

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40640
Summary Calendar

VERNON KING, JR.,

Plaintiff-Appellant,

VERSUS

JOHN RIGGLE, et al.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(6:93 CV 167)

March 24, 1995

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

PER CURIAM:*

Vernon King appeals the dismissal, following trial, of his 42 U.S.C. § 1983 prisoner's civil rights suit. Finding no error, we affirm.

* 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

King sued fifteen named prison employees and several "John Doe" defendants, alleging that various defendants had attacked him without provocation on three occasions. On May 27, 1992, defendant James Sheridan allegedly handcuffed King on the pretext of moving him out of his cell, and defendants John Riggle, David Kersh, and Nolan Hester then attacked King and beat him severely. Nurses Johnson, Kitchen, and Neal allegedly refused to give King medical treatment. On July 22, 1992, defendants Riggle, Hester, Sandy Johnson, David Brown, Roger Adair, Wallace Allsip, Terry Dancer, and Randy Pankey again allegedly handcuffed King and assaulted him in his cell; King again was denied medical treatment for his injuries. Finally, King alleged that, on September 18, 1992, Lieutenant Rickey Kilgore and Officer Gary Stephens handcuffed King, beat him, and attempted to blind him by gouging out his eyes. King alleged that he received medical treatment after this incident.

The defendants were ordered to respond to the complaint, and the case was set for trial. The parties consented to trial before the magistrate judge pursuant to 28 U.S.C. § 636(c). King provided the court with a list of witnesses and a description of their expected testimony. King identified sixteen potential witnesses, including seven inmates, three prison officers, the prison nursing supervisor, his father, his minister, his congressman, a state employee with whom King had corresponded, and the congressman's assistant. The magistrate judge construed King's document as a

motion to subpoena the witnesses.

The magistrate judge ruled that King had failed to provide enough information to subpoena inmate Jhonny Hudge unless King filed additional information with the court. The magistrate judge determined that inmates Collins, Black, Jerome, and Joe Smith were expected to present identical testimony concerning the July 22, 1992, incident. The magistrate judge directed that King select one of those four witnesses to corroborate his July 22 claim. The magistrate judge declined to subpoena Officer Lanny Seedig and Lt. Steven Henderson to testify to the July 22 incident because King had failed to describe their expected testimony.

The magistrate judge determined that inmates Webster and Nichols Smith were expected to give repetitive testimony as to the September 18 incident, and he directed that King select one of those inmates to be subpoenaed. The magistrate judge further determined that King had failed to describe the expected testimony of Major Poston, King's father, the minister, the congressman, and the other proposed witnesses with sufficient specificity to support the issuance of subpoenas. The magistrate judge informed King that his refusal to exercise subpoena power did not mean that King's free-world witnesses would not be allowed to testify if they chose to do so.

In response, King filed a "Supplemental Narrative Witness List," and he requested that the court subpoena inmate Roi'Le Shiloh-Bryant as his witness to the July 22, 1992, assault. King asked that "Lt. Henderson B. Steven" also be subpoenaed to testify

to the July 22 incident and that Major Poston be subpoenaed to testify to the September 18 incident. The court ordered the warden to produce Shiloh-Bryant to testify at trial.

On the day that the case was set for trial, the magistrate judge held "an expanded evidentiary hearing" characterized as a "Flowers" hearing. Id. at 29; see Flowers v. Phelps, 956 F.2d 488 (5th Cir.), vacated in part, superseded in part on reh'g, 964 F.2d 400 (5th Cir. 1992). King and the defendants were allowed to present witnesses. The afternoon session, which lasted approximately seventeen minutes and consisted of cross-examination of medical expert, was not recorded.

Shiloh-Bryant testified that he had no personal knowledge of the July 22 assault because he "wasn't there at the time inmate King was assaulted." Henderson testified that he did not remember King reporting the July 22 incident to him and that if King had reported the incident as he described it, Henderson would have filed a report concerning a use of force. Poston testified that he had absolutely no memory of the September 18 incident.

King argued that he wanted to call the witnesses who had not been subpoenaed. He claimed that he had not received the court's order concerning his initial request for witnesses, although he identified his signature on the receipt for the order. King then gave detailed testimony concerning the alleged assaults. He admitted that the defendants had entered his cell on September 18 because he had set his sheets on fire when he did not receive milk on his breakfast tray.

On cross-examination, he admitted that he had written a letter to a prison administrator and filed a grievance describing the May 27 incident but alleging that it had occurred on June 26, 1992. King was also somewhat confused as to which of the defendants had participated in the May 27 assault.

The defendants presented evidence that on May 27, 1992, three of the four defendants that King claimed had assaulted him had not worked on the pod where his cell is located. They also presented evidence that on July 22, at least two of the defendants identified by King had not been assigned to his pod. Stephens described the September 18 incident in which King was removed from his cell after he started the fire. Stephens testified that he took King to the floor because King tried to kick him. Kilgore came to Stephens's assistance. Stephens stated that he had not hit or kicked King and that he had not seen Kilgore do so.

The magistrate judge found that the May 27 and July 22 incidents did not occur. The magistrate judge stated that it "appear[ed] that the plaintiff filed suit against any guard who happened to pass in front of his cell the particular day he prepared his complaint." The magistrate judge further found that the force used on September 18 was not excessive and that it was used in a good-faith effort to maintain or restore discipline. The magistrate judge noted that King's medical records totally failed to support his claims. The magistrate judge determined that King's claim that the defendants had assaulted him because of his race failed because no one had used excessive force against him. The

magistrate judge declined to exercise supplemental jurisdiction over King's state law claims and dismissed his federal claims with prejudice because they were not supported by credible evidence.

II.

A.

King argues that the magistrate judge abused his discretion by failing to appoint counsel to represent him because he is mentally retarded. Although King requested appointed counsel in his original complaint, he did not allege that he was retarded, and his pleadings do not suggest that this is the case.

"Counsel will be appointed in civil cases only in exceptional circumstances." Richardson v. Henry, 902 F.2d 414, 417 (5th Cir. 1990), cert. denied, 498 U.S. 901, 1069 (1991). In deciding whether the appointment of counsel would advance the proper administration of justice, the district court should consider the type and complexity of the case; whether the indigent is in the position to investigate adequately and present the case; and whether the evidence would consist in large part of conflicting testimony requiring skill in the presentation of evidence on cross-examination. Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982).

Refusal to appoint counsel will be reversed for an abuse of discretion only. Jackson v. Cain, 864 F.2d 1235, 1242 (5th Cir. 1989). The magistrate judge did not abuse his discretion by failing to appoint counsel, as this case does not present the

requisite exceptional circumstances that would justify the appointment of counsel. Jackson, 864 F.2d at 1242.

B.

King urges that the magistrate judge erred by failing to subpoena the additional witnesses that he initially requested because those witnesses could have provided credible testimony to support his claims. We review refusal to issue a subpoena for abuse of discretion. Gibbs v. King, 779 F.2d 1040, 1047 (5th Cir.), cert. denied, 476 U.S. 1117 (1986). The plaintiff must demonstrate a substantial need for the witness's trial testimony before we will find that the district court abused its discretion by the refusing to issue a subpoena. Id.; see also Cupit v. Jones, 835 F.2d 82, 86-87 (5th Cir. 1987) (holding that litigant must show that the excluded testimony was relevant and that he had a substantial need for the testimony before the court will find an abuse of discretion).

King provided the magistrate judge with descriptions of the evidence that he expected each of his proposed inmate witnesses to give. King's descriptions of the expected evidence were repetitive. Additionally, the magistrate judge noted that the proposed inmate witnesses were all confined to administrative segregation, which would have limited their ability to see what was happening in King's cell. Because of the security problems involved, the magistrate judge did not abuse his discretion by refusing to subpoena a large number of administrative segregation inmates who

were expected to give duplicative testimony. Gibbs, 779 F.2d at 1047.

The record supports the magistrate judge's determination that the first two incidents did not occur and that the last incident did not involve excessive force, and King has given no indication, to the district court or this court, of precisely how any uncalled witness's testimony would have been different from that given. Therefore, he has failed to show that the excluded inmate testimony was relevant. Cupit, 835 F.2d at 86-87.

Likewise, King has failed to show that the magistrate judge abused his discretion by failing to subpoena King's congressman, his aide, his correspondent, his father, or his minister. King has not alleged that any of these witnesses witnessed the alleged assaults.

C.

King asserts that the magistrate judge abused his discretion by refusing to decide his state-law assault and battery claim. Upon dismissal of the federal claims, the magistrate judge had the discretion to exercise or decline supplemental jurisdiction. Rhyne v. Henderson County, 973 F.2d 386, 395 (5th Cir. 1992) (in which court declined to adjudicate state claims after directing verdict for defendant on federal claims). Because King's federal claims are not meritorious, no abuse of discretion occurred in this case.

AFFIRMED.