IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 94-40736
Summary Calendar

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RODNEY JAMES GIBSON,

Plaintiff-Appellant,

versus

UNKNOWN SHAW, Warden, and
S. SANCHEZ,

Defendants-Appellees.

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Appeal from the United States District Court for the
Eastern District of Texas
(6:93-CV-52)

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(May 24, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Proceeding *pro se* and *in forma pauperis*, plaintiff-appellant Rodney James Gibson (Gibson), a maximum-security prisoner in the custody of the Texas Department of Criminal Justice (TDCJ), filed this suit under 42 U.S.C. § 1983 against James Shaw (Shaw), the Warden of TDCJ's Coffield Unit, and Sabas Sanchez (Sanchez), a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

security officer there. In his complaint and at a *Spears*[1] hearing before the magistrate judge to whom the case was assigned, Gibson alleged that Sanchez had used excessive force against him in violation of the Eighth Amendment. After the *Spears* hearing, the magistrate judge dismissed Gibson's claim against Shaw with prejudice, but allowed Gibson to proceed *in forma pauperis* with his claim against Sanchez.[2] After a bench trial on April 20, 1994, the magistrate judge made findings of facts and conclusions of law, later entering an order and final judgment dismissing Gibson's suit with prejudice. From this final judgment, Gibson filed a timely notice of appeal.

The magistrate judge made the following factual findings. On December 2, 1992, at the time for outdoor recreation, Gibson violated TDCJ policy by leaving his cell without first undressing. To facilitate searches, this TDCJ policy requires maximum-security inmates, before leaving their cells or the dayroom, to undress to their undershorts and shoes and to carry their clothes with them. Gibson acknowledged that, when he left his cell still dressed, he was in violation of this TDCJ policy. Thereafter, Sanchez ordered him to return to his cell to remove his clothing. Gibson refused, again in violation of TDCJ policy, and called out to a supervisor. In a *de minimis* application of force, Sanchez placed his hand on Gibson's forearm to direct him back to his cell. Gibson resisted,

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[1] *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

[2] Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge.

and the two men struggled until Gibson was handcuffed.[3] The magistrate judge found that Gibson precipitated the "additional force" and that such force was reasonable and necessary "to maintain and restore discipline."

Gibson contends that the magistrate judge's findings of fact are clearly erroneous; however, he has failed to provide on appeal a transcript of the testimony given at the bench trial. As the appellant, Gibson bore the responsibility of including the trial transcript in the record if he wished to challenge the magistrate judge's factual findings. Fed. R. App. P. 10(b)(2) provides, "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." That Gibson is indigent and *pro se* does not relieve him of this burden. *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234, 237 (5th Cir. 1990). *Pro se* appellants, like all appellants, must comply with the Federal Rules of Appellate Procedure. *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994). On the basis of his inability to pay, Gibson could have moved here or below to have a free transcript provided, *Powell v. Estelle*, 959 F.2d 22, 26 (5th Cir.), *cert. denied*, 113 S.Ct. 668 (1992); *Alizadeh*, 910 F.2d at 237, but there is no indication in the record that he did so.

In the absence of a trial transcript, "this court has no alternative but to affirm" the findings of the magistrate judge.

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[3] As a result of the struggle, Gibson suffered bruises, a cut to the nose, and a strained trapezius muscle.

McDonough Marine Service, Inc. v. M/V Royal Street, 608 F.2d 203, 204 (5th Cir. 1979); *see also Powell*, 959 F.2d at 26; *Alizadeh*, 910 F.2d at 237.[4] Because Gibson has failed to establish that the magistrate judge's factual findings are clearly erroneous, we also affirm the magistrate judge's conclusion that the application of force in this case did not violate the Eighth Amendment. *Hudson v. McMillian*, 112 S.Ct. 995, 999 (1992).[5]

AFFIRMED

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[4] In any event, the only evidence relied on by Gibson to challenge the magistrate judge's findings is a videotape showing Gibson, after the struggle, wearing only boxer shorts. Gibson contends that this evidence renders clearly erroneous the magistrate judge's finding that he was in violation of TDCJ policy when Sanchez used force against him. Gibson does not dispute, however, that he was still dressed when he left his cell and that he also violated TDCJ policy in disobeying Sanchez's order for him to return to his cell. The magistrate judge, furthermore, credited the testimony of Sanchez, who stated that Gibson was not undressed when he ordered him to return to his cell. This testimony was corroborated by another TDCJ officer, who testified that Gibson had removed his shirt but was still wearing pants when he approached Sanchez. Rejecting Gibson's contention that the videotape evidence rendered this testimony incredible, the magistrate judge concluded that this evidence showed only that Gibson was in his boxer shorts after the incident, not before, and that it was entirely plausible that his pants were removed during or after the struggle. No clear error is reflected here.

[5] Gibson also contends that Sanchez deprived him of his right to due process by punishing him for conduct not prescribed by written policy. Because this issue was not raised below, we do not review it. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991).