UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4070

BERTRAND BROWN,

Plaintiff-Appellant,

versus

JAMES A. LYNAUGH, Director,
Texas Department of Criminal Justice,
Institutional Division, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:90-CV-415)

(April 8, 1994)

Before: ALDISERT*, REYNALDO G. GARZA and DUHE', Circuit Judges.

Aldisert, Circuit Judge.**

This appeal from the dismissal of Bertrand Brown's complaint brought under 42 U.S.C. § 1983, alleging the use of excessive force by prison employees, requires us to decide whether Brown made an effective demand for a jury trial and, if

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* Circuit Judge of the Third Circuit, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

so, whether the district court deprived him of his right to a jury trial as guaranteed by the Seventh Amendment. We conclude that a proper demand was made and that the dismissal of the complaint after a bench hearing violated rights assured to Brown by the Constitution. We will reverse and remand for a jury trial.

We are not strangers to this litigation. When this case was previously before us, we held that Brown's contention that prison employees used excessive force when returning him to his cell after a visit to the infirmary had an arguable basis in law and fact and that the district court abused its discretion in dismissing his claim as frivolous. Brown v. Lynaugh, No. 91-4791 (5th Cir. March 2, 1992) (unpublished) (hereinafter Brown I.). On remand the district court referred the case to a magistrate judge for an evidentiary hearing and recommendations pursuant to 28 U.S.C. § 636(b)(1)(A) & (B).

After reviewing Brown's allegations that he was body-slammed, beaten, kicked, punched and thrown to the floor of his cell without any provocation, the magistrate judge concluded that the charges of excessive force were not frivolous. Although the magistrate judge's conclusions were consistent with the previous holding of this court, they were superfluous because a determination that Brown's excessive force allegations were not frivolous had already become the law of the case:

> [W]e vacate the dismissal of the second use of force claim. "A determination of whether force is excessive must take into account the significance of the injury and the force needed in the situation." Luciano v.

> Galindo, 944 F. 2d 261, 264 (5th Cir. 1991). When injuries are intentionally inflicted in an unprovoked attack by prison official, which was wholly vindictive and punitive, bleeding cuts and swelling can be significant within the meaning of Huguet [v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990)] (explaining Oliver v. Collins, 914 F. 2d 56, 59 (5th Cir. 1990)).

Brown I at 7.

Following the magistrate judge's determination, the district court vacated its Section 636(b)(1) reference to the magistrate and, in our view, remanded the case back to the magistrate for a very limited purpose -- to determine whether the parties would consent to a bench trial before a magistrate judge. R. 1, 91. Such a referral is authorized under Section 636(c):

> (1) Upon the consent of the parties, a full-time United States Magistrate . . . may conduct any and all proceedings in a jury or nonjury civil matter . . . .

The record indicates that Brown was then asked if he would consent to a bench trial, and he specifically refused. In his original complaint, he had made a demand for a jury trial. He reiterated his demand by filing an objection to a bench trial before the magistrate judge and again affirmatively requesting a jury trial. R. 1, 82-87. Because of the limited nature of the referral to the magistrate, this should have ended the matter, but it did not. Instead, the magistrate judge conducted what was described as an "expanded hearing." Although explaining to Brown that the hearing was not a trial, the magistrate judge proceeded to take testimony from Brown, a prison nurse and the defendants. Thereafter, findings of fact were made, including determinations of credibility. Ultimately, it was determined that the

defendants were entitled to qualified immunity under the teachings of Hudson v. McMillian, 112 S. Ct. 995 (1992).

The magistrate judge's authority to conduct an "expanded hearing" is not clear. Certainly, it was not a hearing as contemplated in Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), because the original hearing, which was the subject of our review and reversal in Brown I, was of that genre. Moreover, following our remand, the district court made a Section 636(b)(1) reference which was later revoked. The record indicates that the sole purpose for returning these proceedings to the magistrate judge after revocation of the Section 636(b)(1) referral was for an inquiry as to whether the parties would agree to a bench trial. Nevertheless, the magistrate judge conducted a hearing without a jury and filed a report with the district court incorporating findings of fact and conclusions of law. The district court accepted the magistrate's recommendations and dismissed the complaint. This appeal followed.

I.

We are satisfied that Brown made a proper demand for a jury trial in his original complaint and in his objection to a bench trial before the magistrate judge. We do not have to decide whether Brown complied with Local Rule 4C of the Eastern District of Texas, which provides that jury demands should be made on a separate paper and not endorsed on the complaint. See Luken v. Collins, No. 92-4922 (5th Cir. Aug. 17, 1993)

(unpublished). Here, the district court specifically directed the magistrate judge to inquire whether Brown would agree to a bench trial. Brown filed an objection to such a trial and reiterated his demand for a jury trial in a separate motion. R. 1, 82.

We conclude that the matter was remanded to the magistrate judge for the limited purpose of inquiring as to whether the parties would agree to a bench trial. Obviously, Brown did not. Notwithstanding the magistrate judge's assurances that the proceedings were not to be considered a "trial," what took place was in fact a bench trial replete with credibility determinations and findings of fact. When a jury trial is demanded, such determinations are for a jury and not for a judge to make, particularly a magistrate judge whose judicial authority is strictly limited by statute and whose jurisdiction to conduct a "jury or nonjury civil matter" is conditioned "[u]pon consent of the parties." 28 U.S.C. 636(c)(1). To proceed, as the magistrate judge did, over the stated objection of Brown, was improper and constitutes reversible error.

II.

The magistrate judge gave a second reason for dismissing Brown's complaint, recommending dismissal under Rule 41(b) of the Federal Rules of Procedure for alleged misconduct by Brown at the hearing. Rule 41(b) dismissals are reviewed for abuse of discretion. Barry v. CIGNA/RSI-CIGNA, 975 F.2d 1188,

1191 (5th Cir. 1992). An abuse of discretion will lie unless "there is a clear record of delay or contumacious conduct by the plaintiff, and . . . the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile." Id. (footnote omitted).

Neither the magistrate judge's report nor the district court's opinion state what conduct was considered reprehensible, nor was there a determination that lesser sanctions would be futile. Accordingly, we conclude that the district court abused its discretion in dismissing Brown's suit under Rule 41(b).

III.

Brown argues also that the district court erred in denying his motion for appointment of counsel. No general right to counsel exists in Section 1983 actions. Branch v. Cole, 686 F.2d 264, 266 (5th Cir. 1982). To determine whether appointment of counsel is proper in an action brought under Section 1983, a court should consider: (1) the type and complexity of the case; (2) whether the indigent is capable of adequately presenting the case; (3) whether the indigent is in a position to investigate the case adequately; and (4) whether the evidence will consist in large part of conflicting testimony, requiring skill in the presentation of evidence and in cross-examination. Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982).

The district court did not abuse its discretion in denying Brown's motion for appointment of counsel. The issues are not complex and the outcome will depend upon the jury's credibility evaluations of the various witnesses.

The judgment of the district court is **REVERSED** and the proceedings **REMANDED** with a direction that the case be listed for a trial by jury in the district court or, if a reference is made in accordance with the provisions of 28 U.S.C. § 636 and consented to by the parties, a trial by jury before a magistrate judge.