IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7076

LEATRICE JOHNSON,

Plaintiff-Appellant,

versus

JOHN A. HINES, ET AL.,

Defendants,

JOHN A. HINES,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(CA-G-89-212)

(September 15, 1994)

Before GOLDBERG, KING and WIENER, Circuit Judges.

PER CURIAM:[*]

In this appeal by a state prisoner of the denial of his civil rights claim under 42 U.S.C. § 1983, predicated on use of excessive force by a prison official, Plaintiff-Appellant Leatrice Johnson))

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

proceeding pro se on appeal))contends that the adverse judgment he suffered in the district court should be vacated and a new trial granted because he did not consent to a trial before a magistrate judge. It is undisputed that Johnson's attorney filed a written consent to trial by magistrate judge under 28 U.S.C. § 636(c); however, Johnson now contends that he did not authorize his attorney to give such consent. As Johnson's consent is essential to the validity of the judgment below, and as the record is silent on counsel's authority to consent on Johnson's behalf, we remand to the district court for factual development in accordance with our opinion.

I

FACTS AND PROCEEDINGS

After suffering injury in an altercation with a prison guard, Johnson filed this civil rights action against the guard, Defendant-Appellee John A. Hines.[1] Johnson was granted leave to proceed in forma pauperis, and following a Spears[2] hearing, counsel was appointed to represent him. The action was then set for trial before a magistrate judge, expressly conditioned on the consent of the parties. Johnson's counsel promptly filed a letter consenting to trial and entry of final judgment by the magistrate judge pursuant to 28 U.S.C. § 636(c). Although that letter bore the signature of his counsel, Johnson did not sign, and the record does

[1]Also named in Johnson's complaint was another prison official; however, that official was dismissed on summary judgment.

[2]Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

not indicate whether counsel consulted with Johnson before filing the letter.[3] Upon receipt of the letter, the district court entered an order referring the case to a magistrate judge who eventually conducted a bench trial. At the conclusion of evidence, the magistrate judge made findings of fact and conclusions of law adverse to Johnson's claims, upon which final judgment was entered against Johnson and in favor of the prison guard. Johnson timely filed a notice of appeal to this court.[4]

At no point did Johnson challenge the magistrate judge's authority to preside over the trial of his cause; neither did Johnson seek leave of the district court to withdraw the consent given by his attorney. Thus, there is no evidence that Johnson objected to trial before a magistrate judge, yet the only evidence of Johnson's consent is the letter executed by his attorney, which Johnson now contends is invalid for lack of authorization. Hines, on the other hand, contends that the parties gave valid consent through their respective counsel, and as Johnson did not thereafter

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[3]Attached to Johnson's appellate brief is copy of a letter from his counsel))dated after entry of the magistrate judge's judgment. This letter recites that a copy of the original consent form had been sent to Johnson three days before counsel filed the original consent form with the district court. This correspondence is not part of the record, however.

[4]Counsel for both Johnson and Hines consented to an appeal to the district court from the magistrate judge's final judgment; however, Johnson has bypassed the district court and appealed directly to this court. Defendant-Appellee has not objected to Johnson's failure to appeal to the district court. By failing to object timely, Defendant-Appellee has waived his "right to enforce the agreement and thus effectively acquiesced in [Johnson's] choice to present his claims to this court." Oliver v. Collins, 904 F.2d 278, 280 (5th Cir. 1990).

withdraw or otherwise challenge the consent given on his behalf, the letter filed with the district court provides a sufficient basis for the magistrate judge's authority under § 636(c).

II

ANALYSIS

In 1979, Congress passed the Federal Magistrate Act[5] which increased the responsibilities and powers of federal magistrate judges. Most significantly, one provision of that Act, codified at 28 U.S.C. § 636(c), conferred on magistrate judges the authority to conduct "any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case."[6] As a prerequisite to the exercise of such authority, however, Congress imposed two express conditions precedent: (1) All of the parties must consent, and (2) the district court must specially designate the magistrate judge to exercise such authority.[7] We have held that, in the absence of either such consent or special designation, a magistrate

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[5]Pub. L. No. 96-82, 93 Stat. 643 (1979).

[6]Section 636(c)(1) provides, in part:
> Upon the consent of the parties, a full-time United States magistrate . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .

[7]See 28 U.S.C. § 636(c)(1). These limitations were viewed by Congress as necessary to save § 636(c)'s grant of authority from constitutional infirmity under Article III of the Constitution. See S. REP. NO. 74, 96th Cong., 1st Sess. 4 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469, 1472-73; H.R. REP. NO. 287, 96th Cong., 1st Sess. 7-9 (1979); Pacemaker Diagnostic Clinic of Am. v. Instromedix, 725 F.2d 537, 542 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984); Glover v. Alabama Bd. of Corrections, 660 F.2d 120, 124 (5th Cir. Unit B. Oct. 1981).

judge is without authority under § 636(c), and any final judgment entered by a magistrate judge pursuant to § 636(c) is void.[8]

In interpreting § 636(c)'s consent requirement, we have held that a party's consent must be narrowly construed,[9] requiring that it be voluntary[10] and express.[11] Moreover, we have refused to imply the requisite consent from a litigant's conduct,[12] such as mere

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[8]See Mendes Junior Int'l Co. v. M/V SOKAI MARU, 978 F.2d 920, 924 (5th Cir. 1992) ("[W]hen the magistrate enters judgment pursuant to 28 U.S.C. § 636(c)(1), absence of the appropriate consent and reference (or special designation) order results in a lack of jurisdiction (or at least fundamental error that may be complained of for the first time on appeal)."); E.E.O.C. v. West La. Health Servs., Inc., 959 F.2d 1277, 1281-82 (5th Cir. 1992); accord Jaliwala v. United States, 945 F.2d 221, 223 (7th Cir. 1991).

[9]Glover, 660 F.2d at 124. For example, in Mendes Junior Int'l, 978 F.2d at 924, the parties consented to proceed before a specified magistrate judge, but the action was later submitted to another magistrate judge. As judgment was not entered by the magistrate judge specified in the parties' written consent, we vacated the judgment.

[10]Carter v. Sea Land Servs., Inc., 816 F.2d 1018, 1020-21 (5th Cir. 1987); Archie v. Christian, 808 F.2d 1132, 1133, 1135 (5th Cir. 1987) (en banc); accord Lovelace v. Dall, 820 F.2d 223, 225 (7th Cir. 1987); Pacemaker, 725 F.2d at 543.

[11]McGinnis v. Shalala, 2 F.3d 548, 551 (5th Cir. 1993) ("A magistrate judge may act in the capacity of a federal district court under 28 U.S.C. § 636(c) *only* upon the express, written consent of both parties."), cert. denied, 127 L. Ed. 2d 647 (1994); Archie, 808 F.2d at 1137; Caprera v. Jacobs, 790 F.2d 442, 445 (5th Cir. 1986) ("Section 636(c) requires the express consent of all the parties, given after they have been informed of their right to a trial before an Article III judge."); accord New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc., 996 F.2d 21, 24 (2d Cir. 1993) (stating consent must be express); Hall v. Sharpe, 812 F.2d 644, 647, 649 (11th Cir. 1987) (same).

[12]See, e.g., West La. Health Servs., 959 F.2d at 1281; Caprera, 790 F.2d at 445; Parks v. Collins, 761 F.2d 1101, 1106-07 (5th Cir. 1985); accord New York Chinese TV Programs, 996 F.2d

acquiescence to a magistrate judge's exercise of judicial power, or active prosecution of an action before a magistrate judge.[13]

Thus, in Caprera v. Jacobs,[14] we vacated a magistrate judge's judgment because less than all of the parties had expressly consented to his authority. After the district court had denied defendants' Rule 12(b)(6) motion to dismiss, the parties had unanimously consented to have a magistrate judge conduct all further proceedings. Thereafter, the plaintiffs amended their complaint to include additional defendants. These defendants never gave express consent to the magistrate judge's authority, but they

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at 24-25 (holding consent can not be inferred from intervenors' status as majority shareholders of consenting plaintiff corporation); Jaliwala, 945 F.2d at 224 (7th Cir. 1991) (holding that party's failure to object could not imply consent).

[13]In Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, (1986), the Supreme Court recognized that Article III confers on litigants a right to "an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States." Id. at 848. That right was characterized as a personal right subject to waiver. Id. Section 636(c)'s consent requirement obviates any constitutional concerns arising from the assumption of the federal judicial power by one who is not an Article III judge, as it constitutes a sufficient waiver of a litigant's right to an Article III judge. See Puryear v. Ede's, Ltd., 731 F.2d 1153 (5th Cir. 1984); Pacemaker, 725 F.2d at 542-43. In Schor, however, the Supreme Court suggested that a party could waive his right to an Article III judge either through express or implied consent. See Schor, 478 U.S. at 849-50. Section 636(c) takes a narrower view, however, requiring that a party's consent be express before a magistrate judge may exercise authority pursuant to § 636(c). Regardless, once valid consent is given pursuant to § 636(c), a party has no absolute right to withdraw that consent and demand his right to an Article III judge. Sea Land Servs., 816 F.2d at 1021 ("Once a right, even a fundamental right, is knowingly and voluntarily waived, a party has no constitutional right to recant at will.").

[14]790 F.2d 442 (5th Cir. 1986).

did join with the consenting defendants in a renewed motion to dismiss. This time, the motion was granted, and the magistrate judge entered judgment for the defendants. On appeal, the plaintiffs asserted that the judgment was void for lack of unanimous consent.[15] We agreed, in essence, holding that § 636(c)'s consent requirement could not be implied from the non-consenting defendants' conduct in moving for dismissal before the magistrate judge. As we stated, "Section 636(c) requires the express consent of all the parties, given after they have been informed of their right to a trial before an Article III judge. We will not infer this statutorily required consent from the conduct of the parties."[16]

Similarly, in E.E.O.C. v. West Louisiana Health Services, Inc.,[17] the plaintiff, through her counsel, consented to the consolidation of her action with another action that had been referred to a magistrate judge with the consent of all the parties. The plaintiff, however, never consented to a reference of her action to a magistrate judge. After trial of the consolidated actions before the magistrate judge, judgment was entered against the plaintiff, and she appealed, contending that the judgment was void for lack of consent. The defendants argued that she had

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[15] Id. at 443-44.

[16] Id. at 445. Although we expressed concern that litigants might remain silent on such jurisdictional defects, hoping that they might get "a second bite at the apple," we noted that "when the objection is to jurisdiction, it cannot be waived." Id.

[17] 959 F.2d 1277 (5th Cir. 1992).

impliedly consented to a trial by magistrate judge, as she had consented to the consolidation of the actions and had failed to object to the reference of the action to a magistrate judge.[18] We disagreed, holding that a party's consent could not be so implied, and that when a magistrate judge enters judgment under § 636(c) without unanimous consent, that failure constitutes jurisdictional error which can not be waived.[19]

Likewise, in Parks v. Collins,[20] the parties consented to a trial before a magistrate judge, who subsequently entered a judgment for the plaintiffs. The plaintiffs then brought a garnishment action to collect on the judgment, but the defendants failed timely to answer, and a default judgment was entered by a district judge. Subsequent to that, the defendants moved to set aside the default judgment, and following a hearing before the original magistrate judge, he granted the motion. On appeal, we stated that "we will not assume that consent to trial of the original action by the magistrate [judge] constitutes a similar consent with respect to the garnishment action; nor will such consent be inferred by virtue of the fact that the Rule 60(b) motion was noticed before the magistrate [judge] and was heard by the magistrate [judge] with no objections."[21]

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[18]Id. at 1278-79, 1281.

[19]Id. at 1281-82.

[20]761 F.2d 1101 (5th Cir. 1985).

[21]Id. at 1106. And most recently in McGinnis v. Shalala, 2 F.3d 548, 551 (5th Cir. 1993), cert. denied, 127 L. Ed. 2d 647 (1994), we refused to imply consent from the fact that the non-

In addition to requiring that the parties' consent be express, § 636(c) requires that such consent be voluntary[22] and, as we stated in Caprera, with awareness of the right to proceed before an Article III judge.[23] Specifically, § 636(c)(2) commands, "Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent."[24] When a party's consent is obtained involuntarily or through undue influence, § 636(c) requires withdrawal of consent so

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consenting defendant moved before the magistrate judge for dismissal of the plaintiffs' action.

[22]See 28 U.S.C. § 636(c)(2); S. REP. No. 74, 96th Cong., 1st Sess. 5 (1979), reprinted in 1979 U.S.C.C.A.N. 1469, 1473 ("The bill clearly requires the voluntary consent of the parties as a prerequisite to a magistrate's exercise of the new jurisdiction."); H.R. CONF. REP. No. 444, 96th Cong., 1st Sess. 8 (1979), reprinted in 1979 U.S.C.C.A.N. 1487, 1489 ("Further, rules of the court must include procedures to protect the voluntariness, knowingness, and willingness of the consent.").

[23]Caprera v. Jacobs, 790 F.2d 442, 445 (5th Cir. 1986).

[24]Fed. R. Civ. P. 73(b) implements this command by specifying procedures for obtaining consent which are designed to preserve the voluntariness of the parties consent:

> When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c), If within the period specified by local rule, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election.
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> A district judge, magistrate judge, or other court official may again advise the parties of the availability of the magistrate judge, but, in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. A district judge or magistrate judge shall not be informed of a party's response to the clerk's notification, unless all parties have consented to the referral of the matter to a magistrate judge.

obtained.[25]

Recognizing the importance of consent to the validity of a magistrate judge's authority pursuant to § 636(c), in Archie v. Christian,[26] we directed that before

> commencing the actual trial of any civil case in which a magistrate [judge] is to preside pursuant to the authority of 28 U.S.C. § 636(c), jury or nonjury, he shall inquire on the record of each party whether he has filed consent to the magistrate's presiding and shall receive an affirmative answer from each on the record before proceeding further.[27]

Close scrutiny of the trial transcript in the instant case reveals no such inquiry by the magistrate judge prior to commencing the bench trial. In the absence of such inquiry, the only evidence of Johnson's consent is the letter signed by his attorney, which Johnson now contends was unauthorized. Thus, we must determine whether, standing alone, written consent executed solely by counsel is sufficient to bind a party. We hold that it is not, even though we will afford such written consent a strong presumption that it has been authorized by the party.

Given that § 636(c) requires that consent be both express and voluntary, we can conclude only that § 636(c) contemplates not that consent is the sole prerogative of trial counsel, but rather, that consent is the party's prerogative to be arrived at with the advice

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[25]See Carter v. Sea Land Servs., Inc., 816 F.2d 1018, 1021 (5th Cir. 1987).

[26]808 F.2d 1132 (5th Cir. 1987) (en banc).

[27]Id. at 1137.

of counsel.[28] If a party personally executes written consent to trial before a magistrate judge pursuant to § 636(c), such written consent, on its face, will evince valid consent, binding upon that party.[29] Thereafter, the party's consent may not be withdrawn except upon a showing of "good cause" or "extraordinary circumstances,"[30] and withdrawal is within the sound discretion of the district court.[31]

We do not suggest, however, that consent can only be conferred by a party personally. To the contrary, we recognize that the exigencies of litigation require that counsel act on behalf of his client in myriad situations, and that when he so acts he may

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[28]In Williams v. Romero, 1993 WL 376500 (7th Cir. Sept. 24, 1993), the Seventh Circuit held, in an unpublished opinion, that a party must personally consent to proceed before a magistrate judge, reasoning that such consent entails the waiver of the right to proceed before an Article III judge which is not a strategic or tactical decision for the attorney to make alone. See also Ortiz v. Page, 1993 WL 382157 (7th Cir. 1993) (unpublished) (suggesting that counsel can confer consent with permission of his client). Similarly, in Jurado v. Klein Tools, Inc., 755 F. Supp. 368, 370-71 (D. Kan. 1991), a Kansas district court held that an attorney's unequivocal consent to trial by magistrate judge was presumably within the scope of counsel's authority, but noted that the client could rebut that presumption with contrary evidence. See id.

[29]See Lovelace v. Dall, 820 F.2d 223, 226 (7th Cir. 1987).

[30]See 28 U.S.C. § 636(c)(6) ("The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection."); Carter v. Sea Land Servs., Inc., 816 F.2d 1018, 1020-21 (5th Cir. 1987) (holding that parties don't have an absolute right to withdraw validly given consent).

[31]However, no such discretion is afforded the district court when it is shown that a party's consent was obtained involuntarily or through undue influence. See Sea Land Servs., Inc., 816 F.2d at 1021.

thereby bind his client. As § 636(c) rests the ultimate decision to consent with the client, however, counsel cannot unilaterally consent, but rather must confer with that client before taking such action on the client's behalf. When counsel executes written consent on behalf of a client, we will not presume that counsel has failed to confer with that client before taking such action. Rather, we will trust that counsel has fulfilled his role as advisor and has informed his client of his right to proceed before a magistrate judge or Article III judge and the significance of election between the two. If, however, a party can show that counsel has given consent without consulting him or against his directions, consent thereby given can not be considered valid for purposes of § 636(c), and the party must be afforded the opportunity to exercise his right to proceed before an Article III judge.

We note that no such inquiry would have been necessary if here the magistrate judge had complied with our directive to inquire of the parties before commencing the bench trial whether they had filed consent to proceed before the magistrate. An affirmative response either by the Johnson or by counsel in Johnson's presence would thereby have constituted sufficient ratification by Johnson of the written consent executed by counsel. If that inquiry had revealed that the parties had failed previously to file written consent with the court, the magistrate judge could have rectified that failure by further inquiring of the parties, on the record, whether they wished to proceed before the magistrate judge or

before an Article III judge.[32] An oral election to proceed before the magistrate judge would constitute sufficient consent to support the magistrate judge's exercise of authority under § 636(c).

III

CONCLUSION

As the record is not sufficiently developed to allow a determination whether Johnson's attorney was authorized to consent on Johnson's behalf, we remand the case to the district court for factual development in accordance with this opinion. Although this appeal also raises challenges to the merits of the magistrate judge's judgment, we reserve ruling thereon until the validity of that judgment is resolved.

[32]That consent is requested on the eve of trial and in the presence of the magistrate judge does not necessarily render any resulting consent invalid as the product of coercive procedure. See Adams v. Heckler, 794 F.2d 303, 307 (7th Cir. 1986). However, it would be good practice to inform the parties that no adverse substantive consequences will flow from their refusal to give such consent.