UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-40486

(Summary Calendar)

JERRY DON SCOTT,

Plaintiff-Appellant,

versus

JIMMY ALFORD, Senior Warden, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas
(6:93 CV 454)

July 6, 1995

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Jerry Don Scott, an inmate of the Texas Department of Criminal Justice-Institutional Division ("TDCJ-ID) proceeding *pro se* and *in forma pauperis*, appeals the district court's dismissal with prejudice of his civil rights claim, *see* 42 U.S.C. § 1983 (1988), against several prison officials. We affirm.

I

In his § 1983 complaint, Scott alleged that several prison

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

officials had violated his Eighth Amendment rights by assigning him to perform work for which he was medically unfit. Scott further alleged that one prison official, Captain Warren, allowed the destruction of documentary evidence supporting Scott's defense against a disciplinary action, and thus denied Scott due process protections guaranteed by the Fourteenth Amendment. The district court referred the case to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1) (1988). The magistrate judge conducted an expanded evidentiary hearing pursuant to *Flowers v. Phelps*, 956 F.2d 488 (5th Cir.), *modified on other grounds*, 964 F.2d 400 (5th Cir. 1992).

At the hearing, Scott testified that the prison officials refused to let him take breaks as required by his medical restrictions.[1] He also testified that a prison official improperly assigned him to his job as a hall porter. Scott testified further about the disciplinary action, and stated that Captain Warren had torn up a witness statement and that other prison officials had failed to protect his rights.

Several prison officials also testified at the hearing. Dr. Rasberry, a TDCJ-ID physician, testified that the job of a hall porter did not conflict with Scott's medical restrictions, but that hall porters could theoretically be asked to perform tasks outside

[1] Scott testified that he suffers from knee and back pain. His medical restrictions include prohibitions against standing for more than 45 minutes and lifting more than 40 pounds. Scott testified further that the prison officers disregarded his pleas concerning his medical restrictions. Another inmate testified that he had overheard two officers verbally abuse Scott concerning his complaints.

those restrictions.[2] Ed Galloway, chief of classification,[3] testified that the procedure used to assign Scott as a hall porter was consistent with TDCJ-ID rules. Captain Oscar Strain testified that Scott had requested the hall porter job. Officer Taylor testified that Scott routinely refused to work. Taylor also testified that after Scott complained about his knee one night, Taylor told him to sit in the gym. Taylor then testified that because he later found Scott playing basketball instead of resting his knee, Taylor ordered Scott to return to work, but Scott refused. Lieutenant Pate testified that he had authorized disciplinary action against Scott due to Scott's refusal to work.

Other TDCJ-ID officials testified about the disciplinary action against Scott. Nurse Carol Gunther testified with respect to her statement that Captain Warren had excluded. Captain Warren testified that he had excluded Gunther's statement because she had told him that it was not accurate.[4] Counsel substitute[5] Hester testified that he had given the statement to Captain Warren, but that he had not tried to admit it into evidence after Warren had

---

[2] Dr. Rasberry also testified that, shortly after the incidents underlying this case, Scott had asked that his medical restrictions be removed as no longer necessary.

[3] The classification department evaluates requests for reassignment of inmates to different jobs.

[4] The statement indicated that Scott's assignment as a hall porter violated his medical restrictions. Gunther told Warren that this was only part of her statement, and that the full statement would indicate that Scott's assignment would violate his restrictions *only if* he did not receive rest breaks or was required to lift heavy items. Gunther also stated that she had no knowledge of what Scott's job duties actually were.

[5] Counsel substitutes represent inmates at disciplinary hearings.

stated that he would not consider it. Counsel substitute Roe testified that he had provided Hester with the statement and had confronted Warren about its destruction. Warden Alford testified that he dismissed the disciplinary action because of the personality conflicts between Roe, Gunther, and Warren.

The parties also admitted several documentary exhibits, including Scott's medical and disciplinary records. After reviewing these records, the hearing testimony, and the pleadings, the magistrate judge recommended that the district court 1) dismiss Scott's Eighth Amendment claims with prejudice, but 2) decide in Scott's favor on the due process claim against Captain Warren.

Neither party filed timely objections to the magistrate judge's report.[6] The prison officials filed objections to the magistrate judge's report nine days late, and Scott filed his objections eighteen days late. After conducting a de novo review of the pleadings, the hearing testimony, the magistrate judge's report and recommendations, and the prison officials' objections, the district court adopted the magistrate judge's findings and recommendations. Accordingly, the court dismissed Scott's Eighth Amendment claims, but it held that Warren had violated Scott's due process rights and ordered Warren to pay Scott $500. Scott appeals the district court's decision on the dismissed claims.

II

Scott contends that the district court improperly refused to

[6] 28 U.S.C. § 636(b)(1) provides: "Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations."

consider his objections to the magistrate judge's report and recommendations. From the day of service of a copy of the magistrate judge's report, the district court must allow the parties ten days to file objections and request a de novo review of the contested issues. 28 U.S.C. § 636(b)(1). A party who properly files objections within ten days perfects the right to a de novo review of all portions of the magistrate judge's report to which the party has objected. 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions [of the magistrate judge's report]. . . to which objection is made.").[7] Conversely, a party waives this entitlement by failing to object to the magistrate judge's recommendations within ten days. *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988); *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. Unit B 1982) (en banc); *United States v. Lewis*, 621 F.2d 1382, 1386 (5th Cir. 1980), *cert. denied*, 450 U.S. 935, 101 S. Ct. 1400, 67 L. Ed. 2d 370 (1981). Consequently, district courts need not consider late objections; instead, we leave to the district court's discretion the decision whether to allow objections after the ten day period. *See Thomas v. Arn*, 474 U.S. 140, 154, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985) ("[W]hile [§ 636(b)(1)] does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a de novo or any other standard."); *Rodriguez*,

---

[7] *See also Koetting v. Thompson*, 995 F.2d 37, 40 (5th Cir. 1993); *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918, 109 S. Ct. 3243, 106 L. Ed. 2d 590 (1989).

857 F.2d at 277 (noting that the district court's "allow[ing] the filing of Rodriguez's objection after the ten day period" was an exercise of its discretion).

Because the prison officials also filed their objections late, Scott contends that the district court abused its discretion by reviewing the prison officials' untimely objections while refusing to review his objections. Even if the district court should have reviewed Scott's objections, any errors committed by the district court in declining to consider Scott's objections are harmless if the district court's actual review included those findings to which Scott objected.[8] In other cases, we have found that a district court's complete de novo review of a magistrate judge's report and recommendation rendered harmless the district court's failure to wait until the expiration of the ten-day period. *McGill*, 17 F.3d at 731; *Rutledge v. Wainwright*, 625 F.2d 1200, 1206 (5th Cir. 1980). We also have found harmless error when the district court, after a complete de novo review, adopted a magistrate judge's recommendations without notifying the parties of their right to

---

[8] The district court retains full authority over cases referred to a magistrate judge and may decide whether to accept, review, or deny the magistrate judge's report and recommendations. *Thomas*, 474 U.S. at 154, 106 S. Ct. at 474; *McGill v. Goff*, 17 F.3d 729, 732 (5th Cir. 1994). Accordingly, a party's objections to a magistrate judge's reports are not required for a meaningful de novo review. *McGill*, 17 F.3d at 732 ("With the benefit of both parties' written argument to the magistrate judge, the district court was well able to conduct a satisfactory review of the pros and cons . . . ."); *see also Thomas*, 474 U.S. at 154, 106 S. Ct. at 474 ("Indeed, in the present case, the District Judge made a de novo determination of the petition despite petitioner's failure even to suggest that the Magistrate erred.").

This presumes, of course, that a party's objections raised no new issues; otherwise, a de novo review of the record before the magistrate judge would not be complete. In this case, however, Scott's objections raised no new issues. Accordingly, a complete de novo review of both parties' pleadings and testimonies would consider all of the issues to which Scott might have objected.

file objections. *Braxton v. Estelle*, 641 F.2d 392, 397 (5th Cir. Unit A Apr. 1981).[9]

In the present case, the district court's order expressly states that it conducted a de novo review of the parties' written arguments as well as the magistrate judge's report: "The Court has conducted a careful de novo review of the pleadings and testimony in this cause, the Report of the Magistrate Judge, and the Defendants' objections thereto. Upon such a review, . . . the Court has determined that the Magistrate Judge was correct." Such language constitutes sufficient proof that the district court conducted a de novo review in accordance with 28 U.S.C. § 636(b)(1)(C). *See United States v. Shaid*, 916 F.2d 984, 988 (5th Cir. 1990), *aff'd on reh'g en banc*, 937 F.2d 228 (5th Cir. 1991), *cert. denied*, 502 U.S. 1076, 112 S. Ct. 978, 117 L. Ed. 2d 141 (1992); *Washington v. Estelle*, 648 F.2d 276, 282 (5th Cir. Unit A June), *cert. denied*, 454 U.S. 899, 102 S. Ct. 402, 70 L. Ed. 2d 216 (1981); *cf. Kreimerman v. Casa Veerkamp*, 22 F.3d 634, 646 (5th Cir.) (presuming, absent evidence to the contrary, that the district court properly conducted a de novo review), *cert. denied*, ___ U.S. ___, 115 S. Ct. 577, 130 L. Ed. 2d 492 (1994).

Because the district court conducted a de novo review, we review the district court's decision to adopt the magistrate judge's recommendations for clear error. *Carter v. Collins*, 918

---

[9] Despite allegations that one party failed to receive proper service of a copy of the magistrate judge's report and was therefore unable to file objections thereto, this Court found harmless error occurred because "`the district judge could assess the merits of the petition from its face.'" *Braxton*, 641 F.2d at 397 (quoting *Rutledge*, 625 F.2d at 1206).

F.2d 1198, 1203 (5th Cir. 1990); *Williams v. K&B Equip. Co.*, 724 F.2d 508, 510 (5th Cir. 1984).[10] Although Scott's failure to file timely objections raises a question of whether we should review for plain error,[11] we need not decide which standard is proper; under either standard of review, the record adequately supported the magistrate judge's recommendations. Scott's objections challenged the magistrate judge's credibility choices and the factual findings that resulted from those choices.[12] We see no error, clear or plain, in the district court's decision to defer to the magistrate judge's evaluation of the testimony. Accordingly, the district court did not err in adopting the magistrate judge's recommendations.

---

[10] Under a clear error standard, this Court reverses only if, after reviewing the district court's adoption of the magistrate judge's findings and the objections thereto, it is "left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948); *Williams*, 724 F.2d at 510.

[11] *See United States v. Carrillo-Morales*, 27 F.3d 1054, 1061-62 (5th Cir. 1994) (holding that failure to file timely objections waives the right to appellate review of a magistrate judge's factual findings unless the party demonstrates manifest injustice or plain error, but not limiting review of legal conclusions), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1163, 130 L. Ed. 2d 1119 (1995); *see also United States v. Pierce*, 959 F.2d 1297, 1300 n.3 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 621, 121 L. Ed. 2d 554 (1992); *Rodriguez*, 857 F.2d at 277; *Parfait v. Bowen*, 803 F.2d 810, 813 (5th Cir. 1986); *Hardin v. Wainwright*, 678 F.2d 589, 591 (5th Cir. 1982); *cf. Nettles*, 677 F.2d at 410 (barring appellate review except for plain error where no objections raised below because "[w]e will not sit idly by and observe the `sandbagging' of district judges when an appellant fails to object to a magistrate's report in the district court and then undertakes to raise his objections for the first time in this court").

[12] The magistrate judge's findings included 1) that Scott's work assignment did not violate his medical restrictions, 2) that Scott had requested the job as a hall porter, and 3) that Scott had been playing basketball rather than working.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.