UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8691

JULIAN SCOTT ESPARZA,

Plaintiff-Appellant,

versus

HERBERT L. SCOTT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(92-CV-607)

(May 27, 1994)

Before WISDOM and JONES, Circuit Judges and COBB*, District Judge.

PER CURIAM:**

Appellant Julian Scott Esparza filed a § 1983 action against Warden Herbert L. Scott, Assistant Warden Bryan Hartnett and other employees of the Ramsey I Unit of the Texas Department of Criminal Justice (TDCJ-ID), complaining that he was unconstitutionally strip searched on three or four occasions in

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* District Judge of the Eastern 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

1992. He also asserted that although he reported the incidents to those in authority, Scott and Hartnett took no corrective action. He sought injunctive relief and money damages. The magistrate judge recommended denying relief, and the district court agreed. We vacate and remand for further proceedings.

Responding to Esparza's "motion for summary judgment," Scott and Hartnett, who alone had been ordered by the magistrate judge to respond to the complaint, rested upon the prison strip search policy. Under that policy, TDCJ-ID officers are authorized to conduct visual strip searches "to insure the safety of inmates and staff alike and to reduce the presence of contraband." Administrative Directive No. AD-03.22 (rev. 4), May 12, 1989. Further, the directive authorizes strip searches only "when directed by specific unit post orders, unit or departmental policy or when a supervisor believes there is reasonable cause to warrant such a search." The prison officials apparently believed that because Esparza was transferred, shortly after the events in question, to a program for physically aggressive mentally ill offenders, his mental condition must have justified the searches. Apart from making this assumption, however, the prison officials attached no documentary evidence or affidavits to establish that Esparza had been so classified at the time of the strip searches. They supplied neither any evidence of "unit post orders, unit or departmental policy" nor of "reasonable cause" to justify the searches in terms of the prison policy directive.

If Esparza was in segregated custody or mentally ill at the time of the strip searches, our precedent clearly condones the officials' actions. Hay v. Waldron, 834 F.2d 481 (5th Cir. 1987). The appellees, as stated, did not show that this was so.

If Esparza did not fall in the class of prisoners or circumstances covered by Hay, then the case becomes somewhat more complex. The circumstances of Esparza's searches, whether those searches comported with AD-03.22, and whether the policy serves a legitimate penological interest are among the facts and issues that may have to be explored. See, e.g., Covino v. Patrissi, 967 F.2d 73 (2d Cir. 1992) (upholding random visual strip searches in prison based on fourth amendment balancing test).

For now, suffice it to say that the record does not assure us that the strip searches conducted on Esparza fall within the holding of Hay, hence, the summary judgment cannot be sustained at this time. Further proceedings are necessary to elucidate the facts and legal issues in the case. We decline to speculate further on the skeletal record.

For these reasons, we vacate the district court's judgment of dismissal and remand for further proceedings consistent herewith.

VACATED and REMANDED.