UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40444
Summary Calendar

IBUKUN' OLUWA WASHINGTON,

Plaintiff-Appellant,

VERSUS

AGUSTIN TORRES, JR., CAPTAIN,
Beto I Unit, Co III, et al.

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:93-CV-397)

(December 23, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:[1]

Washington challenges the dismissal of his § 1983 action. We affirm.

I.

Ibukun' Oluwa Washington, a Texas inmate, brought this **in forma pauperis** § 1983 action alleging that correctional officers Agustin Torres, Jr., and Howard Walker used excessive force to subdue him in violation of the Eighth Amendment. Washington's complaint also alleges that W. C. LaRowe, Director of the Texas

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Center for Correctional Services, denied him access to the courts in violation of the First Amendment. The parties consented to a trial by a magistrate judge judge. Following an evidentiary hearing pursuant to **Spears v. McCotter**, 766 F.2d 179 (5th Cir. 1985), the magistrate judge dismissed Washington's First Amendment claim against LaRowe as frivolous under 28 U.S.C. § 1915(d). The magistrate judge then held a bench trial on Washington's Eighth Amendment claim against Torres and Walker. Following the bench trial, the magistrate judge entered judgment for Torres and Walker. Washington timely appealed.

II.

A.

Washington first argues that the magistrate judge improperly dismissed his First Amendment denial-of-access-to-the-courts claim against Director LaRowe as frivolous. A complaint filed **in forma pauperis** can be dismissed **sua sponte** if the complaint is frivolous. 28 U.S.C. 1915(d); **Cay v. Estelle**, 789 F.2d 318, 323 (5th Cir. 1986). A complaint is frivolous if it lacks an arguable basis in law or fact. **Ancar v. Sara Plasma, Inc.**, 964 F.2d 465, 468 (5th Cir. 1992). We review a dismissal under § 1915(d) for abuse of discretion. **Id.**

Based on our review of the record, we conclude that the magistrate judge did not abuse his discretion in dismissing Washington's denial-of-access-to-the-courts claim. Following the **Spears** hearing, the magistrate judge concluded that Washington's denial-of-access-to-the-courts claim was frivolous because there

was no evidence that LaRowe's actions prejudiced him. A denial-of-access-to-the-courts claim must fail absent evidence that the deprivation actually prejudiced the plaintiff's position. **Henthorn v. Swinson**, 955 F.2d 351, 354 (5th Cir.), **cert. denied**, 112 S. Ct. 2974 (1992). Washington alleges that he voluntarily dismissed his original § 1983 complaint against Torres and Walker because LaRowe promised to provide Washington with legal counsel. When LaRowe failed to provide him with counsel as promised, Washington filed the present complaint naming LaRowe as a defendant in addition to the previously named defendants. Washington fails to allege any facts showing that LaRowe's failure to provide him with legal counsel prejudiced his legal position. To the contrary, the fact that Washington was able to refile his complaint demonstrates that LaRowe's inaction did not prejudice him.

B.

Washington also argues for the first time on appeal that the magistrate judge should have excluded nurse Mary King's testimony during the bench trial of his Eighth Amendment claim. King testified that Washington complained of injuries to both shoulders, his head, and his ankles when he was brought to the prison infirmary. However, King further testified that Washington's actual injuries were only mild contusions on his left shoulder and the right-side of his head. Washington contends that the magistrate judge should have excluded King's testimony under Federal Rule of Evidence 403 because it was confusing and contradictory.

Because Washington did not raise this objection at trial, we limit our review to whether the magistrate judge committed "plain error" in allowing King's testimony. **Highlands Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh**, 27 F.3d 1027, 1032 (5th Cir. 1994). Washington fails to demonstrate that the magistrate judge clearly or obviously erred in allowing King's testimony. Our review of the record reveals that King's testimony was not so confusing or contradictory to warrant exclusion under Rule 403. In short, Washington's challenge to King's testimony bears primarily on its credibility rather than its admissibility.

C.

Washington also contends that the evidence is insufficient to support the magistrate's judgment in favor of Torres and Walker. The crux of Washington's argument is that the testimony of nurse King and medical reports prepared by Dr. Stanley do not accurately portray the seriousness of his injuries and that the magistrate judge erred in relying on this evidence. We review the magistrate judge's factual findings for "clear error." **Odom v. Frank**, 3 F.3d 839, 843 (5th Cir. 1993).

Our review in this case is complicated by the fact that Washington failed to file a full transcript of the bench trial. The magistrate judge denied Washington's request for a transcript at government expense because Washington failed to explain why he needed a copy of the transcript. Washington renewed his motion for a transcript at government expense in this court, and we granted his motion only to the extent of King's testimony. Washington is

responsible for providing a transcript of all relevant evidence that supports his sufficiency argument. Fed. R. App. P. 10(b)(2). Accordingly, we need not consider Washington's evidentiary sufficiency argument to the extent that it is based on the credibility of testimony not included in the transcript on appeal. **Powell v. Estelle**, 959 F.2d 22, 26 (5th Cir.), **cert. denied**, 113 S. Ct. 668 (1992). As for King's testimony, the magistrate judge did not clearly err in finding the testimony credible. The assessment of a witness' credibility is "peculiarly within the province of the" trial court. **Kendall v. Block**, 821 F.2d 1142, 1146 (5th Cir. 1987). Therefore, we conclude that Washington's evidentiary sufficiency argument must fail.

D.

Finally, Washington argues that the magistrate judge prematurely denied his motion for a new trial. The magistrate judge's written order granting judgment to the defendants states that "[a]ll motions by either party not previously ruled on are hereby DENIED." Washington contends that he had not filed his motion for a new trial at the time the magistrate judge issued the final order, and that Federal Rule of Civil Procedure 59 allows him ten days to file his motion. Washington's claim is without merit. The magistrate judge's final order merely denied **outstanding** motions. The order did not prevent Washington from filing his motion for a new trial. Washington's failure to file his motion for a new trial was due to his own misunderstanding of the final order and did not result from error on the magistrate judge's part.

AFFIRMED.