IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8265

WILLIAM ANTHONY HENSLEE,

Plaintiff-Appellant,

v.

RALPH LOPEZ, Sheriff, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-89-CA-1628)

(March 31, 1994)

Before KING and WIENER, Circuit Judges, and ROSENTHAL,[*] District Judge.

PER CURIAM:[**]

William A. Henslee (Henslee) filed a civil rights action, pursuant to 42 U.S.C. §§ 1983, 1985, and 1986, against various officials at the Bexar County Adult Detention Center (BCADC) in federal district court. He alleged that the defendants had violated his rights under the First, Fourth, and Fourteenth

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[*] District Judge of the Southern District of Texas, sitting by designation.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Amendments. The district court granted the officials' motion for summary judgment on Henslee's First Amendment claims against them in their individual capacities on qualified immunity grounds. The court also denied the defendants' motion for summary judgment on Henslee's First Amendment and conspiracy claims against them in their official capacities, and dismissed Henslee's other claims. After a trial by jury before a magistrate, the jury returned a verdict for the defendants, and the magistrate denied Henslee's motions for a judgment as a matter of law, a new trial, and to alter or amend the judgment. Finding no error, we affirm the judgments of the court below.

I.

Proceeding pro se and in forma pauperis, Henslee--an inmate in the BCADC in Bexar County, Texas, from July 3, 1989, through February 16, 1990--filed a civil rights action pursuant to 42 U.S.C. §§ 1983, 1985, and 1986 in the United States District Court for the Western District of Texas against various BCADC officials in their individual and official capacities. His case was referred to a magistrate judge.

Henslee alleged that BCADC officials violated his First Amendment rights by "conspiring" to deprive him of copies of Playboy and Penthouse magazines, to which he had allegedly subscribed during his stay at the BCADC. He also alleged that his First Amendment rights were violated as a result of the defendants' policy prohibiting the possession by inmates of any magazines containing nude photographs, a policy which contravened

the terms of the Devonish v. Garza consent decree governing conditions in Bexar County jails.[1] Moreover, he contended that the facts and circumstances surrounding the withholding of his magazines deprived him of his Fourth Amendment rights. He further asserted that defendant Vera, a BCADC official, violated his Fourteenth Amendment due process rights by seizing a pamphlet and some "legal notes" from him immediately prior to his transfer to the custody of the Texas Department of Corrections (TDC). He sought both injunctive relief and damages. Shortly after he filed his original complaint, Henslee moved for appointment of counsel. The magistrate denied Henslee's motion.[2]

The defendant BCADC officials moved for dismissal and summary judgment, asserting the defense of qualified immunity and arguing that Henslee's request for injunctive relief had been mooted by his transfer to the TDC. The magistrate recommended that the officials' motion be granted in part and denied in part. The district court adopted the magistrate's recommendation concerning the officials' motion with few changes.

The district court first made it clear that as a remedial order the Devonish consent decree could not in and of itself serve as a substantive basis for a § 1983 claim because such an order does not create or enlarge constitutional rights. See

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[1] The Devonish consent decree, issued August 26, 1981, provided a mail and correspondence plan for the BCADC and did not expressly prohibit the admission of periodicals containing nude photographs into the BCADC.

[2] Henslee's motion was, however, eventually granted before his case went to trial.

Green v. McKaskle, 788 F.2d 1116, 1123 (5th Cir. 1986). The court then determined that although Henslee did not specify under which section of § 1985 his claim was being brought, his underlying First Amendment claim--as it was grounded on alleged violations of the Devonish consent decree--was not cognizable under any of the three sections of § 1985. Further, because a violation of § 1986 was premised upon a violation of § 1985, the court determined that Henslee's failure to state a cognizable claim under § 1985 would preclude his doing so under § 1986. The district court noted, however, that Henslee's First Amendment claim against the defendants in their official capacities could supply the substantive right necessary as the basis for a cause of action under § 1985(3) and that thus Henslee's § 1985(3) claim survived.

The district court then (1) dismissed Henslee's Fourth Amendment claim, his Fourteenth Amendment claim, and all claims premised upon an alleged violation of the Devonish consent decree, (2) granted the defendants' motion for summary judgment on Henslee's First Amendment claim against them in their individual capacities on qualified immunity grounds, and (3) denied the defendants' motion for summary judgment on Henslee's First Amendment and conspiracy claims against the defendants in their official capacities.

After a three-day trial by jury before a magistrate, the jury returned a verdict for the defendants, finding that the defendants did not violate Henslee's First Amendment rights.

Henslee then moved for a judgment as a matter of law, a new trial, and to alter or amend the judgment. The magistrate denied Henslee's motions, and Henslee filed a timely notice of appeal.

II.

Henslee first contends that the magistrate erred in denying his motion for judgment as a matter of law or in the alternative for a new trial. We disagree.

We review a motion for judgment as a matter of law de novo, applying the same legal standard as did the trial court. Roberts v. Wal-Mart Stores, Inc., 7 F.3d 1256, 1259 (5th Cir. 1993). In evaluating such a motion, this court is to view the entire trial record in the light most favorable to the non-movant and draw all inferences in the non-movant's favor. Becker v. PaineWebber, Inc., 962 F.2d 524, 526 (5th Cir. 1992). Only if the evidence at trial points so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion, this court will conclude that the motion should have been granted. See FED. R. CIV. P. 50(a); Resolution Trust Corp. v. Cramer, 6 F.3d 1102, 1109 (5th Cir. 1993). We review the denial of a motion for new trial for an abuse of discretion. United States v. Sanchez-Sotelo, 8 F.3d 202, 212 (5th Cir. 1993).

In Thornburgh v. Abbott, 490 U.S. 401 (1989), the Supreme Court specifically held that the prevailing test regarding the impingement on prisoners' constitutional rights by prison regulations or practices--a test which focused on whether the

regulation or practice was "reasonably related to a legitimate penological interest," see Turner v. Safley, 482 U.S. 78, 89 (1987)--should apply to prison regulation of incoming mail. Thornburgh, 490 U.S. at 419. Although the Thornburgh Court did not pass on any question of evidentiary burden or burden shifting, the Court viewed the district court's enunciated standard of review--requiring that after defendant officials had articulated such a rational relationship, the plaintiff had to show that the defendants had "exaggerated their response" to the problem their practice or regulations addressed--as being sufficiently close to the Turner standard to permit the Court to rely on the district court's findings. Id. at n.12. Further, the Thornburgh Court explained that it was rational for prison officials to exclude from inmates materials that, "although not necessarily 'likely' to lead to violence, [were] determined . . . to create an intolerable risk of disorder under the conditions of a particular prison at a particular time." Id. at 1883 (emphasis added).

Defendant officials testified that Playboy and Penthouse magazines were rejected because they contained nude photographs, photographs which posed a risk to the order of the BCADC because of possible problems with inmates stealing or fighting over these pictures. Evidence presented at trial also indicated that there were no easy, obvious alternatives to the ban on nude photographs--especially in light of the BCADC's particular circumstances of overcrowding and short-term incarcerations.

Thus, evidence presented at trial failed to show that the banning of nude photographs from the BCADC was an "exaggerated response" to the problems affecting security and order in the BCADC because of the specific conditions there at that particular time. After viewing the evidence as a whole in the light most favorable to the BCADC officials, we therefore conclude that the magistrate did not err in denying Henslee's motion for judgment as a matter of law or, in the alternative, his motion for new trial.

III.

Henslee also argues that the magistrate erred in refusing to admit his exhibits pertaining to federal regulations on correspondence in federal prisons and his exhibit pertaining to the Federal Bureau of Prisons Program Statement implementing the federal regulations. We disagree.

This court reviews a trial court's evidentiary rulings for abuse of discretion. United States v. Sparks, 2 F.3d 574, 582 (5th Cir. 1993), cert. denied, 114 S. Ct. 720, and cert. denied, 114 S. Ct. 899 (1994); Jon-T Chems., Inc. v. Freeport Chem. Co., 704 F.2d 1412, 1417 (5th Cir. 1983). An erroneous ruling refusing to admit certain evidence does not constitute reversible error unless the ruling affected a substantial right of the party who sought to have the evidence admitted. See FED. R. EVID. 103(a). Moreover, even relevant evidence may be excluded if its probative value is substantially outweighed by considerations of needless presentation of cumulative evidence. See FED. R. EVID. 403.

The magistrate allowed Henslee to offer evidence about the practice of allowing sexually explicit material into state prisons. Thus, the exhibits pertaining to federal prisons which Henslee wanted to offer as evidence could be considered as cumulative evidence with little probative value. Further, Henslee did not brief this issue on appeal and thus did not show that the magistrate's refusal to admit these exhibits affected his substantial rights in any way. We therefore determine that the magistrate did not abuse his discretion in refusing to admit certain of Henslee's exhibits into evidence.

IV.

Henslee also asserts that the magistrate erred in denying his motion to amend judgment. He contends that the failure of the defendants to adhere to BCADC written policy concerning the exclusion of magazines from the BCADC or to adhere to the Devonish consent decree resulted in a deprivation of his liberty interest without due process of law in violation of the Fourteenth Amendment. He also seeks review of the magistrate's denial of his motion pursuant to Federal Rule of Civil Procedure 54(c).

We review a trial court's denial of a motion to alter or amend judgment for an abuse of discretion. Southern Constructors Group, Inc. v. Dynaelectric Co., 2 F.3d 606, 611 (5th Cir. 1993); Youmans v. Simon, 791 F.2d 341, 349 (5th Cir. 1986).

We first note that Henslee's motion to amend judgment sought only to amend the judgment which stated that in accordance with

the jury verdict Henslee's First Amendment rights were not violated, that Henslee recover nothing from Bexar County, and that his case be dismissed with prejudice. Rule 54(c) is thus inapplicable in that it may be used only by a party in whose favor judgment was rendered.[3]

Moreover, Henslee did not request any relief for a deprivation of an alleged liberty interest in his complaint. Although he filed his objections to the magistrate's recommendations--which reasonably apprised him that the magistrate was recommending the disposition of all claims raised by his pleadings and the motions for summary judgment, he did not object--or otherwise bring to the court's attention--that he had alleged a theory of recovery based on a deprivation of a liberty interest without due process. He also did not request a jury instruction or special interrogatory on the due process theory of recovery which he now argues on appeal. He therefore did not at any time apprise the trial court of his theory of recovery based on a deprivation of a liberty interest without due process of law. We thus find his argument that the trial court abused its discretion in denying his motion to amend judgment to be devoid of merit.

[3] Rule 54(c) states in pertinent part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings" (emphasis added).

V.

Henslee further contends that the district court erred in granting summary judgment to the defendant officials in their individual capacities on qualified immunity grounds. He relies on Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978), and Montana v. Commissioners Court, 659 F.2d 19 (5th Cir. 1981), cert. denied, 455 U.S. 1026 (1982), for the proposition that BCADC officials could not unilaterally bar publications containing nude photographs from their facility.[4]

To determine whether a defendant official is entitled to qualified immunity, a court must first ascertain whether the plaintiff has sufficiently asserted the violation of a constitutional right. Siegert v. Gilley, 111 S. Ct. 1789, 1793-94 (1991); see Brewer v. Wilkinson, 3 F.3d 816, 821 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994). If the plaintiff has asserted the violation of a constitutional right, the court must then determine whether that right had been clearly established so that a reasonable official in the defendant's situation would have understood that his conduct violated that right. Brewer, 3 F.3d at 820.

[4] Despite the fact that it was unclear exactly which written policy submitted by the defendants was in effect during the time Henslee was incarcerated, the district court--after reviewing the magistrate's recommendations and the summary judgment evidence--determined that the evidence was undisputed that the actual policy in effect at the BCADC was a flat ban against the admission of any magazines containing nude photographs.

This court has recognized that the precise contours of a prisoner's First Amendment right to free speech are obscure. Id. However, the Supreme Court has made it clear that prisoners retain only those First Amendment rights of speech which are "not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system." Hudson v. Palmer, 468 U.S. 517, 523 (1984) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

As the magistrate and the district court correctly noted, Henslee's reliance on this court's decisions in Guajardo and Montana is misplaced. Guajardo, decided in 1978, and Montana, decided in 1980, must now be read in light of the "reasonableness" standard the Supreme Court has since enunciated in Turner and Thornburgh. See Brewer, 3 F.3d at 824. "That is, in determining the constitutional validity of prison practices that impinge upon a prisoner's rights with respect to mail, the appropriate inquiry is whether the practice is reasonably related to a legitimate penological interest." Id. This reasonableness standard is premised on the recognition that prison administrators, not the courts, are to make the difficult judgment calls concerning day-to-day institutional operations, even in situations in which an inmate's constitutional rights might be impinged. Turner, 482 U.S. at 89.

As we have already indicated, defendant officials testified that all nude photographs were barred from the BCADC chiefly because they posed a risk to the security and order in the

facility. Evidence presented at trial also indicated that there were no easy, obvious alternatives to the ban on nude photographs--especially in light of the BCADC's specific circumstances at that particular time of overcrowding and short-term incarcerations. Hence, Henslee's claim that he was precluded from receiving Playboy and Penthouse while incarcerated in the BCADC does not rise to the level of a constitutional violation, and thus Henslee has failed to set forth a cognizable First Amendment claim. Accordingly, the district court did not err in granting the defendants' motion for summary judgment on qualified immunity grounds.

VI.

Additionally, Henslee argues that the district court's dismissal of his §§ 1985 and 1986 claims based on the theory that the BCADC could not conspire with itself was erroneous. He bases this argument on the fact that because the dismissal of the defendants in their individual capacities on qualified immunity grounds should be reversed, multiple defendants do exist on which his claim brought pursuant to § 1985(2) and (3)--and thus his § 1986 claim--can stand. Because we have determined that the district court's grant of summary judgment to the defendant officials in their individual capacities on qualified immunity grounds was proper, Henslee's argument is moot.

VII.

Finally, Henslee contends that the timing of the appointment of counsel--after the trial court had ruled on the defendants'

summary judgment motion but before trial--was an abuse of discretion on the part of the trial court. He argues that because he was not released from the TDC until July 5, 1991, he was extremely hampered in his efforts to investigate the case and conduct litigation.

Generally, no right to counsel exists in civil rights cases. See Jackson v. Cain, 864 F.2d 1235, 1242 (5th Cir. 1989). A trial court is not required to appoint counsel for an indigent plaintiff asserting a civil rights claim unless the case presents exceptional circumstances. See id.; Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982).

The trial court has "the discretion to appoint counsel if doing so would advance the proper administration of justice." Jackson, 864 F.2d at 1242. We consider various factors in determining whether the trial court's refusal to appoint counsel amounted to an abuse of discretion:

> (1) the type and complexity of the case; (2) whether the indigent was capable of presenting his case adequately; (3) whether the indigent was in a position to investigate the case; and (4) whether the evidence would consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross examination.

Id.; see Ulmer, 691 F.2d at 213.

Although Henslee asserts that his release from the TDC in July 1991 hampered his efforts to investigate the case and conduct the litigation, the record shows that this case had been on the docket for more than three years before it was tried and that Henslee was given ample opportunity to conduct discovery. Further, the record indicates that after Henslee's motion to

appoint counsel was denied on February 20, 1990, he did engage in extensive discovery and was successful in moving the trial court to issue an order summarizing the discovery disputes. He was also given three opportunities to amend his pleadings and was able to file numerous affidavits and exhibits. His claims that were dismissed had no merit, and his principal claim was tried before a jury after counsel had been appointed.

We thus conclude that the trial court did not abuse its discretion in denying Henslee's initial motion for appointment of counsel.

VIII.

For the foregoing reasons, we AFFIRM the judgments of the court below.