IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-4192
Summary Calendar

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SERGIO LUNA RODRIGUEZ,

Plaintiff-Appellant,

versus

C. MARTIN, Assistant Warden, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the
Eastern District of Texas
(9:92cv111)

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(July 22, 1994)

Before GARWOOD, SMITH and BARKSDALE, Circuit Judges.[*]

PER CURIAM:

In his civil rights complaint, plaintiff-appellant Sergio Luna Rodriguez (Rodriguez), a state prisoner incarcerated at the Eastham Unit of the Texas Department of Criminal Justice, alleged that he was stabbed by another inmate as he was being escorted by corrections officer James Chivers (Chivers) to his cell in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

administrative segregation. Rodriguez named as defendants Chivers, Warden Charles Martin, Assistant Wardens R. Cooper and M. Barrett, Administrative Segregation Major R. Parker, Administrative Segregation Captain C. Wooten, Administrative Segregation Lieutenant David M. Forrest, Classification Officers Sammy Buentellos, C. Frizzell, D. Rawlinson, R. Garcia, Gilbert Campuzano, and J.C. Johnson, Administrative Assistant to Classification Committee Cay Cannon, and Texas Attorney General Jim Mattox. Rodriguez alleged that he is a former member of the Mexican Mafia and that other Mafia members at Eastham Unit intended to harm him.

Rodriguez alleged that Chivers *intentionally* exposed him to danger by failing to wait for another officer before removing him from his cell and by leaving him unprotected in front of the cell of one of his enemies. Rodriguez also alleged that Chivers failed to ensure that he received prompt medical attention after the attack. Rodriguez alleged that he had previously informed Chivers that he was a former Mafia member and that he was on a hit list.

Rodriguez alleged that he and other inmates had filed grievances or otherwise notified the grievance coordinator and defendants Martin, Barrett, Cooper, Parker, Wooten, Forrest, and Mattox about previous abuses by Chivers. Rodriguez alleged that all of the defendants knew or should have known that his life was in danger and that they conspired to harm him by placing him with his enemies in administrative segregation instead of in protective custody, as he had requested.

The magistrate judge, following a hearing under *Spears v.*

*McCotter*, 766 F.2d 179 (5th Cir. 1985), recommended that Rodriguez's claims against all defendants except Chivers be dismissed with prejudice as frivolous pursuant to 28 U.S.C. § 1915(d). The district court conducted a *de novo* review, adopted the recommendation of the magistrate judge, and on February 8, 1993, entered a partial order of dismissal with prejudice as to all defendants other than Chivers. Rodriguez on February 19, 1993, filed a notice of appeal from that partial order of dismissal. Subsequently, the magistrate judge recommended that the claims against Chivers be dismissed for failure to state a claim. The district judge agreed and dismissed the claims against Chivers on March 29, 1993. Rodriguez never filed a notice of appeal from this order, or any notice of appeal other than that of February 19, 1993. The state moved this Court to dismiss Rodriguez's appeal. This Court on July 29, 1993, ordered the dismissal of the appeal insofar as it relates to the claim against Chivers but denied the motion to dismiss insofar as it relates to the claims against the remaining defendants which were dismissed as frivolous.

Rodriguez contends that the district court erred by granting Chiver's motion to dismiss. This Court has already concluded that Rodriguez failed to preserve his appeal as to Chivers. Apparently, this Court's decision that it had jurisdiction to hear Rodriguez's appeal of the order dismissing the other parties was based upon the Court's rule permitting it to consider premature appeals in "cases where judgment becomes final prior to disposition of the appeal." *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1166 (5th Cir. 1984); *see Riley v. Wooten*, 999 F.2d 802, 804-05

(5th Cir. 1993).

An *in forma pauperis* complaint may be dismissed as frivolous pursuant to section 1915(d) if it has no arguable basis in law or in fact. *Booker v. Koonce*, 2 F.3d 114, 115 (5th Cir. 1993); *see Denton v. Hernandez*, 112 S.Ct. 1728, 1733 (1992). Section 1915(d) dismissals are reviewed for abuse of discretion. *Id*. at 1734.

A prison guard may violate a prisoner's Eighth Amendment right to be free from cruel and unusual punishment by being deliberately indifferent to a prisoner's need to be protected from other inmates. *Wilson v. Seiter*, 111 S.Ct. 2321, 2323, 2326-27 (1991). The prison guard has been dismissed from this appeal, however, and the defendant supervisory personnel cannot be held liable for his actions under a theory of vicarious liability. *See Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987). A supervisor may be liable for an employee's acts if the civil rights plaintiff shows that the supervisor was (1) personally involved in the alleged constitutional deprivation, or (2) demonstrates "a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Id*. at 304.

As reflected by the *Spears* hearing, Rodriguez makes no specific factual allegations regarding Martin, Cooper, Barrett, Parker, Wooten, Forrest, Buentellos, Frizzell, Rawlinson, Garcia, Campuzano, Johnson, Cannon, and Mattox (none of whom were present at the time, as Rodriguez admits) apart from his general contention that they knew or should have known that placing him in administrative segregation with his enemies would expose him to danger. Allegations of negligence do not support a claim under

section 1983. *Thomas v. Kipperman*, 846 F.2d 1009, 1011 (5th Cir. 1988). A prisoner cannot base a federal civil rights action against prison officials for their negligent failure to protect. *Davidson v. Cannon*, 106 S.Ct. 668 (1986); *Johnston v. Lucas*, 786 F.2d 1254, 1258-60 (5th Cir. 1986). Because the *Spears* hearing reveals that Rodriguez was unable to assert facts which, if true, would indicate or suggest that these defendants personally acted with deliberate indifference to his right to be protected from other inmates or otherwise cause him to suffer a constitutional deprivation, Rodriguez's complaint against them is legally frivolous and the district court did not abuse its discretion by dismissing it pursuant to section 1915(d).

Rodriguez argues that his complaint should have been dismissed without prejudice. Although it is theoretically possible that Rodriguez could articulate facts stating a nonfrivolous claim against the defendant supervisory and classification personnel, Rodriguez, though given an opportunity to do so at the *Spears* hearing, failed to do so. "Dismissal with prejudice [is] appropriate if the plaintiff has been given an opportunity to expound on the factual allegations . . . orally via a *Spears* hearing, but does not assert any facts which would support an arguable claim." *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993) (footnotes omitted).

Rodriguez contends that he should have been given an opportunity to conduct discovery. Dismissal before discovery was appropriate because Rodriguez's complaint lacks an arguable basis in law. A district court may dismiss an IFP suit at any time

pursuant to section 1915(d), including prior to service of process, if it is satisfied that the action is frivolous. *Cay v. Estelle*, 789 F.2d 318, 324 (5th Cir. 1986).

Rodriguez contends that the district court should not have dismissed his complaint on grounds of qualified immunity. The district court's decision was not based upon qualified immunity.

We DENY Rodriguez's motion to appoint counsel. *See Hulsey v. State*, 929 F.2d 168, 172 (5th Cir. 1991); *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982).

The judgment of the district court is

AFFIRMED.