UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8771
Summary Calendar

JERRY R. SULLIVAN,

Plaintiff-Appellant,

VERSUS

INTERNAL AFFAIRS DEPARTMENT,
Hughes Unit, T.D.C.J.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CV-092)

(June 2, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges:

PER CURIAM:[1]

Proceeding *pro se* and *in forma pauperis*, Jerry R. Sullivan appeals the dismissal of his action for failure to state a claim upon which relief may be granted. We **AFFIRM**.

I.

Sullivan, a state prisoner, filed a civil rights action, naming the Internal Affairs Department (IAD), Hughes Unit, Texas Department of Criminal Justice, as a defendant, and alleging that

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

he was beaten and victimized by gangs as a result of complaints he made to the IAD.[2]

At the ***Spears*** hearing convened by the magistrate judge, Sullivan presented a rambling and incomprehensible discourse, apparently complaining that he had been attacked by and fought with black inmates "behind KKK", and that the only response he received from prison authorities regarding his complaints was that something would be done if his allegations proved to be true. As proof that he was a victim of a conspiracy, Sullivan recounted an incident where an unsupervised inmate came to his cell in administrative segregation; believing he was about to be attacked, Sullivan threw hot water on the inmate. The prison warden testified and characterized Sullivan's disciplinary history as "extensive", noting that he had 14 disciplinary offenses for fighting with other inmates.

In his report and recommendation, the magistrate judge concluded:

> At the hearing, Plaintiff's testimony was rambling and he was at times totally incoherent. What Plaintiff was able to make clear, however, is that he is a member of some group which is admittedly opposed to integration; and that as a result of his views and associations, he has

[2] After the suit was filed, the magistrate judge entered an order allowing Sullivan 20 days in which "to state specific facts, and to specifically identify and name as defendants those individuals involved in the alleged constitutional violations." Instead of complying with this order, Sullivan filed a letter with the court clerk, complaining of the way that his lawsuits were being handled and suggesting that he wished to dismiss the suit. Concluding that Sullivan should be required to clarify his desire to dismiss the action, the magistrate judge convened a ***Spears*** hearing.

> repeatedly had problems with the black inmates incarcerated at the Hughes Unit. According to Plaintiff's testimony, these problems consist primarily of physical altercations, which have escalated upon occasion to such a degree as to include ax fights with unnamed black inmates.

The magistrate judge noted that Sullivan had been unable to identify any individual IAD personnel to whom he had written to complain about the attacks, although he did state that he had written to Warden Jack Garner about his inability to get along with the black inmates. Sullivan contended that he should have been moved to another building. He believed that there was a causal connection between his complaints to IAD and the attacks, but was unable to articulate any facts in support of that belief.

The magistrate judge concluded that the IAD was not a proper party defendant in a civil rights action because, as a state agency, suits against it are barred by the Eleventh Amendment. ***Hughes v. Savell***, 902 F.2d 376, 377-79 (5th Cir. 1990); ***Ruiz v. Estelle***, 679 F.2d 1115, 1137 (5th Cir.), ***modified on other grounds***, 688 F.2d 266 (5th Cir. 1982). The magistrate judge further reasoned, assuming Sullivan could amend his complaint to name individual prison officials as parties defendants, that the remedy requested by Sullivan -- to be moved to another building -- would only serve to protect him from racially motivated attacks if the building were racially segregated. Because the Supreme Court has held that prison segregation on the basis of race alone violates an inmate integration policy, this allegation is insufficient, without more, to establish a constitutional violation. *See* ***Lee v. Washington***, 390 U.S. 333 (1968). Finally, because Sullivan had

failed to allege facts from which it could be concluded that he was threatened with a pervasive risk of harm and that prison officials had failed to exercise reasonable care to prevent prisoners from intentionally inflicting harm or creating unreasonable risk of harm to other prisoners, Sullivan had failed to show that prison officials had violated his constitutional right to reasonable protection from harm caused by other inmates. ***See Stokes v. Delcambre***, 710 F.2d 1120, 1124 (5th Cir. 1983). As to the allegation that Sullivan had been required to defend himself in his cell by throwing hot water on an unsupervised inmate, the magistrate judge concluded that Sullivan had alleged no more than negligence on the part of prison officials, which did not state a constitutional violation. *See* ***Davidson v. Cannon***, 474 U.S. 344 (1986).

Because Sullivan could prove no set of facts in support of his claim entitling him to relief, the magistrate judge recommended that the action be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. Sullivan did not file objections, and the district court adopted the report and recommendation and dismissed the action.[3]

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[3] After the district court dismissed his complaint, Sullivan filed another civil rights complaint with the same docket number, noting that "Good cause for = This Appeal." Because we liberally construe notices of appeal where the mislabeling is apparent and there is no prejudice to the adverse party, ***Warfield v. Fidelity and Deposit Co.***, 904 F.2d 322, 325 (5th Cir. 1990), we construe the papers filed by Sullivan as a proper notice of appeal.

II.

A.

Sullivan complains first that he had requested in his complaint that copies of disciplinary hearing tapes, records, photos, incident reports and prison records and the head of the IAD be produced at the ***Spears*** hearing, but they were not. The complaint does not contain these requests and the record does not reflect that the requests were made in any other document.

The magistrate judge's order setting the ***Spears*** hearing requests the defendant to produce copies of disciplinary records, incident reports and any other records relevant to Sullivan's allegations, and there is nothing in the record indicating that the defendant failed to comply.[4] Sullivan does not suggest why he needs the records and does not identify specific records that were omitted, apart from photographs of his injuries and tapes of the disciplinary hearing.

Sullivan's contention misconstrues the purpose of a ***Spears*** hearing. As the magistrate judge's order reflects, the hearing was not convened to determine the merits of Sullivan's claims. Instead, its purpose, in part, was to give Sullivan an opportunity to explain the factual basis for his claims and to determine whether the complaint should be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d) or for failure to state a claim upon which relief may be granted under Rule 12(b)(6). *See* ***Adams v. Hansen***,

[4] In fact, the transcript of the hearing reflects that medical records were available along with at least some of the disciplinary records.

906 F.2d 192, 194 (5th Cir. 1990) (***Spears*** hearing is not trial on merits but is in nature of amended complaint or more definite statement). The magistrate judge requested the records as an aid in determining whether the complaint should be dismissed as frivolous and Sullivan had no independent right to have the records produced at that stage of the litigation.

B.

In Sullivan's brief, most of the stated facts were not raised before the district court.[5] We will not address issues raised by these facts, because they are raised for the first time on appeal. *See* ***Varnado v. Lynaugh***, 920 F.2d 320, 321 (5th Cir. 1991). Further, even construing Sullivan's brief liberally, we are unable to discern any specific challenge to any portion of the district court's judgment.

In any event, we have reviewed the magistrate judge's report and recommendation, and agree that Sullivan has not identified any individuals who are personally responsible for causing him to suffer a constitutional deprivation. Because the IAD is not a proper defendant, and because Sullivan has not identified any other defendant who is personally responsible for failing to protect him from his follow inmates, the district court properly determined

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[5] For example, Sullivan asserts in his appellate brief that he was required to undergo surgery to remove 23 tattoos so that he could get a better job when he was released from prison. According to his appellate brief, however, in the middle of the surgery, while he was "still on the surgery table, fluid still coming out from the burn's and skin," the head of the hospital came in and demanded that the operation stop because it was "cosmetic surgery" that the state would not let them do any more.

that Sullivan could prove no set of facts that would entitle him to judgment in this action. Therefore, the district court properly dismissed the case for failure to state a claim pursuant to Rule 12(b)(6).[6]

III.

For the foregoing reasons, the judgment is

AFFIRMED.

[6] Even construing the complaint, as amended by the ***Spears*** hearing, as favorably to Sullivan as possible, it "lacks even an arguable basis in law" so dismissal would be proper under either Rule 12(b)(6) or section 1915(d). *See* ***Moore v. Mabus***, 976 F.2d 268 (5th Cir. 1992).