

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-5461  
Summary Calendar  
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HUEY P. WILLIAMS

Plaintiff-Appellant,

versus

CHARLES MARTIN, Warden,  
ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the  
Eastern District of Texas  
(9:93 CV 117)

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(August 22, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.\*

PER CURIAM:

Plaintiff-appellant Huey P. Williams (Williams), a Texas prisoner, filed this 42 U.S.C. § 1983 suit *pro se* and IFP, complaining of several prison officials having failed to protect him when he was severely beaten by another inmate, resulting in a concussion, a fractured skull, and nine days' hospitalization. He

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

also complained respecting the medical care he received in that hospitalization. He was allowed to proceed IFP.

Before any service of process or any filing by any defendant, the magistrate judge, *sua sponte*, and without prior notice to Williams, a hearing under *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1983), or any kind of questionnaire to flesh out the facts, issued a report which recommended that the medical claim be dismissed without prejudice for improper venue and that the failure to protect claim be dismissed as frivolous under 28 U.S.C. § 1915(d). The magistrate judge allowed Williams through September 24, 1993, to file objections to the report. Williams' objections, together with his motion to amend his complaint and tendered amendments, were (according to his certificate of service) placed in the prison mail system September 20, 1993, and, if they were then so placed or delivered to the prison authorities (and there is no contrary finding or indication), were hence timely filed, although they were not received and filed until October 7, 1993. *See Thompson v. Rosberry*, 993 F.2d 513, 515 (5th Cir. 1993). The district court, by order dated October 12, 1993, adopted the magistrate judge's report and by judgment of the same date dismissed the entire suit with prejudice as frivolous under section 1915(d). The order recites "no objections to the Report of the United States Magistrate Judge were filed." Neither the order nor the judgment reflect any awareness of Williams' motion to amend, which was filed with his objections. And, neither reflects awareness that the magistrate judge's report recommended dismissal without prejudice of the medical claim while the judgment dismissed

the entire suit with prejudice.

The district court erred in failing to consider Williams' objections. Further, as no responsive pleading had been filed, Williams, having moved to amend, was entitled to amend his complaint, and have his amendment considered. See FED. R. CIV. P. 15(a). Finally, in the absence of a *Spears* hearing, a questionnaire, or some similar factor, a *pro se* complaint should ordinarily not be dismissed under section 1915(d), particularly not with prejudice, where, as here, it appears that insufficient factual allegations might be remedied by more specific pleading. See *Eason v. Thaler*, 14 F.3d 8, 9-10 (5th Cir. 1994).

Accordingly, the judgment below is vacated and the cause is remanded for further proceedings consistent herewith.<sup>1</sup>

VACATED and REMANDED

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<sup>1</sup> Williams' pending motion is denied as unnecessary and moot.