

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-50172
Summary Calendar

GREGORY L. RICHARDSON,

Plaintiff-Appellee,

VERSUS

RAYMOND M. ALDINGERS, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CA-22)

(December 8, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:¹

Richardson, a Texas prisoner, appeals the dismissal of his 42 U.S.C. § 1983 action against correctional officer Raymond M. Aldingers and Warden Jack M. Garner. We affirm.

Richardson alleged that on October 17, 1992, he was in a prison dining hall when Aldingers approached the table at which he was seated with inmate Lloyd Smith and two other inmates.

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Richardson asserted that Aldingers said he needed an empty trash can and that Richardson and Smith got up to retrieve one. As the two inmates were removing pitchers from the trash can, Aldingers allegedly walked over to Richardson, instructed him to put out his hand, and then ran a kitchen knife across Richardson's left hand. Richardson alleged that Aldingers laughed at him when he complained about the cut, then threatened Smith with the same knife.

Richardson filed a grievance with Warden Garner complaining about the assault. Richardson claimed that Garner was aware of prior incidents involving Aldingers' mistreatment of other inmates. Richardson filed suit against Aldingers and Garner and later added James Collins, Director of the Texas Department of Justice, Institutional Division, as a defendant.

After conducting two **Spears**² hearings, the magistrate judge ordered service of the complaint. Thereafter, the parties agreed to have the magistrate judge conduct all further proceedings. Both sides moved for summary judgment. The magistrate judge granted summary judgment for Collins, but found genuine issues of material fact on Richardson's claims against Aldingers and Garner.

The case was tried to the court. The magistrate judge found that Aldingers had never cut Richardson and that Garner had no knowledge, prior to October 17, 1992, that Aldingers posed a threat to any inmate. The magistrate judge entered judgment dismissing the case, and Richardson filed a timely notice of appeal.

II.

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

Richardson argues first that the magistrate judge abused his discretion by denying Richardson's pretrial request for subpoenas for inmates Enrique Valdez and Felix Flores, Jr.³ According to Richardson, both inmates would have testified that they had filed separate grievances against Aldingers, Valdez claiming that Aldingers assaulted him in the kitchen with a large knife and Flores claiming that Aldingers struck him in the chest with a large kitchen pot. Both incidents allegedly occurred before October 17, 1992. Richardson argues that this testimony would show that Aldingers engaged in a pattern of misconduct and that Garner was aware of Aldingers' acts but failed to take corrective action.

This Court reviews a district court's 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). Before establishing an abuse of discretion, the plaintiff must demonstrate a need for the witness's trial testimony. **Id.**

The magistrate judge did not abuse his discretion by denying Richardson's request for these subpoenas. First of all, Valdez and Flores' proposed testimony was only relevant to whether Warden Garner knew that Aldingers was abusive. This claim failed when the judge determined that Aldingers had not assaulted Richardson. In addition, the magistrate judge already had the substance of Valdez and Flores' complaints before him. Flores had already testified at

³The magistrate judge did issue subpoenas for two inmate witnesses who were present during the alleged assault and one other inmate witness who had filed a grievance accusing Aldingers of burning him with a lit cigarette.

the expanded evidentiary hearing, and both inmates' complaints were contained in the investigation report prepared by the Texas Department of Criminal Justice, which the defendants submitted to the court. Richardson was not prejudiced by the magistrate judge's refusal to issue the subpoenas.

B.

Richardson next maintains that the magistrate judge abused his discretion by denying Richardson's motion for appointment of counsel. Richardson contends that his poor educational background and his psychological condition warranted this appointment.

The magistrate judge did not abuse his discretion by denying Richardson's motion. A court is not required to appoint counsel to represent indigent § 1983 plaintiffs unless the case presents exceptional circumstances. **Ulmer v. Chancellor**, 691 F.2d 209, 213 (5th Cir. 1982). The magistrate judge considered the factors listed in **Ulmer** and found no exceptional circumstances.

The record supports the magistrate judge's conclusion. This is a straightforward case alleging a prison guard's assault and a warden's failure to protect. Although Richardson is poorly educated and suffers from a psychological condition, the magistrate judge had observed Richardson at three hearings prior to the trial and was entitled to find him capable of presenting his case.

C.

Finally, Richardson contends that the magistrate judge abused his discretion by denying his post-trial motion for sanctions against Aldingers and Garner for failing to produce a grievance

filed by inmate Horacio Gonzalez, Jr. We do not reach the merits of this contention because we find we have no jurisdiction over this issue.

In his notice of appeal, Richardson was required to "designate the judgment, order or part thereof appealed from" Fed. R. App. P. 3(c). We construe notice liberally "where the intent to appeal an unmentioned ruling is apparent and there is no prejudice to the adverse party." **NCNB Texas Nat. Bank v. Johnson**, 11 F.3d 1260, 1269-70 (5th Cir. 1994). This is particularly true when the appellant is not represented by counsel.

However, even read generously, Richardson's notice of appeal cannot encompass the denial of his post-trial motion. Richardson filed the motion for sanctions on the same day as the notice of appeal, March 18, 1994. The order denying this motion was entered on April 28, 1994. Richardson's notice of appeal could not evince an intent to appeal an order which the magistrate had not yet made. **See id.** For this reason, we dismiss Richardson's appeal from the court's denial of his motion for sanctions.

AFFIRMED.