**UNITED STATES COURT OF APPEALS**
**for the Fifth Circuit**

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No. 93-8159
Summary Calendar

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ROI LE'SHILOH-BRYANT,

Plaintiff-Appellant,

VERSUS

J. GARNER, Etc., ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Western District of Texas
W 92 CA 266

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June 28, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[1]

Shiloh-Bryant appeals the dismissal of his § 1983 suit against Texas prison officials. We affirm.

I.

Texas prison inmate Roi Le Shiloh-Bryant filed suit pro se and **in forma pauperis** (IFP) pursuant to 42 U.S.C. § 1983 alleging that prison officials had violated his civil rights by enforcing prison rules in a discriminatory manner. Specifically, Shiloh-Bryant asserted that he has received disciplinary citations for refusing

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to shave or cut his hair due to his religious beliefs, while other inmates in his administrative segregation unit have not been disciplined for engaging in sexual misconduct.

At a **Spears**[2] hearing, Shiloh-Bryant testified that he refuses to shave or cut his hair because he believes that it is prohibited by the Mosaic law. It is a violation of Texas prison regulations for a prisoner to refuse to shave or to cut his hair. During the time period covered by this complaint, Shiloh-Bryant was not forced to shave or to cut his hair, but he received disciplinary citations for his failure to do so. Shiloh-Bryant did not suggest that the disciplinary proceedings violated his right to due process. Instead, he alleged that prison authorities have discriminated against him because they do not enforce prison Rule 20 (which prohibits sexual misconduct) with the same vigor that they enforce Rule 24.1 (the grooming regulation). Rules 20 and 24.1 are both level-two offenses. Shiloh-Bryant claimed that inmates in administrative segregation were allowed to masturbate with impunity at the same time that he and other inmates in the unit who refused to comply with grooming regulations on religious grounds were disciplined.

Warden Dretke testified that all male prison inmates are prohibited from having beards or long hair in order to facilitate identification and for security reasons. These rules are applied uniformly to all inmates. Dretke also testified that the rule against sexual misconduct is enforced "rather aggressively" "when

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

it is appropriate."

The magistrate judge recommended that the complaint be dismissed as frivolous because Shiloh-Bryant had not demonstrated that he had been denied the right to practice his religion or that prison officials' enforcement of Rules 20 and 24.1 violated the Equal Protection Clause. After a **de novo** review, the district court overruled Shiloh-Bryant's objections to the magistrate judge's report and dismissed the suit as frivolous.

II.

A complaint filed **in forma pauperis** may be dismissed as frivolous if it lacks an arguable basis in fact and law. A § 1915(d) dismissal is reviewed for abuse of discretion. **Ancar v. Sara Plasma, Inc.**, 964 F.2d 465, 468 (5th Cir. 1992).

**A. Equal Protection**

On appeal, Shiloh-Bryant concedes that prison authorities have the right to require that he comply with prison grooming standards and that he is not being denied the right to practice his religion. Shiloh-Bryant suggests, however, that he is a victim of disparate treatment and "invidious discrimination" because the prison rules are enforced in a way that discriminates against him. According to Shiloh-Bryant, Rules 20 and 24.1 should be enforced with equal severity or lenity because both rules are level-two offenses related to health, safety, and security.

A violation of the Equal Protection Clause occurs only when, **inter alia**, the governmental action in question "classif[ies] or distinguish[es] between two or more relevant persons or groups."

**Brennan v. Stewart**, 834 F.2d 1248, 1257 (5th Cir. 1988). The Equal Protection Clause is violated only by intentional discrimination. "Discriminatory purpose . . . implies more than intent as violation or as awareness of consequences. . . . It implies that the decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for **the purpose** of causing its adverse effect on an identifiable group." **Lavernia v. Lynaugh**, 845 F.2d 493, 496 (5th Cir. 1988). Discriminatory enforcement of facially neutral grooming regulations may, under some circumstances, violate the Equal Protection Clause. **Scott v. Mississippi Dept. of Corrections**, 961 F.2d 77, 82 n.21 (5th Cir. 1992).

Shiloh-Bryant's claim fails because he has not established that he is treated differently from other similarly situated inmates. **Green v. McKaskle**, 788 F.2d 1116, 1125 (5th Cir. 1986). Although the regulations concerning grooming and sexual misconduct both relate to Level 2 offenses, the rules are not comparable because they prohibit very different types of conduct. Shiloh-Bryant has long hair and a beard. He has been disciplined for violating Rule 24.1[3] because he has refused documented orders to shave and cut his hair. Shiloh-Bryant has not suggested that other inmates in his administrative segregation unit have not been similarly disciplined for violating Rule 24.1; nor has he suggested he is disciplined for violating Rule 20 more severely than other

[3]Rule 24.1 prohibits "[r]efusing to groom (shave or get a haircut). Plaintiff's exhibit 2, p. 20.

administration segregation inmates.

State prison officials have wide discretion in the creation and enforcement of prison rules. **Wolff v. McDonnell**, 418 U.S. 539, 561-62, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The day-to-day operation of prisons is left to the "broad discretion" of prison officials. **Jackson v. Cain**, 864 F.2d 1235, 1249 (5th Cir. 1989). Without constant surveillance of each individual inmate, it would be impossible for prison officials to enforce Rule 20[4] with the same stringency as Rule 24.1. **See Thompson v. Patteson**, 985 F.2d 202, 207 (5th Cir. 1993) (no equal protection violation where greater consistency in enforcement of rules governing inmates' access to publications could be obtained only if more restrictive rules were imposed).

The dismissal of this suit as frivolous was within the discretion of the district court because Shiloh-Bryant's allegations do not indicate that prison officials have purposefully enforced Rules 20 and 24.1 in a manner that treated similarly situated inmates differently. **See Muhammad v. Lynaugh**, 966 F.2d 901, 903 (5th Cir. 1992).

### B. Adequacy of the Spears Hearing

Shiloh-Bryant suggests that the Magistrate Judge "cut off" his

[4]Rule 20 prohibits "[s]exual misconduct - engaging in sexual acts with others, engaging in sexual acts e.g., masturbation) in public, soliciting sexual acts from others, exposing an inmate's anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, or homosexual conduct involving physical contact (e.g., kissing)."

testimony and refused to give him an opportunity to explain his disparate-treatment claim at the **Spears** hearing. The **Spears** hearing record does not support this contention. The Magistrate Judge did not "cut off" Shiloh-Bryant's explanation of the factual basis of his claim; he merely admonished Shiloh-Bryant that he need not graphically describe other inmates' masturbatory experiences.

### C. Appointment of Counsel

Shiloh-Bryant urges that the district court should have appointed counsel to help him conduct discovery and present his claim. A trial court is not required to appoint counsel for an indigent plaintiff asserting a claim under § 1983 unless there are exceptional circumstances. **Ulmer v. Chancellor**, 691 F.2d 209, 212 (5th Cir. 1982). The district court has the discretion to appoint counsel for a plaintiff proceeding **pro se** if doing so would advance the proper administration of justice. 28 U.S.C. § 1915(d). Among the factors to determine whether exceptional circumstances warrant appointment of counsel in a civil rights suit, the Court should consider: (1) the type and complexity of the case; (2) whether the indigent was capable of adequately presenting the case; (3) whether the indigent was in a position to investigate the case adequately; and (4) whether the evidence would consist in large part of conflicting testimony requiring skill in the presentation of evidence and in cross-examination. **Ulmer**, 691 F.2d at 213. The standard of review for the denial of a motion to appoint counsel is whether the district court abused its

discretion. **Id**.

The court did not abuse its discretion by refusing to appoint counsel. Shiloh-Bryant has clearly explained his legal argument without the assistance of counsel. It is very unlikely that additional discovery would aid Shiloh-Bryant because the record supports the district court's determination that his Equal Protection rights have not been violated.

**D. Access to the Courts**

Shiloh-Bryant argues that he has been denied access to the courts because he has been required to prepare his appellate brief without the benefit of a transcript of the **Spears** hearing and other documents. In his notice of appeal filed in the district court, Shiloh-Bryant requested "all copies of the trial transcripts, records, documents and files compiled [in this suit]." R. 50. The district court did not rule on the request. Shiloh-Bryant is not entitled to relief on this issue. An inmate cannot state a cognizable denial-of-access-to-the-courts claim if his position is not prejudiced by the alleged deprivation. **Henthorn v. Swinson**, 955 F.2d 351, 354 (5th Cir.), **cert. denied**, ___U.S. ___, 112 S.Ct. 2974 (1992). None of the requested documents would have benefited Shiloh-Bryant because the record supports the district court's finding that his claims are without merit.

AFFIRMED.