

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1451

BUFORD GLEN WHITEHEAD,

Plaintiff-Appellee,

v.

EASTLAND COUNTY, TEXAS, ET AL.,

Defendants

EASTLAND COUNTY, TEXAS, DEE HOGAN, and DAVID FRANKLIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(1:91-CV-098-C)

(May 29, 1995)

Before KING and JONES, Circuit Judges, and LAKE*, District Judge.

PER CURIAM:**

Plaintiff, Buford Glen Whitehead, appeals from the judgment of the district court denying him any recovery against defendants Eastland County, Texas, Dee Hogan, and David Franklin. Whitehead argues that the district court erred in denying his request for appointment of counsel, in denying his motion to subpoena witnesses, and in granting defendant Hogan's motion for judgment as a matter of law. Because we conclude that the district court erred

* District Judge for the Southern District of Texas, sitting by designation.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

in denying Whitehead's motion for appointment of counsel, we reverse and remand this case for a new trial without addressing the other issues that Whitehead presents for review.

On September 13, 1991, Buford Glen Whitehead filed a complaint pursuant to 42 U.S.C. § 1983 against Eastland County, Texas, Sheriff Dee Hogan, Deputy Sheriff David Franklin, Texas parole officer Lydia DeLeon, and Sandra Gray, alleging that the defendants conspired to prosecute him for sexually assaulting Gray. R. vol. 1, 9. Whitehead alleged that he had consensual sex with Gray, that Franklin forced Gray to sign a complaint against him, and that even though Gray eventually withdrew the complaint, the complaint resulted in the revocation of his parole because he had followed DeLeon's advice to waive a revocation hearing. Id. at 9, 11. Whitehead was allowed to proceed in forma pauperis. Id. at 3. On March 23, 1992, Whitehead filed an amended complaint naming only Eastland County, Hogan, and Franklin as defendants, id. at 86, and the district court dismissed his claims against Gray and DeLeon. R. vol. 2, 151.

Following a Spears¹ hearing, the magistrate judge determined that Whitehead's complaint stated claims against Hogan and Franklin in their individual capacities for false arrest, false imprisonment, and malicious prosecution that should be presented to a jury. Id. at 219. The district court adopted the magistrate judge's recommendation and determined that the complaint also stated claims

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

against Hogan and Franklin in their official capacities. Id. at 226-230.

Several months before trial Whitehead filed a letter and a motion requesting the appointment of counsel, both of which were summarily denied without explanation by the district court. Id. at 237-240, 251.² Whitehead also filed a motion requesting the court to subpoena a number of witnesses, including Gray, for trial. Id. at 244-246. The district court denied the motion citing Hodge v. Prince, 730 F. Supp. 747 (N.D. Tex. 1990), aff'd, 923 F.2d 853 (5th 1991)(Table), on grounds that Whitehead had not submitted witnesses' fees. Id. at vol. 3, 353 n.1.

Whitehead represented himself at trial while defendants were represented by counsel. The jury failed to find that Hogan and Franklin conspired to deny Whitehead due process or falsely arrested Whitehead and failed to find that Franklin maliciously prosecuted Whitehead. However, the jury found that Hogan maliciously prosecuted Whitehead. The jury awarded Whitehead no actual damages but awarded him punitive damages of \$3,800. R. vol. 3, 526-529. Defendants moved for judgment as a matter of law, arguing that the jury verdict against Hogan should be set aside because there was no evidence that Hogan maliciously prosecuted Whitehead.

² We are aware that the magistrate judge explained his reasons for denying a request for the appointment of counsel that Whitehead made before his Spears hearing was held. R. vol. 1, 56-58. The order recited that at that stage of the case exceptional circumstances did not exist, but that after the magistrate judge had conducted a Spears hearing "circumstances changing, the plaintiff may again at his election request appointment of counsel."

Id. at 532-537. The district court granted defendants' motion, id. at 540, and entered judgment that Whitehead take nothing. Id. at 541-47.

The central dispute in the case arose over the conflicting versions of what Sandra Gray's testimony would have been at trial. Whitehead testified that Gray consented to have sex with him and that she subsequently signed a statement that she wished to dismiss the charges that she had filed against him because he did not rape her. R. vol. 4, 16, 20, 22. The district court would not admit Gray's signed statement because Gray was not present to authenticate it. Id. at 21, 100. Whitehead also testified that Gray was told by officials that her parole would be affected if she dropped the charges. Id. at 22. Defendants denied hampering Gray's attempt to exculpate Whitehead and asserted that Gray dismissed the charges because Whitehead's family badgered her. Id. at 112-113, 116-117. Gray's testimony would have been highly probative of the issues raised in the case, as evidenced by a jury note asking "[i]s it possible to have Sandra Gray brought in to testify." R. vol. 3, 500.

This court reviews the district court's denial of Whitehead's motion for appointment of counsel for an abuse of discretion. Jackson v. Dallas Police Dept., 811 F.2d 260, 261 (5th Cir. 1986). Whitehead argues that because he had colorable claims that required an attorney's assistance with discovery, witnesses, objections, and other legal issues such as the authentication of documentary evidence, the district court abused its discretion in failing to

appoint counsel. In support of his argument Whitehead cites Lopez v. Reyes, 692 F.2d 15, 17 (5th Cir. 1982), for the principle that counsel should have been appointed because there were a number of disputed issues of fact in the case. Citing Jackson, 811 F.2d at 261, appellees argue the district court did not abuse its discretion in denying Whitehead's motions for appointment of counsel because this case did not present any "exceptional circumstances" warranting the appointment of counsel.

Because there is no automatic right to the appointment of counsel in a § 1983 case, district courts are not required to appoint counsel unless the case presents "exceptional circumstances." Jackson, 811 F.2d at 261, citing Branch v. Cole, 686 F.2d 264, 266 (5th Cir. 1982). Because, as stated in Branch, "[n]o comprehensive definition of exceptional circumstances is practical, . . . [t]he existence of such circumstances will turn on the quality of two basic factors -- the type and complexity of the case, and the abilities of the individual bringing it." 686 F.2d at 266. In Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982), the court set forth a number of factors that district courts should consider in ruling on motions for appointment of counsel: (1) whether the case is complex; (2) whether the plaintiff is capable of presenting the case adequately; (3) whether the plaintiff is in a position to investigate the case; (4) whether the evidence consists in large part of conflicting testimony requiring skilled examination of witnesses; and (5) whether appointed counsel would aid in the efficient and equitable disposition of the case. In Jackson

the court directed district courts "[i]n considering motions for appointment of counsel in section 1983 cases . . . [to] make specific findings on each of the Ulmer factors rather than deciding the motion in a conclusory manner," and further stated that "[t]he failure to issue findings frustrates appellate review and cannot ordinarily be accepted." 811 F.2d at 262. Although in Jackson the court affirmed the district court's denial of counsel despite the district court's failure to articulate reasons for the denial due to the clarity of the record, the court specifically stated that "our disposition of this appeal should be seen as an exception to the preferred approach we set out above." 811 F.2d at 262.

The district court's January 25, 1993, and January 27, 1993, orders denying Whitehead's motions for the appointment of counsel offer no explanation why Whitehead's requests for counsel were denied. Furthermore, our own examination of the district court file does not independently reveal sufficient facts to justify the district court's denial of counsel. While this issue should not be resolved based on hindsight gained by observing how the facts developed at trial, Branch, 686 F.2d at 266, the pretrial record demonstrated that Whitehead would be hampered in presenting his case by his inability to prepare for trial and that resolution of the case would turn on conflicting testimony requiring skilled examination of witnesses. See Parker v. Carpenter, 978 F.2d 190, 193 (5th Cir. 1992) (directing district court to appoint counsel when appellant's claims survived preliminary exploration in light

of his inability, as an inmate, to adequately investigate and present a case consisting largely of conflicting testimony).

Under the peculiar facts of this case, and without any explanation from the district court of its reasoning, we conclude that the district court abused its discretion in denying Whitehead's requests for appointment of counsel. Accordingly, we **REVERSE** the judgment of the district court and **REMAND** the case for a new trial with instructions that counsel be appointed to represent Whitehead.³

³ In light of our disposition we have not addressed the denial of Whitehead's motion to subpoena witnesses, which raises an issue of first impression in this circuit. Appointed counsel may be able to arrange for the attendance of Gray without a formal subpoena or, even if a subpoena is necessary, may pay for the subpoena before trial. If Whitehead is successful in obtaining a judgment against any of the defendants, that expense would be recoverable as a taxable cost. Alternatively, with the assistance of counsel Whitehead will be able to develop a better record for the court to use in analyzing the issue of whether he should be entitled to subpoena witnesses at government expense.