions, asserting that it went beyond Dr. Raspberry's testimony offered at the Spears hearing.

Those objections were overruled because the magistrate judge determined that Dr. Ford's testimony was offered to rebut the testimony of Turnbough's expert witness, Dr. Chester Ingram. A review of Dr. Ford's testimony shows that it concerned Turnbough's medical records and the matters developed at the Spears hearing. Interestingly, Dr. Ford had been listed by Turnbough as a witness in his initial notice of disclosure; apparently he had expected Dr. Ford to testify at trial. Turnbough also listed Dr. Ford in a supplemental disclosure. Dr. Ford testified about Turnbough's medical recordssQrecords which Turnbough possessed. Turnbough has not shown an abuse of discretion by the magistrate judge in allowing Dr. Ford to testify to the extent he did.

2. Nurse Fountain

Turnbough argues that the magistrate judge erred by allowing Nurse Fountain to testify at trial. The magistrate judge let Nurse Fountain testify as a fact witness only, prohibiting her from expressing any opinions. Nurse Fountain testified that in light of Turnbough's medical records she treated him for sunburn but did not observe any blisters. She did not offer any opinion testimony. Additionally, like Dr. Ford, Nurse Fountain had been listed by Turnbough in his Initial Notice of Disclosure. Turnbough has again failed to show an abuse of discretion.

F. Jurors Challenged for Cause

Turnbough enumerates as an issue on appeal the claim that the magistrate judge improperly failed to sustain Turnbough's challenge of three jurors for cause. Nevertheless, Turnbough admits that he has not presented any argument regarding this issue, stating that the "[p]age limitation prevented presentation of this error." We note in this regard that Turnbough never requested permission to file a brief in excess of the 50 page limitation under our rules. See Fed. R. App. P. 28(g). Issues listed but not addressed or adequately briefed are deemed abandoned. Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). Therefore, we shall not consider this issue on appeal.

For the foregoing reasons, the district court's dismissal of Turnbough's action is

AFFIRMED.