

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-4093
Summary Calendar

CHRISTOPHER JAMES MURPHY,

Plaintiff-Appellant,

VERSUS

J. JOHNSON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(9:90-CV-152)

(November 15, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:¹

Christopher Murphy, a prison inmate, sued under 42 U.S.C. § 1983 alleging primarily that he was subjected to excessive force by prison guards, that a false disciplinary report was filed against him by those guards, and that he was not afforded due process in the disciplinary hearing. The matter was referred to a magistrate judge who held a hearing following appropriate notice pursuant to Spears v. McCotter, 766 F.2d 179, (5th Cir. 1985). The parties

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

consented to the magistrate judge conducting all further proceedings in the case pursuant to 28 U.S.C. § 636(c). At the conclusion of the Spears hearing, the magistrate judge stated that he would obtain the audio tape of Murphy's disciplinary hearing. Some months thereafter, the magistrate judge dismissed the case without prejudice under Federal Rules Civil Procedure 41(b) based upon the plaintiff's failure to prosecute his case. Plaintiff appeals. We find that the magistrate judge abused his discretion, and we reverse and remand.

Dismissal with prejudice for failure to prosecute is an extreme sanction that is to be imposed "only when the plaintiff's conduct has threatened the integrity of the judicial process [in a way which] leav[es] the court no choice but to deny that plaintiff its benefits." McNeal v. Papasan, 842 F.2d 787, 790 (5th Cir. 1988). Although the dismissal here was without prejudice, plaintiff would be precluded from litigating the dispute because it deals with incidents occurring over two years ago so it would be barred by the appropriate statute of limitations. Owens v. Okure, 488 U.S. 235 (1989); Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989).

In reviewing to determine whether a dismissal is an abuse of discretion we consider whether the record discloses "a clear record of delay or contumacious conduct by the plaintiff" and whether "a lesser sanction would not better serve the best interest of justice." McNeal, 842 F.2d at 790.

This record shows no delay by plaintiff whatever. There is

nothing in the record to indicate that Murphy delayed the prosecution of the suit or acted in a contumacious manner. The last action in the record before dismissal was the Spears hearing which concluded with the magistrate judge indicating that he would obtain and review a tape of the disciplinary hearing. There is no indication that Murphy was required to do anything further. The usual findings which follow a Spears hearing were never made. Accordingly, we find that the magistrate judge abused his discretion. The matter is reversed and remanded for further proceedings.

REVERSED AND REMANDED.