

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10336
Summary Calendar

JULIAN SCOTT ESPARZA,

Plaintiff-Appellant,

VERSUS

DELAROSA, Captain,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(1:93-CV-164-C)

(July 21, 1994)

Before GARWOOD, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Julian Esparza appeals the dismissal, as frivolous under 28 U.S.C. § 1915(d), of his prisoner's civil rights action. Concluding that the record is insufficient for appellate review, we vacate and remand.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Esparza filed this 42 U.S.C. § 1983 action against Captain Delarosa, a correctional officer of the Texas Department of Criminal Justice (TDCJ) at Robertson State Farm, alleging that Delarosa caused him to submit to a body cavity and strip search by threatening him with the use of force. In his brief in support of a motion for preliminary injunction, Esparza asserted that Delarosa abused his power under Administrative Directive 03.22. He sought equitable relief and monetary damages.

The magistrate judge determined that prison policies relating to body cavity searches are not unconstitutional and that alleged violations of prison rules will not support a claim under § 1983. After an independent review of the record and Esparza's objections to the magistrate judge's report, the district court dismissed the complaint as frivolous.¹

II.

Implicitly, Esparza argues that the district court erred in dismissing his claim as frivolous. A district court may dismiss an in forma pauperis proceeding if the claim has no arguable basis in law and fact. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th

¹ The district court stated that the magistrate judge reviewed the questionnaire used to develop the factual allegations in the complaint. See Watson v. Ault, 525 F.2d 886, 892 (5th Cir. 1976) ("[C]omplainants may be required to respond to the questionnaire as a necessary pleading auxiliary, in the nature of a motion for more definite statement, rule 12(e), F.R.Civ.P., in order that the court may assess the factual and legal bases of the claim asserted."). If there was a Watson questionnaire, it is not part of the record, nor is there any indication in the district court's docket sheet that such a questionnaire was sent to Esparza.

Cir. 1992). The dismissal is reviewed for abuse of discretion.
Id.

In a recent decision, this court addressed a similar allegation that the warden, assistant warden, and other employees of the Ramsey I Unit subjected Esparza to unconstitutional strip searches. See Esparza v. Scott, No. 93-8691 (5th Cir. May 27, 1994). Strip searches are authorized in routine situations "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." Id. at 2 (quoting Administrative Directive AD-03.222 (rev. 4), May 12, 1989)). The court reasoned that, under Hay v. Waldron, 834 F.2d 481 (5th Cir. 1987), "[i]f Esparza was in segregated custody or mentally ill at the time of the strip searches, our precedent clearly condones the officials' actions." Esparza, slip op. at 2-3. Because it could not be determined from the record whether the strip searches conducted on Esparza fell within the holding of Hay, the court vacated the judgment of the district court and remanded for further proceedings. Id. at 3.

In this case, the magistrate judge did not address the question of whether Esparza's strip searches fell within the purview of Hay. As in Esparza v. Scott, nothing in the record indicates the circumstances of Esparza's searches. Until the record is further developed, there can be no meaningful appellate review. Accordingly, the judgment is VACATED and REMANDED for further proceedings.