

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-4444
Summary Calendar

JERRY E. EASLEY,

Plaintiff-Appellant,

VERSUS

C. R. MARTIN and K. SULEWSKI,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

(9 91 CV 115)

(March 15, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Jerry E. Easley, a prisoner of the State of Texas, filed a pro se, in forma pauperis complaint against C. R. Martin, the Warden of Eastham Unit, and K. Sulewski, the disciplinary officer. Easley alleged that he was transferred, ostensibly due to overcrowding,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

from Ellis 1 Unit to the Eastham Unit in retaliation because he is a writ writer and has initiated "three eminent [sic] lawsuits and two internal affairs investigations at Ellis 1." Moreover, he alleged that he has been subjected to the following injustices since his arrival at Eastham Unit: 1) he was held in prehearing detention without justification; 2) he was denied an "in-cell art card" based on racial discrimination and prejudice; 3) he was subjected to an illegal shakedown and search of his legal materials, resulting in the loss, theft, or destruction of legal materials and evidence against prison employees; and 4) he was falsely accused in disciplinary reports on October 31, 1990,¹ and January 4, 1991.

Easley sought injunctive relief, a declaration of the rights of prisoners in disciplinary proceedings, and monetary damages. The case was set for an evidentiary hearing before a magistrate judge. At the hearing, Easley attempted to raise claims concerning the conditions of his confinement at the Retrieve Unit. The magistrate judge informed him that those issues had to be raised in the Southern District. Easley elected to proceed with the case before the district court judge. The magistrate judge issued a report regarding the claims alleged to have occurred in the Retrieve Unit and recommended that Easley's motions for a temporary restraining order, a preliminary injunction, and a show cause order be denied. The district court adopted the recommendation and denied the motion for a temporary

¹ The first disciplinary report is not challenged in this litigation because no action was taken. R. 522.

restraining order.

The defendants filed a motion to dismiss with a supporting brief. The defendants asserted that Easley had "failed to provide specific facts stating a constitutional claim or overcoming the Defendants' immunity in such a claim."

In a second report, the magistrate judge concluded as follows: 1) the disciplinary proceeding was constitutionally sufficient, 2) Easley's confinement in administrative segregation for one and one-half days prior to a disciplinary hearing or investigation did not amount to a constitutional violation, 3) the deprivation of "piddling" or art supplies because of Easley's disciplinary record did not violate a constitutional right, 4) Easley had a adequate state remedy for any deprivation of his property, 5) Easley had not asserted facts to support a claim of denial of access to the courts, and 6) Easley's claims that he was the victim of retaliation were "speculative, conclusory and without factual foundation." Additionally, the magistrate judge determined that the defendants were entitled to qualified immunity and recommended that the district court grant their motion to dismiss.

In a subsequent order, the magistrate judge treated the motion to dismiss as a motion for summary judgment because materials outside the pleadings were submitted with the motion and advised the parties to file any other materials within ten days. The district court adopted the recommendation of the magistrate judge, granted the defendants' motion for summary judgment, and dismissed the complaint with prejudice.

OPINION

Easley has presented a 46-page brief raising 19 issues. In his brief, he states that he addresses each issue "in summary form to avoid duplicity and repetition of the record." He incorporates by reference the issues "presented in great detail in the Motion for Reconsideration."

Although the Court liberally construes the briefs of pro se appellants, arguments must be briefed to be preserved. Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988). Generally, claims not argued in the body of the brief are abandoned on appeal, even if the appellant is proceeding pro se. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993) (Court declined to incorporate arguments from other pleadings which would lengthen a 50-page brief). We address only those arguments as presented in the brief and in the reply brief.

Succinctly, Easley contends that the district court erred in granting the defendants' motion for summary judgment. He asserts that the defendants' motion to dismiss was not a proper motion for summary judgment, and, alternatively, that the defendants did not carry their summary judgment burden. Easley argues that the defendants may not assert a personal immunity defense because they abused their power in violation of clearly established law at the time of the incidents. Moreover, he contends that the district court erred in shifting the burden of proof regarding the defendants' immunity. Easley acknowledges that the burden shifts to the plaintiff after entitlement to immunity has been

established, but he argues that the defendants did not establish their entitlement to immunity.

"Ordinarily, when matters outside the pleadings are considered, a motion for dismissal based on failure to state a claim is converted into a motion for summary judgment (see Fed. R. Civ. P. 12(b)(6)), which is disposed of as required by Fed. R. Civ. P. 56." Fernandez-Montes v. Allied Pilots, 987 F.2d 278, 283 n.7 (5th Cir. 1993). "Summary judgment is reviewed de novo, under the same standards the district court applies to determine whether summary judgment is appropriate." Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991). Summary judgment is proper when viewing the evidence in the light most favorable to the non-movant, "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" Id. (quoting Fed. R. Civ. P. 56(c)). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence of the existence of a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The non-moving party "may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial." Rosado v. Deters, 5 F.3d 119, 123 (5th Cir. 1993).

In a case when the defendant asserts a qualified immunity defense, "the first inquiry in the examination of a defendant's claim of qualified immunity is whether the plaintiff `allege[d] the

violation of a clearly established constitutional right.'" Duckett v. City of Cedar Park, 950 F.2d 272, 276-77 (5th Cir. 1992) (quoting Siegert v. Gilley, 500 U.S. 226, ___, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991)). If this Court finds no constitutional injury, it is "unnecessary to address the issue of qualified immunity." Quives v. Campbell, 934 F.2d 668, 671 (5th Cir. 1991).

In his complaint, Easley alleged that (1) his constitutional right to due process was violated at the disciplinary hearing; (2) he was placed in lockdown upon arrival at Eastham Unit without due process; (3) because he exercised his right of access to the courts in his activities as a writ writer, prison officials retaliated against him by transferring him to Eastham Unit and then to Retrieve Unit and by placing him in shackles and wrist locks during a transfer to Ellis II on a medical chain; (4) he was deprived of an art card; and (5) prison officials conducted an illegal search, resulting in loss of legal materials.²

Disciplinary hearing

The January 4, 1991 disciplinary report charged Easley with creating a disturbance and possession of contraband, a wire hanger. Easley contended that the wire hanger, which he used to hang his toothbrush holder, was not contraband. The disciplinary report stated that Easley used the wire hanger in an attempt to remove handcuffs. Both charges were major and subjected Easley to a

² Presumably, the claims that involve prison officials who are not named in the complaint were directed at Defendant Martin in his role as warden.

possible loss of two classes in good-time earning capacity and good-time credits.

In his complaint, Easley alleged that Officer Sulewski conducted a disciplinary hearing in violation of his due process rights: 1) all of his pre-hearing motions were denied; 2) he was denied the right to call witnesses who would have testified on his behalf; 3) the hearing violated the prison's handbook of disciplinary rules and procedure; and 4) the charges were written by Sergeant Cooper, who was not present when the incident occurred. Based on the testimony of Sergeant Cooper and an affidavit from an unknown person, Officer Sulewski found him guilty.

Easley asserted that the witnesses could have testified that he did not create a disturbance and that the "regular officers that shake down the medical chains" had approved of the "hanger" in the past. Specifically, Easley wanted to call inmates that were present, but he was unable to obtain their names. Also, he stated that Warden Martin would have testified that he spoke with Easley about the hanger and took no action.

Easley asked for a meeting with Warden Martin and filed this lawsuit when he received no response. The Warden then met with Easley in his office, and Easley explained all that had happened to him. The Warden ordered the two disciplinary cases expunged from Easley's record and promised that the incidents would not happen again. Shortly thereafter, Easley was transferred to the Retrieve Unit.

On appeal, Easley contends that he was deprived of his rights as contained in the "TDC Disciplinary Rules & Procedures for Inmates." Specifically, he was "denied an opportunity to identify and interview potential witnesses" and access to documentary evidence. He argues that, although violations of state law per se are not constitutional violations, prison officials deprived him of a liberty interest in violation of due process.

"Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." Wolff v. McDonnell, 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The Supreme Court has set out the following standard for disciplinary procedures when a prisoner is punished by solitary confinement and loss of good-time credits: (1) written notice of the charges against him at least twenty-four hours before the hearing, (2) a written statement of the factfinders as to the evidence relied on and the reasons for the disciplinary action taken, and (3) a limited opportunity to call witnesses and present documentary evidence in his defense. Id. at 563-66.

It is undisputed that Easley received notice and that the factfinder relied on the testimony of Sergeant Cooper and the affidavit of an unknown witness. The only question in dispute is whether Officer Sulewski violated Easley's right to due process in disallowing the witnesses.

"[P]rison officials may be required to explain, in a limited manner, the reason why witnesses were not allowed to testify, but

. . . they may do so either by making the explanation a part of the `administrative record' in the disciplinary proceeding, or by presenting testimony in court if the deprivation of a `liberty' interest is challenged because of that claimed defect in the hearing." Ponte v. Real, 471 U.S. 491, 497, 105 S.Ct. 2192, 85 L.Ed.2d 553 (1985). In Wolff, the Supreme Court recognized "that the right to call witnesses was a limited one, available to the inmate `when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.'" Id. at 499 (quoting Wolff, 471 U.S. at 566). It is within the prison officials' discretion "to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence." Id.

Officer Sulewski stated in the disciplinary hearing record that witnesses were not present because they were too numerous and they were unavailable. At the evidentiary hearing, Officer Sulewski testified that it was not necessary to call Officer Quill to testify that he permitted Easley to use the wire to dry his toothbrush. The disciplinary issue concerned the manner in which Easley had used the wire to remove his cuffs. Sulewski did not recall if he had denied the testimony of other witnesses, but he stated that he had not stopped Easley from interviewing witnesses.

This Court finds that the prison official's reasons for limiting the witness testimony were sufficient and that Easley was

not deprived of due process at the hearing. Moreover, Easley suffered no adverse consequences because the warden ordered his records expunged. There was no constitutional violation. Therefore, the Wolff requirements may not be applicable. See Dzana v. Foti, 829 F.2d 558, 561 (5th Cir. 1987) (a "key consideration" in the determination whether the Wolff requirements apply "is the type of sanction imposed," but the Court then characterizes this inquiry as the discipline that the prisoner is "facing").

Easley also argues that the deprivation of procedural rights created by the Texas Department of Criminal Justice deprived him of a liberty interest. A protected liberty interest arises only if the state places substantive limits on the officials' discretion; a liberty interest protected by the due process clause "`cannot be the right to demand needless formality.'" Olim v. Wakinekona, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). Because Easley has alleged only a formal procedural infirmity under the prison's regulations, not a substantive defect, his claim is frivolous.

Prehearing lockdown

Easley alleged that he was placed in prehearing lockdown for a day and a half upon his arrival at Eastham Unit in violation of "due process. He arrived from another unit on a special chain that arrived later in the afternoon than normal chains. Easley did not allege that he was placed in lockdown as a form of punishment.

This Court concludes that one and a half days of segregation, pending a hearing or an investigation, upon arrival at a new unit does not rise to the level of a constitutional violation. See Hewitt v. Helms, 459 U.S. 460, 476-77, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983).

Retaliation claims

Easley alleged that officials of the prison system retaliated against him because he was a known writ writer. Specifically, he asserted that his transfers to Eastham Unit and then to Retrieve Unit were in retaliation for filing grievances and lawsuits.

Prison officials may not retaliate against or harass an inmate for exercising his right of access to courts. See Gibbs v. King, 779 F.2d 1040, 1046 (5th Cir.), cert. denied, 476 U.S. 1117 (1986). Although retaliation by prison officials constitutes a violation of civil rights, the plaintiff must allege facts to support the claim. See Whittington v. Lynaugh, 842 F.2d 818, 819 (5th Cir.), cert. denied, 488 U.S. 840 (1988). As to his retaliatory transfer to Eastham Unit, Easley advanced the claim against Martin and Sulewski without the slightest factual support concerning their involvement. Regarding the transfer to the Retrieve Unit, Easley alleged, in a conclusionary manner, that Warden Martin was responsible because the warden did not want to be subjected to any more lawsuits. However, he provided no specific facts to support his allegation. Moreover, the facts do not give rise to an inference of retaliatory conduct because the warden expunged the two disciplinary cases against Easley.

Easley alleged a third instance of retaliation by Officer Peterson who placed Easley in shackles and wrist locks during Easley's medical trip to Ellis II following the January 4th "hanger" incident, Officer Peterson placed Easley in shackles and wrist locks during the bus ride. He argued that he had done nothing to merit the treatment. Easley alleged that Officer Peterson retaliated against him because Peterson had heard that Easley was a writ writer. Easley did not allege facts to implicate Warden Martin and Sulewski in the incident. Therefore, Easley has not alleged a violation of a constitutional right by the named defendants.

Deprived of an art card

Easley alleged that he was deprived of an "in-cell piddling" art card at Eastham Unit. He asserted that the card is available to anyone without a disciplinary record or some form of restriction. Captain Pace informed Easley that there were too many "of them" and Easley would have to wait until someone went home. Easley asserted that Captain Pace did not understand what he was talking about, but he has spoken to Captain Cook and "maybe they're going to do something about it." Easley has not demonstrated a constitutional violation.

Illegal search, resulting in loss of legal materials

Easley alleged that, upon his return from a weekend chain, he found that his papers had been searched and his legal materials were scattered all over the floor in a closet. He stated that the papers were returned to him in an unorganized manner, but he was

not sure if anything was missing. However, Easley was concerned that officials may have copied some of the materials. The search of his legal property did not cause him to lose an appeal or any kind of legal right.

Easley's allegations do not rise to the dimension of a constitutional violation. The Fourth Amendment's proscription of unreasonable seizures does not apply to penal officers who are seizing items from prisoners. See Hudson v. Palmer, 468 U.S. 517, 528-29 n.8, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). Further, he does not assert that he was deprived of his First Amendment right of access to the courts. See Morrow v. Harwell, 768 F.2d 619, 622 (5th Cir. 1985).

Summary

The Court concludes that Easley has failed to demonstrate that the defendants violated his constitutional rights. Because there was no constitutional violation, the Court need not address the issue of qualified immunity. Drawing all inferences most favorable to Easley, we find that he has not demonstrated that there are genuine issues of material fact. Accordingly, the district court did not err in holding that there were no genuine issues for trial and that the defendants were entitled to judgment as a matter of law.

Easley argues that Martin and Sulewski were not entitled to representation by the Attorney General because they were sued in their individual capacities. This argument is meritless. The

Attorney General is empowered to defend officers of a Texas state institution in a cause of action for deprivation of a constitutional right. Tex. Civ. Prac. & Rem. Code Ann. §§ 104.001 and 104.004 (West 1986, 1994).

Easley challenges the constitutionality of the Civil Justice Expense and Delay Reduction Plan on grounds that it violates due process and denied him the full benefits of discovery as provided in the Federal Rules of Civil Procedure. He contends that the retroactive application of the Plan to his case violated the Ex Post Facto Clause.

To the extent that this argument was raised in the district court, it is frivolous. Congress provided for the implementation of a civil justice expense and delay reduction plan in 28 U.S.C. § 471, and Easley does not make a cogent appellate argument challenging its validity. "It is beyond dispute that the ex post facto clause applies only to criminal cases." United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532, 540 (5th Cir. 1987), cert. denied, 485 U.S. 976 (1988). Moreover, "a statute is not unconstitutional merely for its retroactivity." Pacific Mut. Life Ins. Co. v. First Republicbank Corp., 997 F.2d 39, 53 (5th Cir. 1993), cert. granted, 114 S.Ct. 680 (1994).

The appellee characterizes the argument as arising under equal protection principles applicable to classifications based on indigency. However, Easley expressly invokes the Due Process Clause and the "discrimination" he alleges is against "pro se indigent prisoners."

Easley argues that the district court did not have the authority to dismiss the action pursuant to Fed. R. Civ. P. 56 because its jurisdiction is based in part on the removal of state criminal proceedings pursuant to 28 U.S.C. § 1443. Easley characterizes the prison disciplinary proceedings as a state criminal proceeding which has been removed to federal court. His argument is facially absurd.

Easley contends that the district court erred in denying his motions for a default judgment, for joinder of indispensable parties, to recuse the magistrate judge for misconduct, and to compel discovery. This Court reviews the district court's denial of these motions for abuse of discretion. Matter of Dierschke, 975 F.2d 181, 183-84 (5th Cir. 1992) (default judgment); United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987) (recusal); McKethan v. Texas Farm Bureau, 996 F.2d 734, 738 (5th Cir. 1993), cert. denied, 114 S.Ct. 694 (1994) (discovery and procedural rulings and actions).

Motion for default judgment

Easley filed a motion for default judgment asserting that service was effected on February 18, 1992, and an answer was due within 20 days on March 9, 1992. The magistrate judge denied the motion because the defendants filed their answer on March 11, 1992, and Easley was not prejudiced by the two-day delay. Easley filed objections to the magistrate judge's order, stating that he had suffered harm because he had not been served with an answer from the defendants and reurging his motion for a default judgment. The

magistrate judge provided Easley with a copy of the answer at the evidentiary hearing. There was no abuse of discretion.

Motion for joinder of indispensable parties

Easley contends that the magistrate judge erred in denying his motion to add additional parties "to encompass a broad retaliation issue." He argues that the magistrate judge should not have denied his motion for lack of jurisdiction because "all district courts have the same jurisdiction."

Easley filed a motion seeking to add the warden and the property officer of the Retrieve Unit on claims that they were presently retaliating against him for filing the law suit against Eastham Unit officials. The magistrate judge denied the motion because no amended complaint was attached to the motion.

Easley then filed a motion to amend his complaint to include claims that had arisen since his transfer to the Retrieve Unit and renewed his motion for joinder of indispensable parties. He argued that the motion should be granted in the interest of judicial economy; moreover, any order for injunctive relief should include Retrieve officials because he was in their custody. The magistrate judge denied the motions because the "Retrieve Unit is located in the Southern District of Texas, thus that Court has jurisdiction over the claims presented in the supplemental pleadings." Subsequently, at the evidentiary hearing, the magistrate judge stated that the Retrieve Unit was in the Southern District and that the most expeditious way to get the problems at the Retrieve Unit resolved was to file the case in the Southern District.

Easley filed objections to the magistrate judge's report, asserting that "multiple parties may be joined in a single district with the opportunity for any party to plead venue or to waive it by failing to object." When the district court failed to rule on his objections, Easley filed a motion for leave to file documents to demonstrate the continuing acts of discrimination, retaliation, harassment, etc., that he was experiencing. The district court denied the motion.

Easley's argument effectively challenges the denial of his motion to amend his complaint, which would have enabled him to join indispensable parties. This Court's "review of the district court's denial of leave to amend under [Fed. R. Civ. P.] 15(a) is limited to determining whether that court's action constituted an abuse of discretion." Whitaker v. City of Houston, 963 F.2d 831, 836 (5th Cir. 1992) (footnote citation omitted).

According to docket entries in March and May of 1992, Easley filed his motion to amend after the responsive pleading and after the evidentiary hearing was set. Therefore, Easley required leave of the court to amend his complaint. See Fed. R. Civ. P. 15. "Rule 15(a) instructs that `leave shall be freely given when justice so requires.'" Whitaker, 963 F.2d at 836. In ruling upon a permissive motion to amend, the district court may consider "`undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue

of allowance of the amendment, [and] futility of amendment.'" Id. (quoting Forman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)).

To the extent that the magistrate judge determined that the district court lacked jurisdiction to hear the case against Retrieve Unit officials, that determination was error. A civil action in which jurisdiction is not founded solely on diversity of citizenship may be brought in a judicial district where any defendant resides, if all defendants reside in the same State. See 28 U.S.C. § 1391(b)(1). Notwithstanding, for other reasons, we find that the district court did not abuse its discretion in denying Easley's motions to amend and to join officials at Retrieve Unit.

After the evidentiary hearing, it was apparent that Easley lacked factual support for his allegations of constitutional violations. It would have caused undue delay and prejudice to Warden Martin and Sulewski to permit Easley to amend his complaint to add different allegations against new defendants. Moreover, Easley suffered no prejudice because he was free to file his claims in the Southern District of Texas.

To recuse the magistrate judge

Easley asserts that the magistrate judge violated statutory law and the Code of Professional Ethics and Judicial Conduct by personally denying his motion to recuse. He contends that the

magistrate judge's bias and prejudice "distorted this litigation and contributed to the gross mismanagement by the magistrate" and violated his due process rights.

Easley filed two motions to recuse the magistrate judge.³ "Under both [28 U.S.C.] § 144 and [28 U.S.C.] § 455, the alleged bias or prejudice must be personal and it must stem from an extrajudicial source which would result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." Merkt, 794 F.2d at 960.

In both of his motions, Easley's allegations amount to no more than disagreement with the magistrate judge's rulings and a desire to have the Chief Judge preside over his case. Moreover, in his brief on appeal, he has not asserted facts that demonstrate personal bias or prejudice. There was no abuse of discretion.

To compel discovery

Easley contends that the denial of his motion for an order to compel discovery violated his due process rights because it prevented him from proving his case against the named defendants. His argument on appeal is no more than a repetition of his disagreement with the Civil Justice Expense and Delay Reduction Plan and the denial of his motion to recuse the magistrate judge. He has not demonstrated that the denial of his motion to compel discovery was an abuse of discretion.

³ Presumably the motions were filed under 28 U.S.C. § 455 because they were not filed within the time prescribed in 28 U.S.C. §144.

Accordingly, the judgment of the district court granting the defendants' motion for summary judgment is affirmed.

AFFIRMED.