

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40435
Summary Calendar

WILLIE GARNER,

Plaintiff-Appellant,

VERSUS

PRESIDENT OF UNIVERSITY OF NORTH TEXAS, ET AL.,,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas

(4:92-CV-212)

(January 30, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

On October 16, 1992, Willie Garner, a Texas state prisoner proceeding pro se and in forma pauperis, filed a complaint pursuant to 42 U.S.C. § 1983 against the president of the University of North Texas (UNT), the chief of police at UNT, UNT Assistant Chief

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Jackson, UNT Officers Tober, Lozano, and Elliot, and a former student at UNT. In his complaint, Garner alleged violations of his civil rights through false arrest, false imprisonment, and malicious prosecution, and he sought monetary damages. Garner alleged that on October 2, 1990, while he was jogging in place in a parking lot and watching the UNT football team practice, a UNT student blew his automobile horn and indicated that he wished to park in that parking space. Garner stated that he moved aside and allowed the student, who was hurrying to catch the school's shuttle bus, to park, but advised the student that he should arrive earlier so that he would not have to rush to catch his bus in the future. Garner alleged that he continued jogging down the street and was subsequently arrested by Officer Tober, who had received a call from the dispatcher that a black suspect was on campus harassing a student who was trying to park. Officers Tober and Lozano arrested Garner for criminal trespass; Garner was taken to the UNT police station and was later transferred to the Denton County Jail. Garner further alleged that sometime thereafter, while he was working at a construction job site on the UNT campus, Officers Tober and Lozano informed him that he was in violation of his trespass ban, and that, after radioing the dispatcher to find out whether he was on a "work list," they ordered him to leave the campus. Garner alleged that he subsequently lost his job because of the officers' actions.

On December 22, 1992, the defendants filed a motion to dismiss. The district court granted the defendants' motion to

dismiss with respect to all of the defendants except Officers Tober, Lozano, and Elliot. With respect to the remaining defendants, the district court denied the motion to dismiss without prejudice to the defendants' right to again ask for dismissal through a motion for summary judgment.

On December 3, 1993, the district court notified the parties that an evidentiary hearing would be conducted on January 12, 1994. The notice stated that the issues to be determined at the hearing included "[w]hether plaintiff's or defendant's claims are subject to summary adjudication under F.R.Civ.P. 56," and "[w]hether the individual defendant(s) is (are) subject to a prosecution or liability, in view of any asserted official immunity defense."

On January 3, 1994, Officers Tober and Lozano filed a motion for summary judgment, asserting the defense of qualified immunity. On January 19, 1994, following an evidentiary hearing, the magistrate judge found that Officers Tober and Lozano had probable cause to arrest Garner because the information they received from the dispatcher was based upon a report of the incident from an eyewitness and because Garner had been repeatedly warned against trespassing on the UNT campus. The magistrate judge recommended that the defendants' motion to dismiss, treated as a motion for summary judgment, be granted and that the lawsuit be dismissed with prejudice.

In an order entered on April 20, 1994, the district court adopted the report of the magistrate judge as correct and granted

the defendants' motion for summary judgment. Garner filed a timely notice of appeal.

OPINION

Garner first argues that the district court erred by construing the defendants' motion to dismiss as a motion for summary judgment. He contends that he was not given notice or an opportunity to present "pertinent material." Id.

Generally, parties are entitled to ten days notice that a motion to dismiss is being treated as a Rule 56 motion for summary judgment. Hickey v. Arkla Indus., Inc., 615 F.2d 239, 240 (5th Cir. 1980). Garner was notified more than a month prior to the evidentiary hearing that the court might consider at the hearing whether the defendants' claims were "subject to summary adjudication under [Rule] 56" and whether the defendants were entitled to claim the defense of qualified immunity. Further, one week before the evidentiary hearing, defendants Tober and Lozano filed a motion for summary judgment, asserting the defense of qualified immunity. Thus, Garner's contention that he did not receive notice or an opportunity to present evidence is without merit.

Garner next argues that the district court erred by granting the defendants' motion for summary judgment. He appeals only from the entry of summary judgment in favor of defendants Tober and Lozano. Garner contends that he was arrested without probable cause.

Subsequent to the final judgment by the district court dismissing Garner's claims, the U.S. Supreme Court directed in Heck v. Humphrey, ___ U.S. ___, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), that,

in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Id. at 2372 (footnote omitted). Heck requires the district court to consider "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Id.

The record is unclear as to whether Garner was ultimately convicted of criminal trespass or whether the charges were dismissed for lack of evidence. In his complaint, Garner alleged that the charges had been dismissed for lack of evidence. At the evidentiary hearing, however, he conceded that he had been convicted of the charges.

Assuming, without deciding, that the charges of criminal trespass were dismissed, Garner would still have been required to offer some summary judgment evidence to contradict the affidavits of the arresting officers that they initially arrested Garner in

good faith belief that they had probable cause because he had committed a trespass onto the university campus and had harassed a student, all as evidenced by the affidavit of the bus driver. Garner failed to offer any such rebuttal testimony. Consequently, the judgment of the district court can be affirmed on the basis that there was no genuine issue of fact as to the officers' reasonable good faith belief that probable cause existed to arrest Garner. Therefore, we will affirm the summary judgment in favor of defendants.

Garner additionally argues that the district court erred by repeatedly denying his motions for appointment of counsel. He contends that he has shown exceptional circumstances warranting the appointment of counsel.

This Court reviews the denial of a motion for appointment of counsel for an abuse of discretion. Jackson v. Dallas Police Department, 811 F.2d 260, 261 (5th Cir. 1986). There is no automatic right to the appointment of counsel in § 1983 actions. Id. Counsel must be appointed only if the case presents "exceptional circumstances." Id. (internal quotations and citation omitted).

Four factors should be considered in deciding whether a civil rights case is an exceptional case requiring the appointment of counsel:

- (1) the type and complexity of the case;
- (2) whether the indigent is capable of adequately presenting his case;
- (3) whether the indigent is in a position to investigate adequately the case; and
- (4) whether the evidence will consist in large part of conflicting testimony so as to

require skill in the presentation of evidence and in cross examination.

Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982) (citations omitted). The legal and factual issues in this case are not complex. Garner has not demonstrated that he was unable to present his claims competently. Although several defense witnesses testified at the hearing, much of the questioning was conducted by the magistrate judge; thus skill in the presentation of evidence and in cross-examination was not required. The district court did not abuse its discretion in denying Garner's motion for appointment of counsel.

AFFIRMED.