UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8558
Summary Calendar

BURNICE JOE BIRDO,

Plaintiff-Appellant,

VERSUS

THOMAS W. CARL, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W-92-CV-186)

(July 25, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Burnice Joe Birdo, *pro se*, *in forma pauperis*, challenges an adverse judgment in his 42 U.S.C. § 1983 action. We **AFFIRM**.

I.

Birdo, a prisoner in the custody of the Texas Department of Criminal Justice, Institutional Division (TDCJ), claimed, *inter alia*, that Officer Thomas Carl used excessive force against him, and that other TDCJ officers failed to protect him. His claims

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

against all defendants except Carl were dismissed by a magistrate judge. Birdo appealed that dismissal order, but then dismissed his appeal.

Birdo withdrew his consent to proceed before the magistrate judge, and the excessive force claim against Carl was tried to the district court, which found for Carl. In fact, the district court noted that Birdo's case was "frivolous", and ordered that Birdo "not file any further civil actions alleging excessive force unless expressly granted permission to do so by a United States District Judge or a United States Magistrate Judge".

II.

A.

The thrust of Birdo's appeal is his contention that the district court erred by receiving and crediting testimony contradictory to alleged admissions by Carl. On November 23, 1992, the district court clerk received Birdo's request for admissions. Attached was a certificate of service in which Birdo stated that he mailed a copy of the request to Carl's counsel on November 18, 1992.

Pursuant to Fed. R. Civ. P. 36, such requests must be answered or objected to within 30 days; otherwise, they are deemed admitted. Assuming mailing on November 18, Carl had until December 21 to respond, *see* Fed. R. Civ. P. 6(a) and (e) (additional three days because service by mail). The certificate of service attached to Carl's response states that it was mailed on December 22 -- one day

late.[2] According to Birdo, Carl never moved to withdraw the admissions, but the district court received evidence at the trial that contradicted them; thus, it either treated the admissions as withdrawn or accepted Carl's late response.

We have concluded that "the district court may, in its discretion, permit the filing of [an] untimely" response to a request for admissions. ***Birdo v. Collins***, No. 89-6293, slip op. at 3 (5th Cir. Aug. 2, 1990) (unpublished) (citing, *inter alia*, ***Dukes v. South Carolina Ins. Co.***, 770 F.2d 545 (5th Cir. 1985)). As Birdo is well aware from his involvement in his earlier case,

> [w]e have not so held explicitly, but the prevailing rule is that untimely answers must meet the standards for withdrawal of admissions under Rule 36(b). That is, permitting late filing must further the determination of the merits of the litigation, and the party requesting the admissions must be unable to show he is prejudiced by the late filing. Courts also consider the party's culpability in failing to file timely answers. The requesting party is prejudiced by difficulties in proving its case arising from the sudden need to obtain evidence that would have otherwise been admitted.

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[2] This conclusion assumes that Birdo's November 18 certificate of service is part of the record before this Court. It is contained in the record on appeal, as is an order by the district court striking the request from the record (pursuant to district court local rule CV-5(b), discovery requests are to be served on opposing parties, but not filed with the clerk). As Birdo did not introduce his certificate of service as a trial exhibit, or otherwise seek to include it in the record, a powerful argument can be made that the certificate of service is not before us, and we thus would have no means of assessing whether Birdo's requests should have been deemed admitted. In light of our disposition of this issue, however, we assume that Carl's response was one day late.

Id. (citations omitted). Thus, whether the district court permitted the admissions to be withdrawn or accepted the late response, our review is essentially the same.

Our review is hampered by the absence of a trial transcript. The district court did not enter a separate document in the record explaining its decision to accept the late response. According to Birdo, he had a "running objection" at trial to the admission of evidence contradicting the claimed admissions. Lacking a transcript, we do not know why the district court chose not to deem the requests admitted.

At first blush, it may appear necessary to remand and order that a transcript be produced for Birdo, so that meaningful review of the district court's decision may occur;[3] however, the district court's action could be proper for any number of reasons. In fact, we cannot conceive of a reason that the district court could have offered for accepting the late response which we would find constitutes an abuse of discretion. Bearing in mind that the district court's exercise of discretion in this matter is to be

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[3] For this reason, Birdo assigns as error the district court's refusal to provide a transcript at government expense. Carl's central response to Birdo's appeal is to contend that the appeal should be dismissed because Birdo failed to provide *any* record cites. *See* Fed. R. App. P. 28(e); 30(c); 5th Cir. R. 28.2.3; *see also* ***United States v. Wilkes***, 20 F.3d 651, 653 (5th Cir. 1994) (*pro se* litigant's failure to provide record cites can be grounds for dismissal of appeal). Birdo's failure to provide record cites may be excused, in part, if he should have been provided a transcript at government expense. To prevail in his request for a transcript at government expense, Birdo must demonstrate a "particular need for a transcript", and that need must relate to a "substantial question" that he raises. ***Harvey v. Andrist***, 754 F.2d 569, 571 (5th Cir.), *cert. denied*, 471 U.S. 1126 (1985). As discussed *infra*, Birdo has not presented a substantial question.

judged in relation to the possible prejudice to Birdo arising from surprising, late denials of requested admissions, and further recognizing the significant interest in resolving the dispute on the merits, allowing answers to admissions to be filed *one* day late could not, absent extreme circumstances, constitute an abuse of discretion by a district court.[4]

Birdo does not allege any such extreme circumstances; in fact, he does not assert that any prejudice (of the sort recognized in this context) befell him by allowing the response to be filed one day late.[5] Moreover, it is obvious that allowing the one-day late response facilitated a disposition of the case on the merits. Accordingly, as there is no possibility that the district court abused its discretion by accepting the late response,[6] we will not remand for the production of a trial transcript at government expense, nor will we ask that the district court provide explanation relating to Birdo's request for admissions. *Cf.* ***United States v. Piazza***, 959 F.2d 33, 37 (5th Cir. 1992) ("we decline to engage in a game of `Simon sez' with our overburdened, able and

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[4] In the prior ***Birdo*** case, more than three years lapsed between Birdo's request for admissions and the defendant's response. Although the district court's reasons -- if any -- for allowing late filing of the response in that case were not part of our court's opinion, our court nevertheless affirmed the acceptance of the late response. *See* ***Birdo***, No. 89-6293, slip op. at 2-4.

[5] And, the answers still met the deadline on the scheduling order for the completion of discovery.

[6] Indeed, had the district court refused to consider the response, the State may have possessed a compelling argument for finding an abuse of discretion, given that Birdo could identify no prejudice and given that the acceptance of late response furthered a disposition on the merits.

diligent district courts. To vacate and remand this case for resentencing would be to engage in a hollow act and to waste judicial resources which are sorely needed to deal with the ever increasing burden of matters of substance").

B.

Birdo challenges also the district court's requirement that he obtain permission from a district judge or magistrate judge prior to filing certain additional actions. Most of his challenge amounts to an *ad hominem* attack on the district court.

We review a district court's sanctions against vexatious or harassing litigants under the abuse of discretion standard. ***Mendoza v. Lynaugh***, 989 F.2d 191, 195 (5th Cir. 1993). In reviewing the propriety of sanctions against a *pro se* litigant, we are guided first by a proportional inquiry: how much havoc has this litigant wreaked on the judicial system relative to the harm inflicted by other litigants who have been sanctioned? *See* ***id.*** at 195-97. We also consider whether the litigant has received a warning prior to the imposition of sanctions. ***Id.***

To say that Birdo is a frequent litigator in federal, as well as state, court, is an understatement. Our research disclosed at least 18 civil rights actions involving Birdo since 1987, of which four have turned on Birdo's complaint that a court allowed a late response to requests for admissions. He was unsuccessful in each. *See* ***Birdo***, No. 89-6293 (discussed *supra*); ***Birdo v. Parker***, 842 S.W.2d 699 (Tex. Ct. App. 1992); ***Birdo v. Hammers***, 842 S.W.2d 700 (Tex. Ct. App. 1992); ***Birdo v. Holbrook***, 775 S.W.2d 411 (Tex. Ct.

App. 1989). A number of his prior appeals have resulted in affirmations of trial courts' decisions that Birdo's complaints were frivolous. *E.g.*, ***Birdo v. Logan***, No. 93-1650 slip op. (5th Cir. Feb. 23, 1994) (unpublished) (involving, *inter alia*, assertion that Birdo's equal protection rights were violated because his habitual masturbation occasioned worse treatment than other inmates); ***Birdo v. Williams***, 859 S.W.2d 571 (Tex. Ct. App. 1993); ***Birdo v. Ament***, 814 S.W.2d 808 (Tex. Ct. App. 1991).

The district court's decision requiring Birdo to obtain permission prior to filing new federal actions is more than reasonable and proportional. *Compare* ***Mayfield v. Collins***, 918 F.2d 560, 561-62 (5th Cir. 1990) (requiring pre-filing authorization of judge prior to accepting new filings as a sanction; appellant had filed 38 civil rights complaints) *with* ***Mendoza***, 989 F.2d at 196-97 (same sanction reversed when appellant was a "`second-time offender'"). This is especially true given the scope of the district court's sanction; Birdo was prohibited only from filing excessive force claims without judicial permission.

No reference exists in the record, however, that Birdo had been warned previously that such a sanction might be applied. *See* ***Mendoza***, 989 F.2d at 196. While "[t]he imposition of a sanction without a prior warning is generally to be avoided", ***id.*** at 195 (citation omitted), our court has imposed a similar sanction, apparently without first issuing a warning. ***Mayfield***, 918 F.2d at 562. Moreover, we have given general notice to the "recreational litigators" in this circuit's penal institutions that "future

frivolous or malicious appeals will call forth ... sanctions." ***Gabel v. Lynaugh***, 835 F.2d 124, 125 n.1 (5th Cir. 1988). Finally, Birdo was warned recently by this very panel concerning the possibility that frivolous filings would subject him to sanctions. *See* ***Birdo v. Ashmead***, No. 93-1649, slip op. at 9 (5th Cir. Feb. 23, 1994) (unpublished).

Moving beyond the usual frivolity of Birdo's use of the legal process, we cannot fail to note his repeated efforts to mislead the district court and our court. In appealing the sanctions imposed, Birdo asserts that, "[i]n fact, this was the ONLY Lawsuit I had ever even filed in Waco Federal Court!" (Emphasis in original). While this may be technically correct, it is grossly misleading; Birdo has been to this circuit at least eight times, and he can scarcely pretend to be a stranger to federal district court. Yet this is precisely what Birdo purported to be in his original complaint; when asked to "describe each lawsuit" filed in "state or federal court", Birdo listed only three. He then added that he had "no recollection of other civil rights cases that I have previously filed". Birdo either possesses an incredibly selective (or poor) memory, or he is engaged in deceptive practices before the courts of this circuit. The latter appears more likely.

Accordingly, for the reasons discussed, we do not find any abuse of discretion in the district court's reasonable sanction.

C.

Finally, Birdo moves for sanctions against Carl, and to strike his responsive memorandum. Birdo finds the memorandum deficient,

asserting that it fails to comply with Fed. R. App. P. 28(b) and 32(a) and that it is frivolous. It is not frivolous; and, it contains a statement of the issue, a statement of the case, a summary of argument, and an argument (all with record cites to those portions of the record available). By letter to Birdo, our clerk explained the briefing procedure, and stated that "[t]he appellee's brief may be in letter or memorandum form". Birdo's motions are denied.

If anything, Birdo's motions are frivolous. Having been advised by the clerk that the appellee could file a brief in memorandum form, Birdo nevertheless challenged that form. This again gives light to the need to rein in Birdo's frivolous use of federal courts. Accordingly, for this reason and those set forth earlier, we not only affirm the district court's sanction, but act to protect all federal courts in this circuit by broadening its scope, as stated in part III. We conclude with the following recent observation of our court:

> Frivolous cases harm the justice system. The brunt of the harm is borne by those who seek and are entitled to relief from our courts. This particularly applies to those in custody whose ready access necessarily is limited. When frivolous complaints consume inordinate amounts of scarce judicial resources, valid complaints suffer from delay and all the negative aspects of delay. The frivolous filings by [appellant] pose[] such a burden on legitimate complaints. We will permit that imposition no longer.

Holloway v. Hornsby, ___ F.3d ___, No. 93-3729, slip op. 4833, 4834 (5th Cir. June 24, 1990) (Politz, C.J., writing).

III.

For the foregoing reasons, Birdo's motions to strike Carl's brief and to sanction Carl are **DENIED**. The judgment is **AFFIRMED**. Effective immediately, and until further order of this court, all clerks of court subject to the jurisdiction of this court shall decline to accept and file any civil rights complaint submitted *pro se* by Burnice Joe Birdo unless the complaint has been presented first to a judge of this court, or to a district judge or magistrate judge, who has specifically authorized the filing.

MOTIONS DENIED; JUDGMENT AFFIRMED; SANCTIONS IMPOSED