IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-41290
(Summary Calendar)

LESLIE FOSTER,

Plaintiff-Appellant,

VERSUS

JAMES SHAW, Warden, Coffield Unit, ET AL.,

Defendants-Appellees.

Appeal from United States District Court
for the Eastern District of Texas
6:93 CV 554

February 14, 1996

Before JONES, JOLLY, and STEWART, Circuit Judges.

PER CURIAM:*

Leslie Foster, an inmate at the Texas Department of Criminal Justice (TDCJ), filed a *pro se* and *in forma pauperis* civil rights complaint for incidents surrounding the use of force while Foster was housed at the Coffield Unit. In a bench trial, the magistrate judge entered judgment in favor of the defendants and dismissed the complaint. Foster appealed the dismissal, alleging that the court erred in denying him a transcript at government expense, erred in denying him appointment of counsel, and erred in denying him witnesses. For the following reasons, we affirm in part, vacate in

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

part, and remand.

BACKGROUND

Foster alleged unlawful use of force by correctional officers. Following a hearing pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), the court ordered the defendants to answer the complaint. The parties consented to a bench trial before the magistrate judge pursuant to 28 U.S.C. § 636(c), at which the court found for the defendants. Foster timely appealed the dismissal.

The magistrate judge had denied Foster's motion for the appointment of counsel, subject to reconsideration. Foster did not renew the motion pending trial, but nevertheless, he now appeals that decision. After trial, the court denied Foster's motion for a trial transcript after determining that she lacked jurisdiction to consider the motion because Foster had already filed his notice of appeal. Foster also appeals this denial.

Finally, Foster argues that the magistrate judge abused her discretion by rejecting his witness lists and denying him witnesses at the bench trial. Pursuant to the magistrate's order setting a bench trial, Foster was ordered to submit, no later than May 20, 1994, a proposed witness list including the name and TDCJ number of inmate witnesses and a "brief summary of the testimony that the witness will give at trial." Foster filed his original witness list on April 18, 1994, and reiterated that same list on May 20, 1994, stating that "[a]ll inmates will testify to the unnecessary assault and was [sic] witnesses to the above incident and will testify as to these events." and that "all inmates have information and was [sic] present and will testify to this suit." In an order issued on June 3, 1994, the court denied the writs, stating that Foster had not provided a summary of the expected testimony of his requested witnesses, but if he could provide individual summaries of each witness's testimony in time for the court to issue writs, the denial would be reconsidered. Foster filed an amended witness list on June 16, each entry stating that the prisoner-witness "will testify to the unprovoked assault on plaintiff and unnecessary and excessive use of force." He claimed that he had not received the order mandating amendment until June 13.

The defendant TDCJ filed its own witness list on June 6. After the listing of the first four

defense witnesses, their expected testimony was summarized as "[t]hese individuals participated in the use of force and will testify about their knowledge of the incident in question." The expected testimony of the next four witnesses was similarly summarized as "[t]hese individuals witnessed a portion of the use of force and will testify about the incident in question." The defendants added three witnesses and substituted three others in an amended witness list filed on June 20, but the summaries of expected testimony were not in any way altered, and resembled closely the summaries provided in the plaintiff's original witness list. The court did not object to the form of either of the defendants' witness lists.

At trial on June 23, 1994, the court found no record of the amended filings. In the Memorandum Opinion and Order of Dismissal dated Oct. 11, 1994, the court stated that :

> The lawsuit was set for trial before the Court, which was held on October 4, 1994.[2] At trial, I noted that no witnesses were called for Foster because he did not submit a timely witness list. Foster stated that he was at the Ellis II Unit and received the order eight days late. He also stated that he had sent in a witness list, but the Court had no record of receiving such a list. Foster further objected to the Attorney General's calling witnesses not listed on their witness list. The Attorney General explained that they had submitted an amended witness list; however, neither Foster nor the Court had a copy at the start of the trial [noting that the court had decided to disregard the testimony of those witnesses called by the Defendants not named on the original witness list.] Following these preliminary matters, the trial was held without further objection.

Foster argues that the record shows the trial court had received the corrected list, and that the "strict procedural requirements" were unfair, especially considering that the court had denied his motion for the appointment of counsel.

DISCUSSION

This court ordinarily does not consider the merits of an issue when the appellant fails to order a transcript, Richardson v. Henry, 902 F.2d 414, 416 (5th Cir.), cert. denied, 498 U.S. 901 (1990)

[2]Though the Memorandum Opinion refers to an October 4, 1994 trial date, it is evident from the record that the trial occurred on June 23, 1994.

and 498 U.S. 1069 (1991). However, because Foster made several attempts to have the transcript provided at government expense, and because the nature of Foster's arguments is such that a transcript is not necessary, this court is able to review the issues on appeal.

Foster argues that the court erred in denying his motion for a trial transcript because he had raised a substantial question for appeal. The trial court found it no longer had jurisdiction to grant the motion because Foster had already appealed to this Court, regardless of whether the appeal had merit or not. Thus, Foster's contention that the magistrate judge erred in denying his motion for the transcript is without merit.

This court reviews the denial of the appointment of counsel for an abuse of discretion. Jackson v. Dallas Police Dep't., 811 F.2d 260, 261 (5th Cir. 1986). Counsel is appointed to represent a §1983 plaintiff only in exceptional circumstances. Cooper v. Sheriff, Lubbock County, Tex., (929 F.2d 1078, 1084 (5th Cir. 1991). A thorough review of the record discloses no such exceptional circumstances. Thus, the denial of Foster's motion for the appointment of counsel does not amount to an abuse of discretion. See Jackson, 811 F.2d at 261; Parker v. Carpenter, 978 F.2d 190, 191-93 (counsel is necessary where an investigation of prison policies is required).

Foster also argues that the trial court abused its discretion by rejecting his witness lists and denying him witnesses at the bench trial. A trial court's decision to exclude evidence as a means of enforcing a pretrial order must not be disturbed absent a clear abuse of discretion. Turnage v. General Elec. Co., 953 F.2d 206, 208 (5th Cir. 1992). However, that discretion is abused where it bars an indigent litigant's "meaningful access to the federal courts, as mandated by 28 U.S.C. §1915. Cf. Wilson v. Barrientos, 926 F.2d 480, 482 (5th Cir. 1991). Generally, if a party to an action fails to obey an order to provide discovery, the court in which the action is pending may make such orders in regard to the failure as are just. Fed. R. Civ. P. 37(b). Because the trial court's refusal to allow witnesses to testify on Foster's behalf was based on its conclusion that Foster failed to comply with the pretrial order that he provide summaries of the expected testimony of each of the proposed witnesses, it is in the nature of a Rule 37 (b) sanction. However, the denial of all of Foster's

witnesses meant that he had no way to present his case in chief, despite the fact that his case had enough merit to have survived a Spears hearing. Where a pro se litigant severely abuses the judicial system, a sanction may be appropriate, but that sanction must be proportioned to the severity of the abuse. Mendoza v. Lynaugh, 989 F.2d 191, 196 (5th Cir., 1993). Denying Foster the opportunity to present any of his witnesses is a severe sanction in the context of an in forma pauperis proceeding.

Moreover, the record discloses that Foster did attempt to timely comply with the trial court's order that he provide individual summaries of the expected testimony of his requested witnesses in the amended witness list filed on June 16, seven days before trial. The memorandum opinion does not acknowledge Foster's attempted revision, therefore it is unclear whether the amended list was considered in formulating the decision to dismiss his complaint. Defendants argue that regardless of whether the trial court was cognizant of Foster's amended list, its denial of his witness was merely evenhanded treatment: the court barred all of the new witnesses listed on the defendants' amended witness list submitted at approximately the same time as Foster's amended list. Unfortunately, this was not evenhanded treatment because, by rejecting Foster's first list as not in compliance with the specificity requirement, the court was holding him to a higher standard than it was the defendants. The summaries of expected testimony were substantially the same on Foster's lists as they were on the defendants, yet the court never rejected the defendants' lists as being non-specific.

Additionally, the record contains a file of plaintiff's exhibits which include the affidavits of three inmates who were listed in Foster's witness lists. These affidavits provide an account of the incident similar to that which Foster asserted would be provided were the witnesses allowed to testify; however, it is not clear that the court considered them in formulating its memorandum opinion.

We "will not disturb an evidentiary ruling, albeit an erroneous one, unless it affects a substantial right of the complaining party." Polythane Sys. Inc. v. Marina Ventures Int'l. Ltd., 993 F.2d 1201, 1208 (5th Cir. 1993), cert.denied, __ U.S. __, 114 S. Ct. 1064, 127 L. Ed. 2d 383 (1994). We consider the record as a whole when ascertaining whether an error prejudices the complaining

party by affecting the verdict. Id. at 1209. A trial court's failure to admit evidence substantially prejudices a party's rights where it results in the exclusion of evidence essential to that party's case. Borden, Inc. v. Florida East Coast Ry. Co., 772 F.2d 750, 756 (11th Cir. 1985). Because the admission of Foster's witnesses was essential to his case, their complete exclusion substantially prejudiced his rights, and that exclusion constituted an abuse of discretion.

AFFIRMED in part, VACATED in part, and REMANDED for proceedings consistent with this opinion.