IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5568

Summary Calendar

IRON THUNDERHORSE,

Plaintiff-Appellant,

v.

JAMES A. LYNAUGH, ET AL.,

Defendants,

A.D. CASKEY, CRAIG A. RAINES,
DIANA KELLEY and JERRY P. ROGERS,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:93-CV-3)

(October 12, 1994)

Before KING, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

PER CURIAM:*

Iron Thunderhorse ("Thunderhorse"), a pro se litigant proceeding in forma pauperis, appeals from an expanded

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

evidentiary hearing conducted by a magistrate judge. We affirm in part and remand in part.

I. BACKGROUND

Thunderhorse testified that he is a well known "jailhouse lawyer" and "writ-writer," and the litigation underlying this appeal centers around his allegations that numerous officials in the Texas Department of Corrections, Institutional Division ("TDC-ID") treated him disparately in retaliation for his writ-writing activities.

In December 1991, Thunderhorse returned to the TDC-ID following a parole violation. After being transferred to several facilities, Thunderhorse was sent to the Diagnostic Unit in October of 1992, and he immediately was placed in administrative segregation. This transfer, he claims, was at the direction of Warden Lanny Steele ("Steele") in retaliation for Thunderhorse's writ-writing activities. Ten days later, he was transferred to the Michael Unit where the other events complained of in this appeal are alleged to have occurred. In January of 1993, Thunderhorse filed a complaint in the Eastern District of Texas under 42 U.S.C. § 1983 claiming civil rights violations by numerous administrators and security officers of the TDC-ID. In his suit, Thunderhorse sought temporary and permanent injunctive relief and money damages. Pursuant to 28 U.S.C. § 636 (b)(1)(C), Thunderhorse's claim was transferred to a magistrate judge, who stayed discovery and scheduled a preliminary evidentiary hearing

under Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), and 28 U.S.C. § 1915(d) to determine, among other things, whether Thunderhorse's claims were frivolous.

At the Spears' hearing, held March 4, 1993, Thunderhorse's allegations became clearer. Thunderhorse testified about several instances of mistreatment by prison officials which he claims were conducted in retaliation for his writ-writing and activities in prison reform. Moreover, Thunderhorse claims that he was not alone in suffering such mistreatment. He made other amorphous allegations of a pattern of harassment, intimidation, and retaliation against himself and other known jailhouse lawyers and writ-writers. Because Thunderhorse had failed to exhaust his administrative remedies, the magistrate judge, immediately after the hearing, ordered that the action be "continued for a period not to exceed sixty days . . . to allow Plaintiff to seek relief through the administrative procedures of the Texas Department of Criminal Justice, including all administrative appeals to which the Plaintiff is entitled." At that time, the parties also agreed to conduct further proceedings before the magistrate judge pursuant to 28 U.S.C. § 636(c).

Next, on May 18, 1993, the magistrate judge issued a memorandum opinion and order. In that order, the magistrate judge dismissed with prejudice Thunderhorse's claims against several TDC-ID officials before those officials were required to answer, but allowed Thunderhorse to continue in his retaliation claims against four of the defendants. Additionally, the

magistrate judge severed the claim against Steele and transferred that action to the Southern District of Texas under the powers provided in 28 U.S.C. § 1406(a).

The matter was then set for an "expanded evidentiary hearing" to be held on September 23, 1993. The order setting the hearing provided in part:

> Plaintiff . . . shall be allowed to request inmate witnesses for purposes of this hearing. The Court will have the necessary writs issued if the testimony is material and not repetitive. Plaintiff shall submit a proposed list of witnesses, if any, in this cause no later than September 1, 1993. The witness list shall contain the following information:
>
> a. The name of the witness;
> b. The TDCJ number of inmate witnesses and the unit to which the witness is assigned.
> c. A brief summary of the testimony that the witness will give at the hearing.

In response to the order, Thunderhorse submitted a witness list in which he objected to the above provision. Specifically, he contended that "[a]lthough said order makes provisions to allow the plaintiff to examine inmate witnesses, said ORDER does not allow Plaintiff to examine TDCJ-ID witness-employee[s] who might shed some light on Plaintiff's allegations . . . ." Despite his contention, however, Thunderhorse did request several non-inmate witnesses, including Wayne Scott ("Scott"), Deputy Director of the TDC, Charles Godwin ("Godwin"), Warden, and William T. Habren ("Habren"), former staff council for inmates. The magistrate judge never directly responded to Thunderhorse's objection.

On September 18, 1993, the magistrate judge issued an order to produce witnesses. She ordered the state to produce three of the four inmate witnesses requested by Thunderhorse. The magistrate judge, however, refused Thunderhorse's bid to call Scott, Godwin, and Habren, noting that Thunderhorse had provided "no summary of testimony."

At the subsequent expanded evidentiary hearing, both sides presented their cases. Near the conclusion of the hearing there was a colloquy concerning the case between Thunderhorse and the magistrate judge. Thunderhorse requested that he be given leave to call several witnesses in rebuttal, including those whom the court had previously denied. Through the conversation it became clear that there was a misunderstanding concerning which witnesses could have been called. Thunderhorse thought that he "did not have leave of the Court to produce any or ask for any TDC employees." Conversely, the magistrate judge, while conceding that she "should make [it] clearer in future orders," commented that it was the "intent of the Court . . . that [Thunderhorse] have any witness [he] want[ed]." After this discussion, the magistrate judge denied Thunderhorse's request to call rebuttal witnesses, and Thunderhorse renewed his objections.

After the conclusion of the expanded evidentiary hearing, the magistrate judge issued a written memorandum opinion and order. In that order, the magistrate judge found that Thunderhorse had not satisfied his burden of proving retaliation and had not shown that his civil rights were violated. Further,

she dismissed Thunderhorse's claims with prejudice and denied all pending motions. This appeal followed.

II. STANDARDS OF REVIEW

Two preliminary rules guide our review of the issues raised by Thunderhorse. First, the findings of a magistrate judge appointed pursuant to 28 U.S.C. § 636(c), are reviewed in the same manner as those judgments rendered by a district court judge. See Laker v. Vallette (In re Toyota of Jefferson, Inc.), 14 F.3d 1088, 1090 (5th Cir. 1994). Second, since Thunderhorse is proceeding pro se we "construe his allegations and briefs more permissively." SEC v. AMX, Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993); see also Hughes v. Rowe, 449 U.S. 5, 9 (1980) ("It is settled law that the allegations of [pro se] complaints, however inartfully pleaded, are held to less stringent standards than formal pleadings drafted by a lawyer." (internal quotations and citation omitted)).

In our liberal construction of his pleadings, we find that Thunderhorse raises four issues on appeal. First, he argues that the witness order was vague or ambiguous, and the exclusion of witnesses was error. Second, Thunderhorse claims that the magistrate judge improperly excluded his rebuttal evidence. Third, Thunderhorse claims that the magistrate court incorrectly severed and removed part of his case to the Southern District of Texas. Fourth and finally, Thunderhorse asserts that the magistrate court erred in restricting his discovery.

When an evidentiary decision is guided by a pretrial order, we will not disturb the trial court's finding "absent a clear abuse of discretion." Geiserman v. MacDonald, 893 F.2d 787, 790 (5th Cir. 1990); see also Bradley v. United States, 866 F.2d 120, 124 (5th Cir. 1989) ("We must review the court's ruling [excluding evidence under a pretrial order] under the `abuse of discretion' standard.").

A similar standard informs our review of the exclusion of rebuttal witnesses. A trial judge has great leeway in decisions regarding the admission or exclusion of evidence. Compared to a reviewing court, the trial judge has superior knowledge of the trial scene and, therefore, we "accord considerable deference to a trial judge's evidentiary rulings." Hardy v. Chemetron Corp., 870 F.2d 1007, 1009 (5th Cir. 1989). Further, "this court has long observed that questions as to the order of proof are committed to the sound discretion of the trial judge." Rodriguez v. Olin Corp., 780 F.2d 491, 494 (5th Cir. 1986) (citation and internal quotations omitted). In light of our great deference to a trial court's management of a case and decisions regarding proof, "we overturn an evidentiary ruling . . . only if the ruling was so erroneous as to constitute an abuse of discretion." Hardy, 870 F.2d at 1009. This standard applies with equal force to a trial court's decision about whether to admit or to exclude rebuttal witnesses. Rodriguez, 780 F.2d at 495 ("[R]efusal to allow . . . a rebuttal witness will not be overturned unless such refusal was an abuse of discretion").

A trial court also has broad discretion in controlling the scope and manner of discovery, and its "discovery rulings will be reversed only where they are arbitrary or clearly unreasonable." Williamson v. United States Dep't of Agric., 815 F.2d 368, 373 (5th Cir. 1987).

Finally, a trial court has the power, if a case is brought in an improper venue, to "transfer such a case to any district in which it could have been brought." 28 U.S.C. § 1406(a).

III. DISCUSSION

A. Exclusion of Witnesses

Thunderhorse's first contention is that the trial court erred in not allowing him to call Scott, Godwin, and Habren as witnesses because of his failure to comply with the witness order. A trial judge has the discretion to enter a pretrial order and to manage the discovery in a case. See Fed. R. Civ. P. 16(b); Geiserman, 893 F.2d at 790. Additionally, when a party fails to follow the requirements of a pretrial order, the trial court has broad discretion to enforce the order, even by excluding otherwise admissible evidence. Geiserman, 893 F.2d at 790; Bradley, 866 F.2d at 124-25 & n.7. Here, in the exercise of these powers, the magistrate judge excluded the witnesses proposed by Thunderhorse for failure to provide a summary of their testimony.

We examine four factors in reviewing the judge's discretionary decision to exclude evidence for violation of a

pretrial order: (1) the explanation for the failure to identify the witness's testimony; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of a continuance to cure such prejudice. See Geiserman, 893 F.2d at 790.

In examining the initial factor, we note that Thunderhorse presents a very compelling reason for his failure to provide the summaries of the witnesses' testimony--he did not understand the order. We agree--as did the magistrate judge in retrospect--that the witness order is opaque. First, it is unclear from the magistrate's order whether she intended to allow Thunderhorse to call non-inmate witnesses. Second, assuming that the witness order was intended to apply to non-inmate witnesses, it is ambiguous whether the conditions specified in the order (e.g., provision of a summary of testimony) applied only to inmate witnesses or to all witnesses. It is clear, however, that Thunderhorse reasonably believed that he was permitted to call only inmate witnesses and apprised the magistrate judge of this understanding in a written objection that accompanied his proposed list of witnesses. Although Thunderhorse did include the names of the non-inmate witnesses whom he wished to testify, this list appears to be contingent on the court granting his objection to the witness order.

Next we turn to the importance of the testimony that the excluded witnesses were to give. At the expanded evidentiary hearing, the defendants from the Michael Unit (the assistant unit

health administrator, the major of the correction's officers, a lieutenant of the correction's officers, and the assistant warden) all testified. None of them admitted to treating Thunderhorse differently than other prisoners, and in fact, none admitted any knowledge of Thunderhorse as a writ-writer. Thunderhorse contends that the testimony of Scott, Godwin, and Habren would have served both to bolster his claims of retaliation and to impeach the defendants on their claims of ignorance about Thunderhorse's writ-writing activities.

Assuming that these witnesses would have testified as Thunderhorse hoped, their testimony would have provided minimal support to Thunderhorse's claim. To prevail in his § 1983 action Thunderhorse was required to show not only that he engaged in protected activities but also that he was treated illegally because of those activities. In the expanded evidentiary hearing, the magistrate judge specifically found, among other things, that Thunderhorse had failed to demonstrate "that any of the Defendants engaged in any activities with a desire to retaliate against [Thunderhorse] because of his writ writing activities," and that Thunderhorse's "writ writing activities were totally irrelevant with respect to the actions taken and the decisions made by [the defendants.]"

Nothing in either Thunderhorse's objection to the witness order or in his appeal to this court realistically indicates that the senior TDC-ID officials he desired to call would offer any additional information that he was mistreated in the prison

system. If all had gone as he hoped, the testimony of the deputy director of the Texas Department of Corrections, the warden of a large state penitentiary, and the former staff counsel of the inmates might have bolstered Thunderhorse's claim that he was well known in the penal system; nonetheless, we are unpersuaded that their testimony would have done much to show that he was retaliated against for his notoriety. Therefore, in light of all the evidence produced at the hearing and the nature of Thunderhorse's accusations, the testimony of the excluded witnesses was relatively unimportant.

The next factor to evaluate in examining the decision to exclude witnesses is the potential prejudice in allowing the testimony. In the instant case, the defendants believed that Scott, Godwin, and Habren would not be called, and prepared and presented their case under that assumption. Although preparing for the testimony of the additional witnesses in advance of trial would not have occasioned a great expenditure of time or expense, preparing for these witnesses in the middle of trial would have been unnecessarily burdensome.

The potential prejudice from calling these witnesses dovetails into the fourth factor--the possibility of a continuance. While generally "continuance, not exclusion, is the preferred means of dealing with a party's attempt to designate a witness out of order or offer new evidence," Equal Employment Opportunity Comm'n v. General Dynamics Corp., 999 F.2d 113, 116 (5th Cir. 1993), looking at this case in its entirety, we find a

rare instance where a continuance was not necessarily the better option. This case required the transportation of incarcerated prisoners at significant judicial expense; continuing this case in light of the testimony already adduced at the hearing and the relative unimportance of the excluded testimony would not have been appropriate.

Given these considerations, especially the likelihood that the excluded testimony would not have sustained Thunderhorse's claim, we find that the magistrate did not abuse her discretion in excluding Scott, Godwin, and Habren as witnesses.

B. Exclusion of Impeachment Evidence

Thunderhorse next argues that the court erred in refusing to allow him to call rebuttal witnesses to show that he was known to the defendants as a writ-writer and a jailhouse lawyer. In his case-in-chief, Thunderhorse was able to present testimony from several witnesses, as well as cross-examine all of the defendants, about his purported notoriety as a writ-writer in the Texas Penal System. As noted above, we review a trial court's decision whether to allow rebuttal testimony for an abuse of discretion. See Rodriguez, 495 F.2d at 494. Further, we have noted that in excluding rebuttal evidence, "a trial court does not abuse its discretion when the offering party already has presented evidence on the same issue as part of its case." Tramonte v. Fibreboard Corp., 947 F.2d 762, 766 (5th Cir. 1991). Here, Thunderhorse already had presented evidence on the issue of

his notoriety as a writ-writer, and we find that the magistrate judge did not abuse her discretion in refusing to allow rebuttal witnesses.

C. Severance and Transfer

Although his brief is not entirely cogent, Thunderhorse next appears to contend that the magistrate court improperly transferred his claim against Steele. The magistrate court found that the events underlying Thunderhorse's claims against Steele, the warden of the diagnostic unit in Huntsville, Texas, occurred at that facility located in Walker County in the Southern District of Texas. Invoking 28 U.S.C. § 1406(a), the magistrate judge severed Thunderhorse's claim against Steele and transferred it to the Southern District of Texas.

The general venue statute provides that a federal question action may be brought either in "the judicial district where any defendant resides, if all defendants reside in the same State" or in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1392(a).

If a plaintiff brings suit in an improper venue, however, section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such a case to any district or division in which it could have been brought." Nevertheless, this section does not

vest discretion in the trial court to transfer any case; rather, this section applies only to cases "laying venue in the wrong division or district" and a prerequisite to invoking this section is improper venue. 15 Charles A. Wright et al., Federal Practice and Procedure § 3827, at 263-264 (1986) ("If the original forum was a proper venue, § 1406(a) cannot apply."). Thus, the magistrate judge's transfer of the claim against Steele is beyond her power under § 1406(a) if venue was proper in the Eastern District.[1] See Ruiz v. Unidentified Shipman, No. 93-5529, slip op. at 7-8 (5th Cir. May 3, 1994) (finding an abuse of discretion when district court dismissed on venue grounds where it was possible venue was proper); Holloway v. Gunnell, 685 F.2d 150, 153 (5th Cir. 1982).

Although Thunderhorse did not adequately explain why the Eastern District is the proper venue, he is not required to do so. Holloway, 685 F.2d at 153 ("`The burden is on the defendant to object in a proper and timely fashion if he thinks venue is improper'") (quoting Charles A. Wright et al., Federal Practice

---

[1] This is not to intimate that the magistrate judge is without the power to transfer the claim. Instead, we find only that the magistrate court was without power to transfer the claim under § 1406(a). It is possible that the magistrate judge, in the exercise of her discretion, could have transferred the case under the powers granted to courts in 28 U.S.C. § 1404(a). See Mills v. Beech Aircraft Corp., 886 F.2d 758, 761 (5th Cir. 1989); Jarvis Christian College v. Exxon Corp., 845 F.2d 523, 528 (5th Cir. 1988). Section 1404(a) provides that "[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Moreover, a court may make such a transfer on its own motion. Mills, 886 F.2d at 761 (holding that a § 1404 motion "may be made sua sponte"); Jarvis Christian College, 845 F.2d at 527.

and Procedure § 3826, at 166-67 (1976)). Since the claim against Steele was transferred before he was required to answer, we do not know whether venue was proper in the Eastern District. As we noted in Holloway, "since the . . . court has not required the defendant[] to answer it would be inappropriate . . . to anticipate a venue problem under the general venue statutes." Therefore, we find that the magistrate court erred in transferring the claims against Steele under the power provided in § 1406(a).

D. Failure to Allow Discovery

Thunderhorse's final contention is that the district court erred in refusing to allow him to conduct discovery. This argument is without merit. In February of 1993, the magistrate judge stayed discovery. Later, the magistrate continued the proceedings in her court for sixty days so that Thunderhorse could exhaust his administrative remedies. In May of 1993, after the Spears hearing, the magistrate judge granted Thunderhorse leave to proceed on some of his claims, provided that Thunderhorse gave proof that he had exhausted his administrative remedies.

At no time did Thunderhorse request discovery. Although the magistrate stayed discovery until the Spears hearing was complete, it is clear that granting Thunderhorse the right "to proceed with his retaliation claims" against several defendants served to lift the restrictions on discovery. The court was

under no obligation to affirmatively notify Thunderhorse that he could conduct discovery. Although the court construes the pro se litigant's pleadings liberally, that litigant still "acquiesces in and subjects himself to the established rules of practice and procedure," Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981), and there is no procedural practice requiring notification that discovery is available. Since we find that the magistrate judge's handling of discovery was not arbitrary or clearly unreasonable, we reject Thunderhorse's contention that the discovery process in this case was infirm. See Williamson, 815 F.2d at 373.

IV. CONCLUSION

For the foregoing reasons we VACATE the magistrate judge's transfer of the claims against Steele, and we AFFIRM all other decisions of the magistrate judge.