IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40132
Conference Calendar

NELSON R. SHILLING,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:93-CV-147

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(September 20, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Nelson R. Shilling's appellate brief is an argument on the facts, re-urging that he proved his case and should prevail on the strength of his evidence. However, such an argument is inappropriate; more properly, his argument, given a liberal construction, is that the magistrate judge's factual findings are clearly erroneous. He does not assert that the magistrate judge did not make the findings and conclusions embodied in the Memorandum Opinion and Order, but argues only that he has a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

different interpretation of the evidence; i.e., the magistrate judge should have believed his testimony. He also argues that the magistrate judge improperly analyzed his claims under an Eighth Amendment rubric and that she should have engaged in an equal-protection analysis under the Fourteenth Amendment. He offers no support for such a contention.

Factual findings made at trial are reviewed for clear error. See, e.g., Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir. 1992). An appellant, even one pro se, who wishes to challenge findings or conclusions that are based on proceedings at a hearing has the responsibility to order a transcript. Fed. R. App. P. 10(b); Powell v. Estelle, 959 F.2d 22, 26 (5th Cir.), cert. denied, 113 S. Ct. 668 (1992). This Court does not consider the merits of an issue when the appellant fails in that responsibility. Powell, 959 F.2d at 26; see also Richardson v. Henry, 902 F.2d 414, 416 (5th Cir.) (pro se appellant), cert. denied, 498 U.S. 901 (1990).

Shilling has not provided a trial transcript. Even if a transcript were available, the credibility and weight to be given the evidence are exclusively within the province of the trier of fact. "`An appellate Court is in no position to weigh conflicting evidence and inferences or to determine the credibility of witnesses; that function is within the province of the finder of fact.'" Martin v. Thomas, 973 F.2d 449, 453 n.3 (5th Cir. 1992) (quoting Staunch v. Gates Rubber Co., 879 F.2d 1282, 1285 (5th Cir. 1989), cert. denied, 493 U.S. 1045 (1990)). Therefore, a transcript is irrelevant because his argument

regarding credibility determinations is inappropriate. We thus decline to consider his contention on appeal. See Alizadeh v. Safeway Stores, Inc., 910 F.2d 234, 237 (5th Cir. 1990).

Regarding his equal-protection argument, Shilling has failed even to allege that he as a member of a protected class entitled to equal protection. He has failed to present any substantive argument or adequately brief the issue. Thus, it is not properly before this Court. Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987).

Shilling also argues that the magistrate judge erred by denying his request for appointment of trial counsel. A trial court is not obligated to appoint counsel in a § 1983 suit unless the case presents "exceptional circumstances." Ulmer v. Chancellor, 691 F.2d 209, 212-13 (5th Cir. 1982). The denial of appointment of counsel is reviewed for abuse of discretion. Id.

Shilling's motion for appointment of counsel failed to set forth facts which would indicate the necessity of such an appointment. The issues in this case were not complex, the legal theories were not novel, and Shilling has not shown how an attorney could have aided him significantly in proving his case. The magistrate judge did not abuse her discretion by denying the appointment of counsel.

AFFIRMED.