UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40276
Summary Calendar

KENNETH RAY HASKER,

Plaintiff-Appellant,

VERSUS

WILLIAM CHICO, CO III,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas
(6:93-CV-284)

(September 16, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Kenneth Roy Hasker, a state prisoner, filed a civil rights action against a corrections officer, William Chico. Hasker alleged that Chico, for no apparent reason, slammed his face into the floor with the intention of causing injury. Chico jumped on

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Hasker's back and pulled his arms upward causing excruciating pain, Hasker claimed.

Chico consented to proceed before the magistrate judge pursuant to 28 U.S.C. § 636(c). After a trial, the magistrate judge found that, at the time of the incident, Chico was escorting Hasker from the day-room to his cell. Hasker, who was in handcuffs, jerked his arm away. Chico told him not to jerk away, but Hasker did so again. Because he feared that Hasker was about to become violent, Chico grabbed Hasker's arm and tripped him over his leg. Once Hasker was on the ground, Chico stood over him and raised Hasker's arms to keep him from struggling. The incident was Chico's first use-of-force incident. The nurse attributed Hasker's pain to a tooth extraction which had been performed earlier that day. Subsequent X-rays were normal. The magistrate judge noted that these facts were testified to by three corrections officers and were consistent with the incident report. The magistrate judge discredited Hasker's testimony that he had not jerked away and that Chico had not warned him against jerking. There was no support in the medical record for Hasker's assertion that his dentist had noted a facial fracture. Hasker called two inmates whose testimony was consistent with Hasker's. They believed that Chico was upset because of verbal abuse heaped upon him by other inmates and was provoked into using force on Hasker. Chico testified that he was frequently the target of verbal abuse and that he did not let it bother him. Because Hasker provoked the use-of-force incident and was not seriously injured, the magistrate judge concluded that he

had failed to demonstrate that force was used maliciously and sadistically for the very purpose of causing harm rather than in a good faith effort to restore discipline. Citing Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 999-1000, 117 L. Ed. 2d 156 (1992).

OPINION

The record does not contain a transcript of the trial and Hasker has not moved for production of the transcript at government expense. Factual findings and credibility determinations made at trial are reviewed for clear error. E.g., Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir. 1992). An appellant, even one proceeding 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 has not considered the merits of an issue when the appellant fails in that responsibility. Powell, 959 F.2d at 26; see Richardson v. Henry, 902 F.2d 414, 416 (5th Cir.), (pro se appellant), cert. denied, 498 U.S. 901 (1990), and cert. denied, 498 U.S. 1069 (1991). Accordingly, we will not consider whether the magistrate judge's fact-findings were clearly erroneous.

Hasker moved for relief from the judgment pursuant to Fed. R. Civ. P. 60(b) because of new evidence. The new evidence consists of a report by an oral surgeon who examined Hasker and found "hypermobility of the mandible, irregular right zygomatic arch with

palpated mass anterior to the TMS area" possibly related to an "Old zygomatic fracture ? mandibular prognabhism, Mandibular hypermobility." The magistrate judge denied relief[1] because Hasker had not offered the physician's report with his motion and because the original judgment was not based upon lack of injury but upon Hasker's failure to show that Chico had acted maliciously and sadistically with the purpose of causing harm rather than restoring discipline.

Rule 60(b) permits relief from a final judgment for several reasons, including newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). See Fed. R. Civ. P. 60(b). Newly discovered evidence justifies Rule 60(b) relief only if the evidence is material and controlling and clearly would have produced a different result had it been presented before the original judgment was entered. Brown v. Petrolite Corp., 965 F.2d 38, 50 (5th Cir. 1992). The denial of a Rule 60(b) motion is reviewed for an abuse of discretion. First Nationwide Bank v. Summer House Joint Venture, 902 F.2d 1197, 1200-01 (5th Cir. 1990). Although the new evidence would be material to the question of whether the use-of-force was improperly motivated, see Hudson, 112 S. Ct. at 999, such evidence is insufficient to compel a different result in this case.

[1]The district court retains the power to consider on the merits, and deny, a Rule 60(b) motion filed after a notice of appeal, because the district court's action is in furtherance of the appeal. Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930 (5th Cir. 1976).

Therefore, we hold that the magistrate judge did not abuse her discretion by refusing to grant Rule 60(b) relief.

AFFIRMED.