IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40892
(Summary Calendar)

BERTRAND BROWN,

Plaintiff-Appellant,

versus

JAMES A. LYNAUGH, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:90-CV-581)

(April 19, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

In the continuing saga of this § 1983 case, as filed and prosecuted pro se and in forma pauperis (IFP) by Plaintiff-Appellant Bertrand Brown, a Texas state prisoner, we are asked on

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

this second appeal (Brown II) to consider whether on remand the district court improperly dismissed Brown's remaining complaints. For the reasons set forth below, we affirm in part, and vacate and remand in part, the rulings of the district court.

I

FACTS AND PROCEEDINGS

Requesting a jury trial, Brown filed the instant civil rights complaint against 41 defendants. He alleged that his personal property was taken or destroyed; that officers twice used excessive force against him, first on August 10 and again on October 29, 1990; and that he was denied medical care for injuries received during the latter incident.

Following a Spears[1] hearing, the magistrate judge (M.J.) recommended dismissing without prejudice the property complaint under Fed. R. Civ. P. 41(a); dismissing as repetitious the August 10 excessive-force claim; dismissing as frivolous the denial-of-medical-care claim because it appeared that the claim's realistic chance of ultimate success was slight; and dismissing as frivolous the October 29 excessive-force claim due to Brown's failure to allege a significant injury. The district court adopted the M.J.'s report and recommendation, and dismissed the complaint.

The first time around we affirmed the dismissal of the property claim and the August 10 excessive-force claim, but vacated the dismissal of the denial-of-medical-care and October 29 excessive-force claims. Brown v. Lynaugh, No. 91-5102 (5th Cir.

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

Dec. 10, 1992) (unpublished) (Brown I). On remand the M.J. held a second Spears hearing and recommended dismissing the denial-of-medical-care claim as frivolous[2] but allowing Brown to proceed with his October 29 excessive-force claim against officers Ham, Rocco, Lucas, and Seedig. The district court then ordered the M.J. to conduct a Flowers[3] hearing and to submit proposed findings of fact and recommendations for disposition.

The M.J. conducted an "expanded" evidentiary hearing during which Brown, Ham, Rocco, Lucas, and Seedig testified. Following the hearing the M.J. recommended entering judgment for the defendants and dismissing Brown's complaint. Brown filed objections to the M.J.'s report, arguing, inter alia, that he was denied his right to a jury trial. Despite Brown's objection, the district court adopted the M.J.'s report and recommendation, and dismissed the complaint without expressly addressing the jury trial issue.

II

ANALYSIS

Brown contends that the M.J. improperly conducted a bench trial without obtaining his consent. He argues that the Flowers hearing amounted to a bench trial.

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[2]Brown has not challenged the district court's dismissal of his denial-of-medical-care claim so we deem it to have been abandoned. Evans v. City of Marlin, Tex., 986 F.2d 104, 106 n.1 (5th Cir. 1993) (issues not raised or briefed are considered abandoned).

[3]Flowers v. Phelps, 956 F.2d 488 (5th Cir.), modified on other grounds, 964 F.2d 400 (5th Cir. 1992).

In his original complaint, again during the original Spears hearing, and yet again in a motion following remand, Brown invoked his right to a jury trial. See Fed. R. Civ. P. 38(b). Even though the M.J. and the defendants referred to the Flowers hearing as an expanded evidentiary hearing, in reality it constituted a bench trial: The M.J. took testimony from the parties, made credibility determinations, and resolved factual disputes.

When a jury trial is properly demanded, resolution of factual disputes and credibility determinations are for the jury. See Brown v. Lynaugh, No. 93-4070, slip op. at 5 (5th Cir. Apr. 8, 1994) (unpublished; copy attached). Therefore, the district court's dismissal of Brown's October 29 excessive-force claim based on the Flowers hearing was improper, given Brown's valid jury trial requests and the absence of subsequent waiver of trial by jury or consent to a bench trial. Consequently, we must vacate that portion of the district court's judgment and remand it for a jury trial before the district courtSQunless on remand the parties should consent to a jury trial before the M.J. pursuant to 28 U.S.C. § 636. Clark v. Richards No. 93-5119, slip op. at 11-14 (5th Cir. June 14, 1994) (unpublished; copy attached). It goes without saying that on remand Brown could always change his mind, waive a jury trial, and consent to a bench trial.

Brown also claims that the district court improperly imposed a $100 sanction. A review of the record reveals, however, that no monetary sanction was imposed, so this claim is moot.

The appellees argue that Brown raised the issue whether the

district court erred by failing to appoint counsel for Brown during the Flowers hearing. If Brown did raise that issue, he has not pursued it on appeal so it too is deemed abandoned and we do not address it. See Evans v. City of Marlin, Tex., 986 F.2d 104, 106 n.1 (5th Cir. 1993) (issues not raised or briefed are considered abandoned).

III

CONCLUSION

For the foregoing reasons, the portion of the district court's judgment dismissing Brown's excessive force claim relating to the October 29, 1990, incident is vacated and remanded to explore the issue of a jury trial. In all other respects, the judgment of the district court is affirmed.

AFFIRMED in part; VACATED and REMANDED in part.