

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-41168  
Summary Calendar

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GEORGE WARNER,

Plaintiff-Appellant,

versus

A.S.A. JEFFCOAT ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 6:92-cv-149  
- - - - -

(March 13, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:\*

George Warner's motion seeking to proceed in forma pauperis (IFP) on appeal is DENIED. This court may authorize Warner to proceed IFP on appeal if he is economically eligible and the appeal is not frivolous. Jackson v. Dallas Police Dep't, 811 F.2d 260, 261 (5th Cir. 1986). Warner has established his financial eligibility to proceed IFP on appeal.

Warner argues on appeal that the magistrate judge made erroneous factual findings, made incorrect credibility

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

determinations, and incorrectly weighed the evidence in reaching his ultimate conclusions.

This Court reviews a district court's factual findings for clear error. Fed. R. Civ. P. 52(a). "If the district court's findings are plausible in light of the record viewed in its entirety, [the Court] must accept them, even though [it] might have weighed the evidence differently if [it] had been sitting as a trier of fact." Price v. Austin Independent School Dist., 945 F.2d 1307, 1312 (5th Cir. 1991) (citations omitted). Great deference is given to a district court's determinations when they are based on credibility findings. Id. This court will not reweigh conflicting evidence and inferences or determine the credibility of witnesses. Martin v. Thomas, 973 F.2d 449, 453 n.3 (5th Cir. 1992). The district court's legal conclusions are reviewed de novo. Price, 945 F.2d at 1312.

The law in effect at the time of the offense is used to evaluate the reasonableness of the defendant's conduct and to ascertain the defendant's eligibility for qualified immunity. See Rankin v. Klevenhagen, 5 F.3d 103, 108 (5th Cir. 1993). In order to prevail on an excessive force claim under the Eighth Amendment at the time of this incident, Warner was required to show (1) a significant injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was (3) clearly unreasonable, and (4) that the action constituted an unnecessary and wanton infliction of pain. Huquet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990). A plausible claim of an unprovoked attack on an

inmate by a guard who is not engaged in a legitimate employment function lowers the standard for assessing the significance of an injury. See Luciano v. Galindo, 944 F.2d 261, 264 (5th Cir. 1991).

The magistrate judge determined that the testimony of Lott was more credible than the testimony of Warner. The magistrate judge determined that Warner had initiated the confrontation with Lott and that Lott's action in response was reasonable and was taken to insure Lott's personal safety and order in the institution. The district court's credibility findings are entitled to great deference and are plausible in light of the evidence presented by the defense witnesses at trial. Price, 945 F.2d at 1312. Based on Huquet and the district court's credibility findings, which are not clearly erroneous, Warner failed to establish that he was subjected to excessive force in violation of his constitutional rights. Warner has failed to raise a nonfrivolous issue on appeal, therefore his motion to proceed IFP is DENIED.

Warner filed a motion for appointment of counsel on appeal. This case does not present exceptional circumstances, and Warner has demonstrated his ability to provide himself with adequate representation. Warner's motion for appointment of counsel is DENIED. See Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982).

Warner has also filed a motion seeking to obtain a copy of the trial transcript at government expense. Warner has not satisfied the criteria of 28 U.S.C. § 753(f) and, thus, his

motion for preparation of a transcript at government expense is DENIED. See Harvey v. Andrist, 754 F.2d 569, 571 (5th Cir.), cert. denied, 471 U.S. 1126 (1985).

Warner also filed a motion for disclosure of relevant documents. Warner's medical records were admitted into evidence in the district court. The other documents requested by Warner constitute new evidence which he is not entitled to present for the first time on appeal. See United States v. Flores, 887 F.2d 543, 546 (5th Cir. 1989). The motion for disclosure of documents is DENIED.

Warner's motion for leave to appeal IFP is DENIED, and the APPEAL IS DISMISSED as frivolous. See 5th Cir. R. 42.2.