UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7318
Summary Calendar

HARVEY F. GARLOTTE, ET AL.,

Plaintiffs,

HARVEY F. GARLOTTE,

Plaintiff-Appellant,

versus

MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
(CA GC89-358-B-D)

(March 16, 1994)

Before POLITZ, Chief Judge, JONES and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:[*]

Harvey F. Garlotte appeals the dismissal, after a bench trial, of his prisoner civil rights suit. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Garlotte's eighth amendment complaint challenged the conditions of his confinement, specifically the failure of prison officials to control the level of noise which interfered with Garlotte's attempts to read, write, and sleep. Following a **Spears**[1] hearing, during which the magistrate judge permitted unserved defendants to participate, several defendants were dismissed. After a bench trial the magistrate judge recommended dismissal of the remaining claims. The district judge rejected Garlotte's objections and request for reconsideration and accepted the magistrate judge's recommendations. Garlotte timely appealed.

Garlotte raises multiple issues on appeal. None has merit. We review each in turn.

He challenges the **Spears** hearing. That screening procedure is well established in this circuit. Even if it were not, the bench trial following the hearing would have mooted any challenge. Garlotte complains that some of the defendants were allowed to participate in the **Spears** hearing. We authorize such.[2] He complains that some defendants received copies of his pleading before it was served. No possible prejudice resulting from this was shown, nor could any be shown.

Garlotte complains that certain defendants were improperly dismissed over his objections. Given our conclusion that no claim was established against any prison official the interim dismissal of some cannot be prejudicial and reversible error. He also

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[1] **Spears v. McCotter**, 766 F.2d 179 (5th Cir. 1985).

[2] **Wilson v. Barrientos**, 926 F.2d 480 (5th Cir. 1991).

complains that he was not given appointed counsel. That is a matter left to the discretion of the trial judge and we perceive no abuse of that discretion.[3]

Garlotte next contends that the magistrate judge erred by granting defendants' motion for a protective order to Garlotte's attempt to secure production of an inordinate number of records. This is a matter within the discretion of the district and magistrate judges.[4] We find no abuse particularly in light of the court *a` quo*'s order describing a more narrowly drawn request which Garlotte might have used. Nor is there any merit to Garlotte's complaint of untimeliness of the request for a protective order. The court may extend that time.[5]

Garlotte contends that the trial court erred in denying him a continuance. We review this denial for abuse of discretion and find none. The **Spears** hearing was on April 17, 1991. A scheduling order was entered on August 16 requiring completion of discovery by November 15, 1991. Garlotte's discovery request came on October 24, six months after the defendants were served and over two months after entry of the scheduling order. The court extended discovery until January 3, 1992. Garlotte had ample time for discovery. He is responsible for his own delays in initiating requests.

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[3] 28 U.S.C. § 1915(d); **Ulmer v. Chancellor**, 691 F.2d 209 (5th Cir. 1982).

[4] **Wichita Falls Office Assoc. v. Banc One Corp.**, 978 F.2d 915 (5th Cir. 1992), cert. denied, 113 S.Ct. 2340 (1993).

[5] See Fed.R.Civ.P. 34(b), 36(a).

Garlotte then challenges the magistrate judge's entry of a scheduling order, contending that the local rules do not permit of such in prisoner *pro se* cases. He errs. The local rules view the routine entry of scheduling orders inappropriate in such proceedings. Those rules do not proscribe their use in a specific case, as here, after a **Spears** hearing.

Garlotte next argues that the district court did not consider his objections or review the evidence *de novo*. The record belies both complaints and supports the findings that there was no eighth amendment violation as a result of the noise and the prison officials were not deliberately indifferent to Garlotte's rights. These are factual findings which we may reject only if found to be clearly erroneous.[6] We do not so find.

The remainder of Garlotte's assignments of error either are totally devoid of merit or were not raised in the district court and cannot be first considered on appeal.[7]

AFFIRMED.

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[6] **Alberti v. Sheriff of Harris County, Tex.**, 978 F.2d 893 (5th Cir. 1992), cert. denied, 113 S.Ct. 2996 (1993).

[7] **United States v. Garcia-Pillado**, 898 F.2d 36 (5th Cir. 1990).